# 2011-2012 TERM ANALYSIS OF FIRST CIRCUIT COURT OF APPEALS, U.S. DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO, AND U.S. SUPREME COURT LABOR AND EMPLOYMENT LAW JURISPRUDENCE

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## I. INTRODUCTION

During the 2011-2012 term, the First Circuit Court of Appeals, the U.S. District Court for the District of Puerto Rico ("the USDC-PR"), and the U.S. Supreme Court decided multiple labor and employment cases. From those, a selection of over 30 cases was made in order to summarize the most important holdings made by those courts concerning Labor and Employment Law. The cases are organized according to their respective subject matters.

## II. DISABILITY

### A. The Americans with Disabilities Act "Association Provision" and the Family and Medical Leave Act

In *Mena Valdéz v. E.M. T-Shirt Distributors, Inc.*,[1] the plaintiff claimed that he was discriminated against and forced to resign from his job based of the stress he suffered and leaves of absences he had to take because of his daughter's medical condition. As a result, he filed claims pursuant to sections 12122(a) and 12112(b)(4) ("the association provision") of the Americans with Disabilities Act ("ADA"),[2] and also the Family and Medical Leave Act ("FMLA").[3] The defendant filed a motion for summary judgment and the Court granted it with respect to the ADA claims but denied it with respect to the FMLA claim.

To establish an unlawful discrimination claim under section 12112(a) of the ADA, a plaintiff must prove by a preponderance of the evidence that: (1) he was disabled within the meaning of the Act; (2) with or without reasonable accommodation he was qualified to perform the essential functions of the job; and (3) the employer discharged him because of his disability. The Court held that the plaintiff failed to prove the first element. In reaching that conclusion, the Court applied the following sub-analysis which is used by the First Circuit.[4] In order to demonstrate a disability: (1) the employee must prove that he suffers from a physical or mental impairment; (2) the Court must evaluate the life activities affected by the impairment to determine whether they constitute "major" life activities; and (3) the Court

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[1] Mena Valdéz v. E.M. T-Shirt Distributors, Inc., 869 F. Supp. 2d 252 (D.P.R. 2012).
[2] Americans with Disabilities Act, 42 U.S.C. §§ 12112(a)-12112(b)(4) (1990).
[3] Family Medical Leave Act, 29 U.S.C. §§ 2601-2654 (1993).
[4] *See e.g.*, Carroll v. Xerox Corp., 294 F.3d 231, 238 (1st Cir. 2002).

must ask whether the impairment substantially limits the major life activity. In this case, the Court held that the employee failed to satisfy the first prong as he failed to provide evidence of any "medical care" he received in light of his daughter's condition or a psychiatric evaluation diagnosing his alleged mental impairment. Thus, the Court granted summary judgment against the plaintiff with respect to the section 12112(a) claim.

Concerning section the "association provision" of ADA, which protects employees from discrimination for knowing or having a relationship with a disabled person, the Court held that the it does not require an employer to make any reasonable accommodation to an employee caring for a disabled relative. Rather, section 12112(b)(4) only guarantees that an employee with a disabled relative be treated no differently than any other employee; it does not provide extra benefits or allowances to an employee simply because of his association with a disabled person.[5] Thus, the Court also granted summary judgment against the plaintiff on his ADA association provision claim.

However, the Court refused to grant summary judgment on the FMLA claim. The FMLA contains two distinct types of provisions: those establishing substantive rights for employees and those providing protection for those rights.[6] The first, codified at 29 U.S.C. § 2612(a)(1)(C), "awards eligible employees 'a total of 12 workweeks of leave during any 12–month period,' which may be taken intermittently in order to care for a child with a 'serious health condition.'"[7] "The second type of provision prohibits employers from interfering with the substantive rights conferred by the FMLA."[8] Section 2619(a) sets forth a notice provision requiring an employer to prominently display notices containing excerpts or summaries of pertinent FMLA employee information. Moreover, under 29 U.S.C. § 2615(a), an employer may not restrain or deny an employee from exercising his right to take an FMLA leave. If such a situation arises, an employee may bring a civil action seeking compensatory damages, including wages, salary, and benefits. In this case, the employer failed to provide notice to its employees about their FMLA rights to 12 unpaid weeks leave to take care of a disabled child.[9] Additionally, there were genuine issues of material fact as to that regard.

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[5] Torres-Alman v. Verizon Wireless Puerto Rico, Inc., 522 F. Supp. 2d 367, 382 (D.P.R. 2007);
[6] Mena-Valdez, 869 F. Supp. 2d at 262 (citing Colburn v. Parker Hannifin Corp., 429 F.3d 325, 330 (1st Cir. 2005)).
[7] *Id.* at 252 (citing 29 U.S.C. § 2612(a)(1)(C)).
[8] *Id.* (citing 29 U.S.C. § 2615).
[9] *Id.* at 263.

In our opinion, the logical statute to bring this claim was under the FMLA. Although the plaintiff's argument with respect to the association provision of the ADA was creative, it was destined to fail and seems to have been a long shot argument by the plaintiff.

B. Exhaustion of Administrative Remedies

In four cases during the 2011-2012 term, the Courts analyzed the need to exhaust administrative remedies before filing a claim under the ADA or Title VII of the Civil Rights Act of 1964 ("Title VII").[10] First, in *Cintrón-García v. Supermercados Econo, Inc.*,[11] the USDC-PR had to decide whether a party is barred from filing a lawsuit in federal court after receiving a second right-to-sue letter from the U.S. Equal Employment Opportunity Commission ("EEOC"), if that party failed to file a lawsuit within the ninety day period provided by a first right-to-sue letter. It is a notable case because the issue at hand has not been covered by the First Circuit and therefore Judge Gelpí had to cite to cases from other circuits (notably the Fifth, Sixth, and Eight circuits).

In *Cintrón-García*, the plaintiff filed an ADA discrimination claim with the Anti–Discrimination Unit of the Commonwealth of Puerto Rico Department of Labor and Human Resources ("ADU")[12] on May 2, 2007. After being subsequently terminated on July 16, 2007, he amended his charge to include retaliation. On May 21, 2008, the plaintiff received a right-to-sue letter ("the First Letter") from the EEOC. Almost a year later, on April 13, 2010, he inexplicably received a second right-to-sue letter from the EEOC ("the Second Letter"). The plaintiff then filed suit in the USDC-PR pursuant to Title VII[13] and ADA[14] alleging disability discrimination, retaliation, and wrongful termination. The defendant filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)[15] on grounds of failure to exhaust administrative remedies, arguing that the complaint was time-barred because it was not filed within ninety days of the receipt of the First Letter. The plaintiff countered by arguing that the complaint was not time-barred since it was filed within ninety days of the Second Letter.

Title VII and the ADA require, as a predicate to a civil action, that the complainant first file an administrative charge with the EEOC within a

[10] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17.
[11] Cintrón-García v. Supermercados Econo, Inc., 818 F. Supp. 2d 500 (2011).
[12] The filing of an administrative charge with the ADU is considered a filing with the EEOC. *See id.* at 507.
[13] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17.
[14] Americans with Disabilities Act, 42 U.S.C. §§ 12112(a).
[15] Fed. R. Civ. P. 12(b)(6).

specified time period, usually 180 or 300 days,[16] after the discrimination complained of, and that the lawsuit be brought within a period of 90 days after notice that the administrative charge was dismissed or after the agency instead issues a right-to-sue letter.[17] If the suit is not filed within the 90 days, the complainant forfeits his right to bring a private civil action.[18] In lieu of an on point First Circuit case, Judge Gelpí relied primarily on a Sixth Circuit case: *Brown v. Mead,*[19] which presented almost identical circumstances to the instant case.[20] In *Brown*, the Sixth Circuit held that "a plaintiff in a Title VII action, who received two successive, facially valid right-to-sue notices from the EEOC, but who did not commence a suit in a district court within ninety days of receipt of the first notice, is precluded from proceeding under the second notice."[21] The Sixth Circuit reached such conclusion even though the first-issued right-to-sue letter later turned out to be in error and was followed by the second letter with an admission by the EEOC to that effect. Under some circumstances, the EEOC may issue a second right-to-sue notice upon completion of a discretionary reconsideration of a prior determination provided it has given notice to both parties of its decision to reconsider within the ninety-day period provided by the initial notice of the right-to-sue. A party may challenge the validity of that reconsideration and second notice only by showing that the sole purpose of reconsideration was to extend the initial notice period.[22]

In the instant case, the two right-to-sue letters issued were based on the same charge and the plaintiff admitted that he did not file a new charge or a reconsideration with the ADU or the EEOC. Thus, the Court applied *Brown* and held that the plaintiff's Title VII and ADA claims were time barred

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[16] *See* Cintrón-García, 818 F. Supp. 2d at 507 n. 5 ("In Puerto Rico, an aggrieved employee has 300 days from the occurrence of the employment action complained of to file an administrative charge in instances where the local Department of Labor is empowered to provide relief, i.e., in instances of 'deferral' jurisdiction.") (citing Lebrón–Ríos v. U.S. Marshals Service, 341 F.3d 7, 11 n. 5 (1st Cir. 2003)). The Court further held that "[o[therwise, the applicable period is 180 days." *Id.* (citing 42 U.S.C. § 2000e–5(e)(1)).

[17] *Id.* at 507 (citing 42 U.S.C. § 2000e–5(f)(1); Clockedile v. New Hampshire Dept. of Corrections, 245 F.3d 1 (1st Cir. 2001)).

[18] *Id.* at 507 (citing 42 U.S.C. § 2000e–5(f)(1)).

[19] Brown v. Mead, 646 F.2d 1163, 1164 (6th Cir. 1981).

[20] Judge Gelpí also relied, to a lesser extent, on Spears v. Mo. Dep't of Corr. & Human Res., 210 F.3d 850, 853 n. 2 (8th Cir. 2000) (refusing to consider an adverse employment action stemming from an earlier EEOC complaint where complainant did not file suit within ninety days of the prior EEOC decision).

[21] Brown, 646 F.2d at 1164.

[22] González v. Firestone Tire & Rubber Co. Et al., 610 F.2d 241, 246 (5th Cir. 1980).

due to not being filed within 90 days of having exhausted administrative remedies unless the plaintiff could demonstrate that an equitable tolling exception applied.[23]

The Court also held that "equitable tolling is not appropriate unless a claimant misses a filing deadline because of circumstances effectively beyond his control (such as when his employer actively misleads him, and he relies on that misconduct to his detriment)."[24] Cases in which the equitable tolling doctrine is invoked are most often characterized by some affirmative misconduct by the party against whom it is employed, such as an employer or an administrative agency.[25] Courts generally weigh five factors in assessing claims for equitable tolling: "(1) lack of actual notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement."[26] Assessing those factors, the Court in *Cintrón-García* found that equitable tolling was not justified and thus held that the plaintiff's ADA and Title VII claims were time barred and dismissed them.

The second case in this term related to the exhaustion of administrative remedies was *Vázquez-Rivera v. U.S.*,[27] which dealt with a federal U.S. Army employee who filed claims under the ADA[28] and the Age Discrimination in Employment Act ("ADEA").[29] With respect to the ADEA claim, "whereas most employees must first exhaust administrative remedies before instituting an ADEA action, a federal employee has the option of bypassing administrative remedies entirely and suing directly in federal district court."[30] For federal employees that opt to file suit directly, § 633a(d) provides that the employee must give the EEOC not less than thirty days' notice of an intent to file suit and must file said notice within one hundred and eighty days after the alleged unlawful practice occurred.[31] In the instant case, the plaintiff did not exhaust administrative remedies. Moreover, he did not meet the requisites under § 633a(d) because he did not give thirty days' notice to the EEOC. Thus, the USDC-PR dismissed the ADEA claim.

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[23] Cintrón-García, 818 F. Supp. 2d at 509.
[24] *Id.* (citing Bonilla v. Muebles J.J. Álvarez, Inc., 194 F.3d 275, 278 (1st Cir. 1999)).
[25] *Id.*
[26] *Id.* (citing Kelley v. N.L.R.B, 79 F.3d 1238, 1248 (1st Cir. 1996); Neves v. Holder, 613 F.3d 30, 36 n.5 (1st Cir. 2010)).
[27] Vázquez-Rivera v. United States, Civil No. 11–1346, 2012 WL 2423285 (D.P.R. Jun. 26, 2012) ("Vázquez-Rivera I") (amended in Vázquez-Rivera v. United States, Civil No. 11–1346, 2012 WL 4863728 (D.P.R., Oct. 12, 2012) ("Vázquez-Rivera II")).
[28] Americans with Disabilities Act, 42 U.S.C. §§ 12101–12203.
[29] Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634.
[30] Vázquez-Rivera I, 2012 WL 2423285 at *4 (citing Jorge v. Rumsfeld, 404 F.3d 556, 566 (1st Cir. 2005); 29 U.S.C. § 633a(c)).
[31] Vázquez-Rivera I, 2012 WL 2423285 at *4 (citing 29 U.S.C. § 633a(d)).

With respect, to the ADA claim, Judge Fusté of the USDC-PR noted that federal employees are not covered by the ADA, but are instead "covered under the Rehabilitation Act."[32] Therefore, the plaintiff's claim was actually under the Rehabilitation Act rather than the ADA. In this case, it was undisputed that the plaintiff did not exhaust administrative remedies. The Court initially erroneously held that under the Rehabilitation Act, the exhaustion of administrative remedies was never required and consequently did not dismiss the plaintiff's Rehabilitation Act claim.[33] However, the Court reversed itself 4 months later and granted a motion to alter its judgment filed by the defendant.[34] The Court explained that in sections 794a(a)(1) and (a)(2) of the Rehabilitation Act, a distinction is made between the remedies and procedures for employees of the federal government versus those for employees of federal fund recipients.[35] In summary, under the Rehabilitation Act, the remedies available to employees of the federal government are outlined in section 794a(a)(1) which specifies that the procedural rules for such remedies are to be derived from Title VII of the Civil Rights Act,[36] which in turn requires the exhaustion administrative remedies. However, the remedies available to employees of mere recipients of federal funds are governed by the procedural rules of Title VII of the Civil Rights Act,[37] which do *not* require an exhaustion of administrative remedies.[38] Since the plaintiff was a U.S. Army employee, he was obliged to exhaust administrative remedies. Since he did not do so, the Court altered is previous judgment and also dismissed the Rehabilitation Act claim.[39]

Third, in *Flores-Silva v. McClintock-Hernández*,[40] Judge Fusté faced a similar situation to the one presented in *Vázquez-Rivera* albeit with a Puerto Rico Department of State employee as the plaintiff. In this case, the plaintiff

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[32] *Id.* at *3 (citing Enica v. Principi, 544 F.3d 328, 338 n.11 (1st Cir. 2008) (Federal Employees are not covered by the ADA); *see also* Rehabilitation Act, 29 U.S.C. §§ 791-794f.
[33] Vázquez-Rivera I, 2012 WL 2423285.
[34] Vázquez-Rivera II, 2012 WL 4863728.
[35] *Id.* at *1.
[36] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–16.
[37] *Id.* § 2000d–1.
[38] *Id.* at *1-2 (citing 29 U.S.C. § 794a; Prescott v. Higgins, 538 F.3d 32, 44 (1st Cir. 2008); Roman–Martinez v. Runyon, 100 F.3d 213, 216 (1st Cir. 1996)); *see also* Brennan v. King, 139 F.3d 258, 268 n.12 (1st Cir. 1998) (citing Cook v. Rhode Island Dept. of Mental Health, Retardation, and Hospitals, 783 F. Supp. 1569, 1572 (D.R.I. 1992), *aff'd*, 10 F.3d 17 (1st Cir. 1993)).
[39] Vázquez-Rivera II, 2012 WL 4863728.
[40] Flores-Silva v. McClintock-Hernández, 827 F. Supp. 2d 64 (2011).

had presented a discrimination claim under section 12101 of the ADA,[41] a retaliation claim under section 12203 of the ADA,[42] and a Rehabilitation Act[43] claim. However, the plaintiff never filed a claim with the EEOC prior to filing suit. Consequently, the defendant presented a motion to dismiss all the federal claims due to a failure to exhaust administrative remedies.

The Court reiterated the well-established principle that administrative remedies must be exhausted before filing a claim under section 12101 of the ADA, such as that filed by the plaintiff, and dismissed said claim.[44] With respect to the retaliation claim under section 12203 of the ADA, the Court noted the remedies and procedures that apply to such claims depend on which Title is the source for the plaintiff's underlying claim. Since the section 12203 claim's underlying claim was under section 12101, which requires exhaustion of administrative remedies, the plaintiff's retaliation claim also required an exhaustion of administrative remedies, something which the plaintiff failed to do.[45] Thus, that claim was also dismissed.

With respect to the plaintiff's Rehabilitation Act claim, Judge Fusté contradicted his own opinion published only 15 days before[46] in *Vázquez-Rivera v. U.S.*.[47] In a concise section, the Court justified its dismissal of the plaintiff's Rehabilitation Act claim by stating that "[t]he First Circuit has held that the Rehabilitation Act requires plaintiffs to exhaust administrative remedies before filing suit in federal court."[48] It does not go more in depth into its justification. However, as the same Judge noted in *Vázquez-Rivera*, the Rehabilitation Act does not always require an exhaustion of administrative remedies.[49] Since the plaintiff in this case worked for a state agency which was the recipient of federal funds, the applicable Rehabilitation Act provision was § 794a(a)(2), which in turn states that the remedies are governed by the procedural rules of Title VI of the Civil Rights Act, which do *not* require the exhaustion of administrative remedies.[50]

Therefore, dismissing the plaintiff's Rehabilitation Act claim on the sole basis of a failure to exhaust administrative remedies, as the Court did, is

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[41] Americans with Disabilities Act, 42 U.S.C. § 12101.
[42] *Id.* § 12203.
[43] Rehabilitation Act, 29 U.S.C. § 791.
[44] Flores-Silva, 827 F. Supp. 2d at 74.
[45] *Id.* at 75.
[46] Flores-Silva was published on October 27, 2012.
[47] Initially Vázquez-Rivera v. United States, Civil No. 11–1346, 2012 WL 2423285 (D.P.R. Jun. 26. 2012) ("Vázquez Rivera I"). Judgment amended in Vázquez-Rivera v. United States, Civil No. 11–1346, 2012 WL 4863728 (D.P.R., Oct. 12, 2012) ("Vázquez-Rivera II").
[48] Flores-Silva, 827 F. Supp. 2d at 75.
[49] *See* Vázquez-Rivera II, 2012 WL 4863728, at *1 n.2.
[50] *See id.*; *see also* Brennan v. King, 139 F.3d 258, 268 n.12 (1st Cir. 1998) (citing Cook v. Rhode Island Dept. of Mental Health, Retardation, and Hospitals, 783 F. Supp. 1569, 1572 (D.R.I. 1992), *aff'd,* 10 F.3d 17 (1st Cir. 1993)).

erroneous because the plaintiff was not a federal employee. The fact that this error was made despite the same judge having published an opinion only 15 days before which corrected a similar error and explained in detail the distinction between how the Rehabilitation Act applies to federal and non-federal employees is puzzling.

Fourth and finally, in *Villalongo Gordillo v. Centennial de Puerto Rico/ AT&T Mobility, Inc.,*[51] the USDC-PR had to analyze the applicability of an exception to the exhaustion of administrative remedies requirement in ADA cases —the so-called reasonably related retaliatory claims test, commonly known as the *Clockedile* exception in the First Circuit.[52] This exception states that claims based on retaliation for filing an EEOC charge are "preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency. That is, the retaliation must be for filing the complaint with the EEOC."[53] Thus, the failure to file an EEOC charge for retaliatory activities does not preclude district courts from considering a plaintiff's retaliation claim if the plaintiff previously filed the claim for which it claims to have been retaliated against with the EEOC.

In this case, the plaintiff first filed a claim with the EEOC and the ADU alleging Title VII sexual harassment. However, the plaintiff subsequently amended her claim to add a retaliation claim related to the previously reported Title VII sex discrimination claim. She alleged that the retaliation had negatively affected her emotional and mental state, and caused her to suffer from severe major depression for which she was denied reasonable accommodations and short term benefits. After receiving a right-to-sue letter from the EEOC, the plaintiff proceeded to file a suit in district court alleging a Title VII sex discrimination claim, a retaliation claim for filing her EEOC charge in regard to sex discrimination, and an ADA retaliation claim. The plaintiff clearly exhausted the proper administrative remedies with respect to her Title VII and retaliation claims on the basis of sex. Rather, the issue at hand was whether she had exhausted administrative remedies with respect to the ADA claim.

In response to the defendants' motion to dismiss the ADA claim, the plaintiff conceded that she did not exhaust the administrative remedies for her ADA claim, but argued that her ADA claim was proper under the *Clockedile* exception because it was reasonably related to, and grew out of,

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[51] Villalongo Gordillo v. Centennial de Puerto Rico/ AT&T Mobility Inc., No. 11-1115 (DRD), 2012 WL 589576 (D. P.R. Feb. 21, 2012).
[52] *See* Clockedile v. New Hampshire Dept. of Corrections, 245 F.3d 1 (1st Cir. 2001).
[53] *Id.* at 6.

the conduct which gave rise to her Title VII claim. However, in this case, the retaliation charge she added to her EEOC complaint was based on sexual discrimination rather than disability discrimination. The disability was a result of the retaliation rather than the cause. Therefore, *Clockedile* did not apply. In order for the district court to properly entertain her ADA claim, the plaintiff was required to first exhaust the proper administrative remedies by filing a claim with the EEOC or ADU alleging disability discrimination. Thus, the plaintiff should have filed a second EEOC charge for her disability claim. Therefore, the Court dismissed the plaintiff's ADA retaliation claim.

### C. Individual Liability in ADA Claims

In *Román-Oliveras v. Puerto Rico Electric Power Authority ("PREPA")*,[54] the First Circuit resolved an issue of first impression for the Circuit: whether an individual can be liable for a claim brought under section 12101 of the ADA ("Title I of the ADA")[55]. In this case, the plaintiff sued PREPA and his supervisors, in their individual capacities, pursuant to both 42 U.S.C. § 1983 ("section 1983") and Title I of the ADA. On a motion to dismiss, the USDC-PR dismissed the claims in their entirety and the plaintiff appealed. After affirming the USDC's dismissal of the section 1983 claims as to all defendants, the First Circuit overturned the USDC's dismissal of the ADA claim because the defendant did state a claim upon which relief could be granted under the "regarded as" provision of Title I of the ADA. However, the individual supervisors argued that the USDC's dismissal as to them was valid even though the plaintiff stated a claim upon which relief could be granted because there was no individual liability under the ADA.

The Court acknowledged that neither it (the First Circuit) or the U.S. Supreme Court had explicitly rejected individual liability under the ADA, but that a number of other circuits have.[56] The First Circuit, in *Fantini v. Salem State College*, had already rejected individual liability in Title VII cases.[57] The Court noted the similarity between the ADA and Title VII in that "[t]he statutory scheme and language [of both statutes] are identical in many respects" such as directing their prohibitions to employers, and identically

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[54] Román-Oliveras v. Puerto Rico Electric Power Authority (PREPA), 655 F.3d 43 (1st Cir. 2011).

[55] Americans with Disabilities Act, 42 U.S.C. § 12101.

[56] Román-Oliveras, 655 F.3d at 50 (citing Fantini v. Salem State College, 557 F.3d 22, 31 (1st Cir. 2009). *See also e.g.,* Albra v. Advan, Inc., 490 F.3d 826, 830 (11th Cir. 2007); Walsh v. Nev. Dep't of Human Res., 471 F.3d 1033, 1037-38 (9th Cir. 2006); Fasano v. Fed. Reserve Bank of N.Y., 457 F.3d 274, 289 (3d Cir. 2006); Corr v. MTA Long Island Bus, 199 F.3d 1321, 1999 WL 980960, at *2 (2d Cir. 1999); Butler v. City of Prairie Vill., 172 F.3d 736, 744 (10th Cir. 1999); EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995).

[57] Fantini, 557 F.3d at 31.

defining "employer."[58] Under both statutes, an employer is "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such . . . person."[59]

Extending the logic it used in *Fantini*, the First Circuit held that, just like Title VII, Title I of the ADA's exemption for small employers with less than 15 employees signified an intention not "to burden small entities with the costs associated with litigating discrimination claims."[60] "If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees."[61] Furthermore, with respect to the statutory mention of "any such agents" in the ADA's definition of "employer," the First Circuit again deferred to *Fantini* in holding that said mention does not connote individual liability, but " 'simply . . . establish[es] a limit on an employer's liability for its employees' actions.'"[62] Thus, the First Circuit affirmed the USDC-PR's dismissal of the Title I ADA claims against the plaintiff's supervisors in their individual capacities and only limited its reversal to the claim against PREPA, therefore rejecting individual liability in claims under the ADA.

D. Failure to Accommodate

In *Pagán-Torres v. House of Representatives of the Commonwealth of P.R.*,[63] the USDC-PR analyzed an employer's motion for summary judgment against an employee's ADA failure to accommodate claim. The Court held that it was to be analyzed using the *McDonnell Douglas* burden shifting framework[64] albeit with a different set of requirements or elements from those that would have been used to establish an ADA disability

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[58] Román-Oliveras, 655 F.3d at 50 (citing Walsh, 471 F.3d at 1038).
[59] *Id.*; *see* Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A); *see also* Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e(b).
[60] Román-Oliveras, 655 F.3d at 50 (citing Fantini, 557 F.3d at 29).
[61] *Id.* (citing Fantini, 557 F.3d at 29; Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993)).
[62] *Id.* (citing Fantini, 557 F.3d at 30); *see also* Mason v. Stallings, 82 F.3d 1007, 1009 (11th Cir. 1996) (noting that "the 'agent' language was included to ensure *respondeat superior* liability of the employer for the acts of its agents").
[63] Pagán Torres v. House of Representatives of the Commonwealth of P.R., 858 F. Supp. 2d 172 (D. P.R. 2012).
[64] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

discrimination case.[65] Accordingly, the first step was for the plaintiff to establish a *prima facie* case for a "failure to accommodate," for which he must: (a) furnish sufficient admissible evidence she is a qualified individual with a disability within the meaning of ADA; (b) establish that he/she worked for an employer covered by ADA; (c) demonstrate that the employer, despite its knowledge of the employee's limitations, did not accommodate those limitations; and, (d) show that the employer's failure to accommodate the known limitations affected the terms, conditions or privileges of the plaintiff's employment.[66] The burden then shifts to the employer to establish a legitimate, non-discriminatory reason for its actions.[67] If the employer offers a non-discriminatory reason, the burden then shifts back to the plaintiff to show that the employer's justification is a mere pretext used to cloak the discriminatory animus.[68] In this case, the Court applied the test and held that the plaintiff had proved a *prima facie* case for his failure to accommodate claim and that there were genuine issues of material fact as to the employer's justification's legitimacy. Thus, it denied the employer's motion for summary judgment.

E. "Major Life Activity"

In *Pérez v. Saint John's School,*[69] the USDC-PR found that considering an employee not suitable to perform one task within the rest of her responsibilities is not evidence of her having been regarded as disabled because it does not imply belief that she was substantially limited in the major life activity of working. Rather, it implied doubt over her ability to perform a single task, in this case that of completing mailings.

In *Ramos–Echevarría v. Pichis, Inc.,*[70] the Court found that the plaintiff's disability did not impair him from performing his duties since no evidence was introduced about his inability to work, other than that he stopped working temporarily when he had an epileptic episode and continued working after it finished. The Court held that the plaintiff failed to introduce evidence that his impairment affected a major life activity outside of the workplace. He also accepted during a deposition that he was capable of working. Other aspects taken into consideration by the Court were that the employer knew about the plaintiff's health condition since the beginning of

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[65] Pagán Torres, 858 F. Supp. 2d at 186 (citing Orta–Castro v. Merck, Sharp & Dohme Química P.R. Inc., 447 F.3d. 105, 112 (1st Cir. 2006)).
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] Pérez v. Saint John's School, 814 F. Supp. 2d 102, (D.P.R. 2011).
[70] Ramos–Echevarría v. Pichis, Inc., 659 F.3d 182 (1st Cir. 2011).

his employment and did not consider it an impairment and that he had a second job in another restaurant.

## III. LABOR LAW

During this term the U.S. Supreme Court had the opportunity in *Knox v. Service Employees International Union, Local 1000*,[71] to decide whether the First Amendment allows a public-sector union to require objecting nonmembers to pay a special fee for the purpose of financing the union's political and ideological activities. Under California law, public-sector employees in a bargaining unit may decide by majority vote to create an "agency shop" arrangement under which all the employees are represented by a union selected by the majority. While employees in the unit are not required to join the union, they must nevertheless pay the union an annual fee to cover the cost of union services related to collective bargaining (so-called chargeable expenses). In the seminal case of *Teachers v. Hudson*,[72] the Supreme Court identified procedural requirements that a union must meet in order to collect fees from nonmembers without violating their rights. One of these requirements is the so-called *Hudson* notice which is a yearly notice sent to non-members explaining the basis for the annual fee assessment.

In this case, a union of a California "agency shop" properly issued its annual *Hudson* notice, charging non-union members 56.35% of the member fees since that was the percentage of union expenditures related to collective bargaining. However, it subsequently issued a temporary mid-year fee increase for expenses not related to the union's representation costs but rather to sponsor political activities to oppose "anti-union" initiatives. The union did not issue a second *Hudson* notice. Instead, it gave non-members the choice to, within a 30 day period, opt out of paying 56.35% of the emergency fee despite all of the payments going to political activities. The non-members then sued the union for violating their First, Fifth, and Fourteenth Amendment rights. The district court granted summary judgment in favor of the non-members, the Ninth Circuit reversed, and the Supreme Court granted certiorari.

The Supreme Court held for the non-members. It ruled that the First Amendment requires unions to provide non-members with a fresh *Hudson* notice regarding its special assessment and the affirmative consent of non-members to charge them the fee. Although it is a "tolerable" practice to

[71] Knox v. Service Employees International Union, 132 S. Ct. 2277 (2012).
[72] Teachers v. Hudson, 475 U.S. 292 (1986).

provide non-members with a single opportunity per year to make a decision regarding the use of funds by the union, in this case they were not provided with "a fair opportunity" to make an informed decision since the special assessment was not disclosed at the time the original *Hudson* notice was made. Moreover, the same unexpected circumstances that led to the establishment of the special fee may have also changed the non-members' choice, justifying that they be provided with a new opportunity to make a decision.

The Court also stated that an offer of a full refund to the non-members did not justify or remedy the infringement of their First Amendment rights. In order to comply with the First Amendment, the union should have sent a new Hudson notice for non-members to be able to opt in, rather than to opt out of the special fee since non-members "should not be required to fund a union's political and ideological projects unless they choose to do so."[73] Although an opt-out requirement is allowable for the annual process, there is no justification for additional opt-out requirements whenever the union chooses to collect special fees.

Another important labor law case in this term was decided by the First Circuit. In *Balser v. International Union*,[74] an employee filed a claim under section 301 of the Labor Relations Management Act ("LRMA")[75] against both her employer and her union. She alleged that:

> [T]he company violated the collective bargaining agreement between itself and the Union when it reclassified a position for which she was hired, resulting in her subsequent removal from that position; and that the Union violated its duty of fair representation in colluding with the employer to reclassify her position and in refusing to take her filed grievance to arbitration.[76]

The Court held that such a claim under the LRMA against both an employer and a union was a "hybrid claim" and that in order to prevail in such a claim, the plaintiff needs to prove a breach of duty of fair representation by *both* the union and the employer.[77] The court proceeded to analyze the plaintiff's allegations against the employer and found that she did not prove the requisite breach of duty. Under the labor agreement, the company had the right to assess staffing needs for positions at the facility at any time. Having this right, the company did not violate the collective bargaining agreement with the union. Therefore, the Court found it

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[73] Knox, 132 S. Ct. at 2291 (citing Hudson, 475 U.S. at 303).
[74] Balser v. International Union, 661 F.3d 109 (2011).
[75] Labor Relations Management Act, 29 U.S.C. § 185.
[76] Balser, 661 F.3d at 110.
[77] *Id.* at 118 (citing Fant v. New Eng. Power Serv., 239 F.3d 8, 14 (1st Cir. 2001)).

unnecessary to consider whether the union breached its duty of fair representation. The case was therefore dismissed.

In the third case during this term dealing with labor law, *NLRB v. USPS*,[78] the First Circuit had the opportunity to consider an issue involving the disclosure of employees' private information to labor unions. In this case, the Court was presented with a balancing-of-interests case between two federal acts: the National Labor Relations Act (NLRA)[79] and the Privacy Act.[80] The union requested the dossiers of 22 new hires after an unfair employment practice concern regarding seniority based on an aptitude test was communicated to the union by some of the new hires. The USPS refused to release the register information because under the Privacy Act "any information contained within a federal agency's 'system of records' may not be disclosed by any means of communication, to any person or entity except upon 'prior written consent of the individual to whom the record pertains,' or unless the disclosure falls within one of several enumerated exceptions."[81] One of these exceptions requires that agencies define and disclose specific "routine uses" for which the agency may reveal employee information. In the USPS's case, such a routine use included disclosure to unions "[a]s required by applicable law . . . when needed by that organization to perform its duties as the collective bargaining representative . . . ."[82] The USPS did offer to disclose the information of employees' for which the union had previous consent but the union was not satisfied.

The case was brought to the National Labor Relations Board (NLRB), which confirmed the Administrative judge's ruling in favor of the union, ordering the USPS to disclose the new hires' information. The NLRB found that the information was relevant for collective bargaining purposes and that the USPS committed an unfair labor practice by not providing the employee information to the union without the employees' consent. The NLRB decision rested on the idea that there are no conflicting interests to bar the employer from releasing the information while the USPS argued that employees' privacy would be compromised if the information were to be revealed. The NLRB filed suit seeking enforcement of its order.

The First Circuit held that the NLRA does not oblige the employer to disclose "all the information in the manner requested" nor that it trumps all

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[78] NLRB v. USPS, 660 F.3d 65 (2011).
[79] National Labor Relations Act, 29 U.S.C. § 158(a)(5).
[80] Privacy Act, 5 U.S.C. § 552a(b).
[81] USPS, 660 F.3d at 67 (citing 5 U.S.C. § 552a(b)).
[82] *Id.* at 68.

other interests.[83] The Supreme Court, in *Detroit Edison Co. v. NLRB*, established that the NLRA does not impose an unconditional obligation to disclose.[84] Similarly, other circuits have stated that the routine use exception "*permits* disclosure of relevant information, but does not *mandate* such disclosure unconditionally where there is a strong competing interest in privacy."[85] The aptitude tests which the union sought included notices to the applicants regarding the privacy of their information and the limited reasons of disclosure. This provided them with a legitimate expectation of privacy and therefore required that the First Circuit apply a balancing test. A balancing of interests is required based on three factors: "the interest of the employees in confidentiality, the burden placed upon the union by conditional disclosure, and whether there was evidence that the company was using employee privacy as a pretext to avoid its statutory obligations to bargain collectively."[86] The Court applied the test and held that the notices did not eliminate all expectation of privacy, that the requirement of consent was a "minimal burden," and that the USPS was acting on a serious concern for their employees' privacy and not with intent to frustrate the bargaining process. Therefore, the USPS did not violate its obligations under the NLRA by resisting the un-consented disclosure of the information. Moreover, the USPS complied with its statutory obligations under the NLRA by offering the edited register. The Court vacated the NLRA's decision, holding that the employees had a legitimate privacy interest that was ignored in the original analysis, and remanded the case for further proceedings.

## IV. WORKERS' COMPENSATION

In *Martínez v. Eagle Global Logistics (CEVA)*,[87] the USDC-PR had to decide how the date of accrual for claims under Puerto Rico's Workers' Compensation Act ("Law 45")[88] is calculated and whether presenting such a claim before Puerto Rico's ADU tolled the statute of limitations. In this case, the plaintiff, who had been on leave authorized by the Puerto Rico State Insurance Fund, sought to go back to work on December 13, 2006. She was reinstated the next day, albeit at a different position and with a different schedule than she had prior to her leave. Consequently, on January 25, 2007, she filed a disability and age discrimination complaint with the ADU. Almost

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[83] *Id.* at 69 (citing Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979)).
[84] *Id.* at 71 (citing Detroit Edison, 440 U.S. at 301).
[85] *Id.*
[86] *Id.* at 69.
[87] Martínez v. Eagle Global Logistics (CEVA), No. 09-2265, 2011 WL 5025904 (D. P.R. Oct. 21, 2011).
[88] Puerto Rico Worker's Compensation Act, Act No. 45 of Apr. 18, 1935, PR LAWS ANN. tit. 11, §§ 1-42 . (1935).

two years later she filed a claim in the USDC-PR under Article 5-A of Law 45[89] against her employer. The defendant requested the dismissal of the claim, arguing that it was time-barred because the plaintiff requested reinstatement more than three years prior to filing that complaint and the claim she presented in the ADU did not toll the statute of limitations. With respect to the claim's accrual date, the Court held that the 3 year statute of limitations of article 5-A claims begins to run on the day the employee seeks reinstatement and his employer refuses to do so.[90] The plaintiff had argued that on December 14, 2006 she did "not know for certain" that she would not be reinstated and was "in a sort of limbo." The Court cited to a Puerto Rico Supreme Court case in holding that the plaintiff's "subjective mental state as to her belief that she might be reinstated later is irrelevant, since as early as December 14, 2006, she had notice that she would not be reinstated to her former position."[91]

With respect to the plaintiff's argument that filling a claim with the ADU constituted an extrajudicial claim for purposes of Law 45 and therefore tolled the statute, the Court rejected it. According to Article 3 of the General Regulation of the ADU, this administrative agency does not have jurisdiction over Article 5-A claims. That is, "the ADU is not empowered to hear, investigate or solve claims under Law 45–such unit's jurisdiction is limited to claims arising under the enumerated state statutes."[92] Therefore, the court held that filing the claim with the ADU did not toll the statute of limitations.

In another case related to worker's compensation rights, the U.S. Supreme Court in *Pacific Operators v. Valladolid*,[93] held that the widows of workers that are compensated under the Outer Continental Shelf Lands Act[94] (OCSLA) are beneficiaries entitled to benefits under the Longshore and Harbor Workers' Compensation Act[95] (LHWCA), even if the employee's accident occurred while not working on the Outer Continental Shelf (OCS).[96] That is, benefits under the LHWCA are not limited to injuries or deaths that

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[89] *Id.*

[90] Martínez, 2011 WL 5025904, at *3 (citing Vélez Rodríguez v. Pueblo International, Inc., 135 DPR 500 (1994)).

[91] *Id.* (citing Vélez Rodríguez, 135 DPR at 500).

[92] *Id.* at *4.

[93] Pacific Operators v. Valladolid, 132 S. Ct. 680 (2012).

[94] Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331A-1356 (1953).

[95] Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901A-950 (1927).

[96] Valladolid worked 98% of his time on the offshore platform and the remainder on the onshore facilities.

occur on the Outer Continental Shelf. However, the Court also held that the plaintiff must establish a substantial causal link between the injury that he suffered and his employer's extractive operations on the OCS.

## V. DISCRIMINATION AND RETALIATION

It is well settled that to establish a *prima facie* retaliation claim under the ADA or Title VII, a plaintiff must show that: (1) she was engaged in protected conduct; (2) suffered an adverse employment action; and (3) there was a causal connection between the protected conduct and the adverse action.[97] The employer then has a burden of persuasion to offer a "legitimate, nondiscriminatory justification for the adverse employment decision" that is the basis of the plaintiff's complaint.[98] If the employer satisfies that requirement, the plaintiff then "retains the ultimate burden of showing that the employer's stated reason ... was in fact a pretext for retaliation."[99]

The cases analyzed under this section are organized according to the retaliation element or analysis phase on which they focus.

### A. Protected Conduct

In *Colón v. Infortech Aerospace Serv., Inc.*,[100] the USDC-PR held that sending confidential company information without authorization and in violation of company policy was not a protected activity. Moreover, the Court noted that establishing that the employee engaged in protected conduct is necessary before considering the "particularly close temporal proximity" element between protected conduct and an adverse employment action. Although such a connection can be "strongly suggestive of retaliation," it is only one of three requirements for establishing a prima facie case of retaliation.[101] Since in this case there was no protected conduct, it was unnecessary to delve into the causal connection element.

### B. Adverse Employment Action and Causal Connection

In *Colón–Fontánez v. Municipality Of San Juan*,[102] the First Circuit reiterated the well settled legal standard to determine whether a certain action or conduct is an adverse retaliatory employment action. Firstly, an

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[97] *See, e.g.,* Colón-Fontánez v. Municipality of San Juan, 660 F.3d 17 (1st Cir. 2011) (ADA); González Santos v. Torres Maldonado, 814 F. Supp. 2d 73, (D.P.R. 2011) (Title VII).
[98] Colón v. Infotech Aerospace Serv., Inc., 869 F. Supp. 2d 220, 226 (D.P.R. 2011) (citing Mesnick v. General Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991)).
[99] *Id.*
[100] *Id.*
[101] *Id.* at 228.
[102] Colón-Fontánez v. Municipality of San Juan, 660 F.3d 17 (1st Cir. 2011).

"adverse employment action must be 'materially adverse' which means that it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[103] Moreover, for the action to be material, it must produce "a significant, not trivial, harm."[104] Actions like "petty slights, minor annoyances, and simple lack of good manners will not [normally] create such deterrence."[105] However, "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees" may constitute adverse employment action, subject to the facts of a particular case.[106]

With respect to causality, it is mainly a question of intent. The plaintiff must show a nexus between the protected conduct and the alleged retaliatory act.[107] That is, the plaintiff must show that the defendant took the adverse employment action because of, in whole or in part, the protected conduct he or she engaged in. An important but not determinative element to consider is the close temporal proximity between the employer's knowledge of the protected conduct and the adverse employment action.[108]

In *Colón-Fontánez*, an employee had requested reasonable accommodation for her alleged disability in the form of a reserved parking space. The Court held that this constituted a protected conduct and proceeded to analyze whether a series of actions alleged by the plaintiff were in effect adverse and held a causal connection with the protected conduct. The employee specifically alleged five adverse employment actions which she claimed were retaliatory. First, she alleged that a temporary removal of "essential working tools," specifically her phone and computer, were adverse. However, the Court held that the evidence proved that such removal was temporary and a result of the municipality's maintenance practices. Moreover, the plaintiff did not prove retaliatory intent as to the removal.[109] Second, the employee alleged that several of her paychecks were withheld as retaliation. The Court held that the defendant presented evidence that "that any withheld, docked, or delayed paychecks were paid and/or justifiably attributable to days owed or insufficient remaining sick or annual leave" and therefore held that there was no causal connection.[110] Furthermore, in

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[103] *Id.* at 36 (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).
[104] *Id.*
[105] *Id.* at 36-37 (citing Burlington, 548 U.S. at 68).
[106] *Id.* at 37.
[107] *See id.*
[108] *See id.*
[109] *Id*. at 38.
[110] *Id.*

support of its conclusion, the Court analyzed the temporal proximity between the protected conduct and the alleged retaliatory acts. In this case, the Municipality customarily docked the employee's pay, or sent letters indicating a reduction in a subsequent paycheck, well before the protected action took place. Also, the contested withheld payments took place well over seven months after the protected request; an amount of time the Court deemed too distant to establish causality.[111]

Third, the employee alleged that she sent a request to her supervisor to make a change in her work schedule so that she could attend medical appointments but never received an answer and thus lost sick/vacation days to attend her appointment. However, she made the request by means of a single email and did not follow up on it. The Court held that the fact that the supervisor "simply never responded to what likely was one of numerous emails received over the course of a month in her supervisory position is not sufficient for purposes of establishing a causal connection" to the protected conduct.[112] Fourth, the employee alleged that a delay in approving her participation in a computer training session was retaliatory. The Court also rejected this argument, noting that the delay was not "intentional, material, or causally connected" to the protected conduct.[113]

Fifth and finally, the employee alleged the removal of her assistant, effectively eliminated her supervisory duties and therefore constituted an adverse retaliatory action. However, the Court held that the removal was not a material adverse action. Although a change in an employee's responsibilities may be sufficient to establish an adverse employment action, the evidence cast doubt on whether the employee was a "supervisor" in the first place because she was not responsible for evaluating her assistant's performance.[114] Moreover, the evidence showed that the employee received the assistant "on account of her unpredictable yet recurring absences, not because of any promotion in employee status, raise in salary, or change in job title."[115] Finally, upon the alleged elimination of supervisory duties, the employee suffered no demotion, salary reduction, position reclassification, or loss of rank or prominence in her department.[116] Thus, the removal of the assistant was not an adverse action. On account of all the above, the Court affirmed the USDC's granting of summary judgment in the defendants' favor.

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[111] *Id.* at 39 (citing Calero–Cerezo v. U.S. Dept. of Justice, 355 F.3d 6, 25 (1st Cir. 2004) (noting that "[t]hree and four month periods have been held insufficient to establish a causal connection based on temporal proximity")).
[112] *Id.* at 40.
[113] *Id.* at 41.
[114] *Id.* at 42.
[115] *Id.*
[116] *Id.*

In another case, *Ayala Sepúlveda v Municipality of San Germán*,[117] a sexual orientation discrimination case, the First Circuit held that the plaintiff did not prove that a transfer to another department constituted an adverse employment action. In that case, the employee was transferred but suffered no change in pay, rank, or duties. Thus, the Court held that the transfer was not an adverse action.[118]

During this term, the First Circuit decided in *Muñoz v. Soc. Española de Auxilio Mutuo*,[119] yet another case related to temporal proximity as a factor to take into consideration in determining the causal connection between a protected conduct and an adverse employment action. In that case, a doctor/employee sued his employer for age discrimination in 1998. Then, in 2004, one day after the employee was deposed in connection with that lawsuit, the hospital terminated his employment. The plaintiff then sued in federal court, alleging that he was terminated in retaliation for his pending lawsuit and related 2004 deposition testimony. After a jury trial, a verdict was reached in favor of the plaintiff and the employer appealed.

The First Circuit held that 5 years was too distant a causal proximity between the alleged protected act (filing a lawsuit against the employer) and the adverse employment action (termination of the employee) so as to by itself establish causality.[120] However, the 1998 lawsuit was only one of several pieces of evidence that the employee had presented at trial. In this particular case, the Court held that when all of the pieces of evidence were viewed together and in the plaintiff's favor, they formed "a mosaic that is enough to support the jury's finding of retaliation."[121] Thus, the First Circuit again reiterated that causal proximity or the lack thereof between a protected act and an adverse employment action is an important but not determinative factor in establishing a causal connection in federal retaliation claims.

In *Gómez Pérez v. John E. Potter*,[122] the First Circuit analyzed whether three alleged retaliatory acts against the plaintiff constituted adverse employment actions. The first act evaluated was the denial of a requested transfer. The Court held that the denial was not an adverse action because the employee requested it after the post had already been filled and before

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[117] Ayala Sepúlveda v. Municipality of San Germán, 671 F.3d 24 (1st Cir. 2012).
[118] *Id.* at 32.
[119] Muñoz v. Soc. Española de Auxilio Mutuo, 671 F.3d 49 (1st Cir. 2012).
[120] *Id.* at 56.
[121] *Id.*
[122] Gómez Pérez v. John E. Potter, 452 F. App'x 3 (1st Cir. 2011).

her protected action took place.[123] The second act was a pre-disciplinary meeting between the plaintiff, her supervisor, and two other employees (included as witnesses) in which the filing of eight sexual harassment complaints against the plaintiff by other employees was discussed. The Court held that this meeting constituted a reprimand without tangible consequences and was therefore not a material adverse action.[124]

The third alleged adverse action was taunting and threats by other employees which the employee claimed amounted to a hostile workplace. Indeed, "toleration of harassment by other employees" can possibly constitute an adverse employment action.[125] However, the plaintiff's supervisor immediately addressed the situation by informing the staff that this behavior would not be tolerated. Thus, that action was also held to not be materially adverse. Finally, the plaintiff alleged that her hours were reduced in retaliation. However, the Court also held that the plaintiff failed to present enough evidence that her scheduled hours were more or less than other employees'.[126] Thus, the plaintiff failed to establish a *prima facie* case of retaliation and the case was dismissed.

### C. Legitimate or Pre-textual Employer Reasons for the Adverse Action?

Once a plaintiff meets the burden of establishing a *prima facie* retaliation case, the burden shifts to the defendants, who must presented evidence that they had legitimate, non-discriminatory, and non-retaliatory reasons to take the adverse employment action.[127] If the defendants meet this burden of proof then the burden shifts back to the plaintiff, who needs to prove that the employer's motives were pre-textual in order for her case to survive.[128]

In *García v. Sprint PCS Caribe*,[129] the plaintiff proved a *prima* facie retaliation case. However, the employer managed to give a legitimate explanation for terminating the plaintiff's job: they had received numerous complaints from the plaintiff's subordinates and customers due to her repeated attitude problems and lack of tact. The burden of proof was then shifted back to the plaintiff who based her argument on the close temporal proximity between the adverse action and her protected act. However, the Court reiterated that "temporal proximity alone is not probative of

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[123] *Id.* at 8.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *See* Rivera García v. Sprint PCS Caribe, 841 F. Supp. 2d 538, 560 (D.P.R. 2012) (citing Fantini v. Salem State College, 557 F.3d 22, 32 (1st Cir. 2009)).
[128] *Id.* (citing Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990)).
[129] *Id.*

retaliation"[130] and that the plaintiff failed to prove that the employer's motives were pre-textual.[131] The retaliation claim was therefore dismissed.

In *Oliveras Zapata v. Univision Puerto Rico, Inc.*,[132] an age and sex discrimination retaliation case, the USDC-PR was faced with a motion for summary judgment by the employer. The employee managed to establish a *prima facie* retaliation case and, in response, the employer argued that it terminated the employee due to poor job performance. Thus, the burden shifted back to the employee to argue that the reason was pre-textual.

The Court stated that in cases where the parties' focus is on whether the employer's grounds for its actions are pre-textual or legitimate, "a court may often dispense with strict attention to the burden-shifting framework, focusing instead on whether the evidence as a whole is sufficient to make out a jury question as to pretext and discriminatory animus."[133] Such evidence can include "weakness, implausibility, inconsistency, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that the employer did not act for the act" because of the proffered non-discriminatory reasons.[134] That is, a plaintiff must present enough evidence to enable a jury to find that the reason given for the adverse action is "not only a sham, but a sham intended to cover up the employer's real motive: discrimination."[135]

The Court then proceeded to examine the evidence offered by the employee, which focused on two allegations. The first was that the investigation of the employee's discrimination complaint (the "protected activity" in this case) deviated from company policy. The Court acknowledged that pretext may be demonstrated by showing an employer has deviated inexplicably from a regular business practice.[136] However, it noted that "where an employer's approach to personnel matters is flexible or discretionary, there is by definition no standard practice from which to deviate."[137] Thus, it rejected this argument.

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[130] *Id.* at 562.
[131] *Id.*
[132] Oliveras Zapata v. Univision Puerto Rico, Inc., No. 09–1987(BJM), 2011 WL 4625951, at *8 (D.P.R. 2011).
[133] *Id.* at 19.
[134] *Id.*
[135] *Id.*
[136] *Id.* at 19 (citing Kouvchinov v. Parametric Technology Corp., 537 F.3d 62, 68 (1st Cir. 2006)).
[137] *Id.*

The second allegation proposed by the plaintiff was an email by the employee's supervisor which, the Court held, could permit the inference that he considered the employee's pursuit of his claim to be in direct tension with whether he could perform his job well.[138] Thus, the Court held that the employee met his burden and provided, with the email, enough evidence to permit a rational inference that poor performance was used a pretext for retaliation.

## VI. CONSTRUCTIVE TERMINATION

During this term, there were two cases that analyzed an employee's constructive termination. In *Cabrera Ruiz v. Rocket Learning, Inc.*,[139] the plaintiffs alleged that they were forced to resign from their jobs, i.e. were constructively terminated, due to a hostile environment created against then because of their age,. They sued under the Age Discrimination Employment Act[140] (ADEA).

Under a normal ADEA case, to establish a *prima-facie* case of employment discrimination, a plaintiff must establish (1) that he is within the age protected category; (2) was qualified for the position and met the employer's legitimate expectations; (3) was subjected to an adverse employment action, and (4) was substituted by a person with substantially less age. Once the plaintiff has established his prima-facie case,[141] the burden of proof shifts to the employer to come forward with a legitimate, nondiscriminatory reason for the decision. If the employer meets this burden, "the focus shifts back to the plaintiff, who must then show, by a preponderance of the evidence, that the employer's articulated reason for the adverse employment action is pre-textual and that the true reason for the adverse action is discriminatory."[142]

However, in order to establish a *prima facie* ADEA hostile workplace harassment claim with a constructive termination being alleged as the adverse employment action, the plaintiff must establish an additional element: that the employee's working conditions were so "onerous, abusive, or unpleasant that a reasonable person in the employee's position would have felt compelled to resign."[143] In this case, neither of the two plaintiffs

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[138] *Id.* at 20.
[139] Cabrera Ruiz v. Rocket Learning, Inc., 852 F. Supp. 2d 154 (D.P.R. 2012).
[140] Age Discrimination Employment Act (ADEA), 29 U.S.C. § 621-634.
[141] The First Circuit has described "this prima facie showing as 'modest,' . . . and a 'low standard.'"
[142] Lockridge v. Univ. of Me. Sys., 597 F.3d 464, 470 (1st Cir. 2010) (citing Smith v. Stratus Computer, 40 F.3d 11, 16 (1st Cir. 1994)).
[143] Cabrera Ruiz, 852 F. Supp. 2d at 169 (citing Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000).

demonstrated that additional element and summary judgment was thus granted for the defendants.

In *Mena Valdez v. E.M. T-Shirt Distributors, Inc.*,[144] the court also discussed constructive termination; this time, under Puerto Rico's Act Number 80.[145] The Court noted that under Law 80, plaintiffs have a similar burden of proof as in an ADEA claim such as that of *Cabrera*: they must demonstrate that the working conditions were "so difficult or unpleasant that a reasonable person . . . would have felt compelled to resign." The standard "cannot be triggered solely by an employee's subjective beliefs, no matter how sincerely held."[146] In this case, just like *Cabrera*, the plaintiffs failed to meet their burden and the Court granted summary judgment for the defendants.

## VII. SUCCESSOR EMPLOYER DOCTRINE UNDER LAW # 80 (PUERTO RICO'S TERMINATION LAW)

In *Acosta-Ramírez v. Banco Popular de Puerto Rico (BPPR)*,[147] the court decided that Banco Popular was not accountable for several ex-employees' claims under Puerto Rico Act 80[148] since BPPR did not continue with Westernbank's business operations. The court stated that BPPR's acquisition of some of Westernbank's assets and deposits by means of the transaction executed with the Federal Insurance Deposit Corporation as Receiver (FDIC–R), did not turn BPPR into the successor of Westernbank. The court emphasized the fact that Westernbank was closed by the OCFI due to its insolvency and therefore BPPR did not ". . . continu[e], without interruption or substantial change, the predecessor's business operations."[149] This is, as the Court stated, the determining factor when analyzing if a business has become the successor of another. The District Court also considered the fact that Westernbank's employees were terminated as a result of the bank's insolvency and much before any agreement was consummated between the FDIC and BPPR. Therefore, all but one employee were hired under a contract that specifically stated "that their employment relationship with BPPR was

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[144] Mena Valdéz v. E.M. T-Shirt Distributors, Inc., 869 F. Supp. 2d 252 (D.P.R. 2012).
[145] *See* Wrongful Discharge Act, Act No. 80 of May 30, 1986, P.R. LAWS ANN. tit. 29, § 185a-185m.
[146] Suárez, 229 F.3d at 54.
[147] Acosta-Ramírez v. Banco Popular de Puerto Rico, No. 10-2131, 2012 WL 1123602, at *1 (D.P.R. 2012).
[148] Wrongful Discharge Act, Act No. 80 of May 30, 1986, P.R. LAWS ANN. tit. 29, § 185a-185m.
[149] Acosta-Ramírez, 2012 WL 1123602, at *9 (D.P.R. 2012).

new, and did not constitute a continuation of their prior relationship with Westernbank . . ."[150] Consequently, BPPR was not found to be the plaintiffs' successor employer and was not liable for such claim.

With this decision the court opened the door to the erosion of the successor employer doctrine. It is yet to be seen whether an acquisition could be structured to look like a liquidation followed by acquiring most but not all of the assets and deposits would have the effect of evading the successor employer doctrine. Moreover, in such an acquisition, would re-hiring the employees in temporary capacities have the effect of bypassing the successor employer doctrine? Or, on the other hand, can the USDC's rationale be explained by considering the nature of the transaction between BPPR and the FDIC as the predominant element?

After *Acosta-Ramírez*, the District Court reaffirmed its decision in the case of *Alvarado-Rivera v. Oriental Bank and Trust*.[151] In *Alvarado-Rivera*, the court also decided that the bank, in this case Oriental Bank, was not responsible for its ex-employees' claims under Puerto Rico's Act 80 because the bank could not be considered a successor employer of Eurobank. The court applied the same reasoning used in *Acosta-Ramírez*, establishing that "[t]he mere fact that Eurobank was closed on insolvency grounds and that the FDIC dismissed all Plaintiffs prior to being hired by Oriental, confirms that Oriental was not a successor employer of Eurobank."[152] Therefore, the Court seemed to imply that it is not enough for the bank to have been closed, what was in large part determinative was that it was closed on grounds of insolvency. Thus, Oriental Bank, as was BPPR in *Acosta-Ramírez*, was not considered responsible for any "severance benefits accrued during the [employee's] employment with Eurobank."[153]

It is worth mentioning that in this same case, a motion to dismiss filed by the FDIC prior to the matter discussed above, was not upheld because the court considered that the successor employer issue would be better addressed ". . . at the summary judgment juncture."[154] This is why the defendants in Alvarado-Rivera later filed the motion for summary judgment, which was upheld.

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[150] *Id*. at *9.
[151] Alvarado-Rivera v. Oriental Bank and Trust, No. 11-1458, 2012 WL 6213305 (D.P.R. 2012).
[152] *Id*. at *4.
[153] *Id*.
[154] *Id.* at *5.

## VIII. SEXUAL HARASSMENT

In *González Santos v. Torres Maldonado*,[155] two plaintiffs sued their former employer and supervisors alleging, among other things, Title VII discrimination under hostile work environment and *quid pro quo* sexual harassment. With respect to this work, we shall discuss what the District Court considered a plaintiff needs to present in order to establish a prima facie case of *quid pro quo* sexual harassment and hostile work environment and, therefore, survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). For *quid pro quo* claims, a plaintiff needs to show that (1) he or she was subject to unwelcome sexual advances by a supervisor and (2) that his or her reaction to these advances affected tangible aspects of his or her compensation, terms, conditions, or privileges of employment or educational training.[156] A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.[157] The First Circuit Court of Appeals has held that "[i]f the plaintiff is threatened, and if the plaintiff is rewarded or punished, then there is quid pro quo harassment."[158]

The First Circuit has repeatedly held that in order to state a *prima facie* case of hostile work environment under Title VII, a plaintiff must prove that: "(1) she (or he) is a member of a protected class; (2) she was subjected to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) the sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) some basis for employer liability has been established."[159]

In hostile work enviroment cases, an employer is subject to vicarious liability if the hostile work environment was caused by a direct or indirect supervisor.[160] The employer may raise an affirmative defense to the vicarious liability. Under the *Faragher/Ellerth* defense, an employer must prove, by a

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[155] González Santos v. Torres Maldonado, 814 F. Supp. 2d 73 (D.P.R. 2011).
[156] *See* Lipsett v. U.P.R., 864 F.2d 881 (1st Cir. 1988); *see also* 42 U.S.C. §§ 2000e1-e17.
[157] *See* Burlington Industries, Inc. v. Ellerth, 524 U.S. 724, 761 (1998).
[158] Lipsett, 864 F.2d at 913-914.
[159] O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001); *see also* Pérez-Cordero v. Wal-Mart Puerto Rico, Inc., 656 F.3d 19 (1st Cir. 2011).
[160] *See* Burlington, 524 U.S. at 765.

preponderance of the evidence, that: "(1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[161] The affirmative defense is only available "when no tangible employment action is taken . . . ."[162] In this case the court found that the record did not indicate that a tangible employment action took place.

## IX. FAIR LABOR STANDARDS ACT (FLSA)

In *Cristopher v Smithkline Beecham Corporation*,[163] the U.S. Supreme Court evaluated if pharmaceutical sales representatives (PSR's) are "outside salesmen" as defined in the Fair Labor Standard Act[164] (FLSA). A PSR's primary duty is "promote their products to physicians through a process called "detailing," whereby . . . [they] try to persuade physicians to write prescriptions for the products in appropriate cases."[165] According to the FLSA, an outside salesman "is any employee whose primary duty is making sales and who is customarily and regularly engaged away from the employer's place of business in performing such primary duty"[166] Their duties also includes "exchange, contracts to sell, consignment for sale, shipment for sale, or other disposition".[167] Outside salesmen, as defined previously, are exempt from FLSA overtime provisions.[168] The Court, led by Justice Alito, affirmed a summary judgment, holding that PSR's "qualify as outside salesmen under the most reasonable interpretation of the DOL's regulations."[169] The Court noted that "the provision that establishes the overtime salesman exemption does not furnish a clear answer to the question."[170] The Court therefore relied upon a textual analysis of applicable law.[171]

A similar claim was brought before the First Circuit in *Hines v. State Room, Inc.* In this case a group of sales managers sued their former employer for overtime back-pay.[172] However, the employers filed a motion for summary judgment, arguing that the sales managers were administrative

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[161] *Id.*
[162] *Id.* at 761.
[163] Cristopher v Smithkline Beecham Corporation, 132 S. Ct. 2156 (2012).
[164] Fair Labor Standard Act (FLSA), 29 U.S.C. §§ 201-219 (1938).
[165] Cristopher, 132 S. Ct. at 2163.
[166] 29 C.F.R. § 541.500 (2011).
[167] *Id.*
[168] 29 U.S.C. § 213(a)(1).
[169] Cristopher, 132 S. Ct. at 2174.
[170] *Id.* at 2170.
[171] *See id.* at 2170-75.
[172] Hines v. State Room Inc., 665 F.3d 235 (1st Cir. 2011).

employees as defined by the FLSA and were therefore exempt from the overtime provisions pursuant to 29 U.S.C. § 213(a)(1). The Court began its analysis by noting that the Department of Labor regulations in effect at the time of the plaintiffs' employment provided the following three-prong test for determining whether an employee qualifies for the administrative exemption:

> (a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> > (1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;
> >
> > (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
> >
> > (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.[173]

In this case, the there was no dispute that the plaintiffs met the first two prongs. Rather, the issue was whether they met the third prong. The sales managers' primary functions included coordinating the setup, design and execution of events and developing relationships with clients. Although they did not have the authority to make financial decisions, nor did they supervise other employees, the Court found that the plaintiffs "exercised sufficient discretion in their work" so as to be exempt employees under the FLSA. Basically, although they had guidelines and limited options, the sales managers had the authority to approach clients and potential clients and make deals with them, maintaining a relationship even once the contract was closed.[174] "The sales managers were the face of the businesses to prospective clients, and the judgment that they exercised concerned how best to represent the employers and to develop a proposal that would attract the

[173] *Id.* at 242 (quoting 29 C.F.R. § 541.200(a)).
[174] *Id.* at 243-247.

prospective clients to a contract with the venues."[175] Therefore, summary judgment was granted for the defendants. In reaching this conclusion, the First Circuit recognized and took into account a Supreme Court mandate that the FLSA should be narrowly construed. [176]

## X. WHISTLEBLOWING

The Sarbanes–Oxley Act ("SOX"), provides protection to employees who report financial activities that they believe constitute violations to related federal laws.[177] In *Lawson v. FMR LLC*[178], the plaintiffs brought a retaliation suit against their employer, a corporation who provided advisory services to mutual funds. The District Court denied a Motion to Dismiss, holding that, under the applicable scope of review, the SOX protections were available to plaintiffs but certified the matter to the Court of Appeals.[179] The First Circuit determined that the whistleblower protections provided by Section 806(a) of the Act,[180] do not apply to employees working for private contractors or subcontractors that provide services to public companies, and therefore reversed, granting the motion to dismiss.[181]

The Court concluded that "the clause that reads 'officer, employee, contractor, subcontractor, or agent of such company', goes to *who* is prohibited from retaliating or discriminating, *not who is a covered* employee."[182] The Court also referenced other literal and textual parts of the U.S.C. and the Act itself, relying on such analysis to specify that only employees of public corporations fall under the statute.[183] Furthermore, the Court also noted that two earlier whistleblower statutes had explicitly extended their coverage to employees of contractors employed by the companies regulated by those statutes. This was construed to imply that if Congress had wanted to include the employees of contractors under SOX's protections then it would have explicitly specified so.[184] Finally, the Court noted that it has previously "admonished the lower federal courts not to give securities laws a scope greater than that allowed by their text."[185]

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[175] *Id.* at 247.
[176] Hines, 665 F.3d. at 242 (quoting Arnold v. Ben Kanowsky, Inc., 361 U.S. 388 (1960)).
[177] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).
[178] Lawson v. FMR LLC, 670 F.3d 61 (1st Cir. 2012).
[179] For the USDC opinion, *see* Lawson v. FMR LLC, 724 F. Supp. 2d 141 (D. Mass. 2010).
[180] 18 U.S.C. § 1514(A)(a)(1).
[181] Lawson, 670 F.3d at 83.
[182] *Id.* at 69. (citing § 1514(A)) (emphasis added).
[183] For the full analysis, see *id.* at 69-74.
[184] *See id.* at 75 (mentioning as examples The Nuclear Whistleblower Protection provision of the Energy Reorganization Act, 42 U.S.C. § 5851(a)(1); and the whistleblower protection provision of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129(a)(1)).
[185] *Id.*

After a brief discussion and analysis, the Court found even further support to conclude that the SOX protections are only available to employees of public companies in the legislative history of SOX.[186] The conclusion of the majority opinion clearly states: "[i]f we are wrong and Congress intended the term "employee" in § 1514A(a) to have a broader meaning than the one we have arrived at, it can amend the statute. We are bound by what Congress has written."[187]

It should be noted that this opinion is currently before the United States Supreme Court.[188]

## XI. PUERTO RICO'S CONSTITUTIONAL PROPERTY INTERESTS

In *Alberti v. University Of Puerto Rico (U.P.R.)*,[189] the plaintiff presented a lawsuit claiming that she was deprived of her property when the administrative position and academic assignment she had were terminated without due process of law. The District Court granted a summary judgment, finding in favor of defendants. The Court found that the administrative position was a trust position which could be terminated at the will of the Chancellor because this type of position requires harmony and empathy between the employee who holds the position and the nominating authority, the Chancellor.[190] The Rules and Regulations of the U.P.R. specifically prohibit individuals who occupy teaching and managerial positions, like the plaintiff's, from attaining permanence (tenure) in the managerial position, and prohibit anyone from obtaining permanence in a position without first undergoing a probationary period for a minimum of five years. Since the plaintiff did not meet the established requirements, the Court concluded she did not have a property interest in the trust position she was assigned and did not comply with the requirement of five years in a teaching position to be able to become a permanent professor. In other words, the plaintiff did not reach "the required state level of a property interest in any of the two positions" and held against her.[191]

In a similar case, *Rojas-Velázquez v. Figueroa-Sancha*, the First Circuit concluded that there is no property right over specific duties that are part of

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[186] *Id*. at 77-80.
[187] *Id.* at 83.
[188] *See* Lawson v. FMR LLC, 133 S.Ct. 470 (2012).
[189] Alberti v. University of Puerto Rico, 818 F. Supp. 2d 452 (D.P.R. 2011).
[190] *Id.* at 465.
[191] *Id.* at 469.

a position.[192] The plaintiff was not terminated; he remained with his same position title and salary. The only real change was the elimination of some of his prior duties and a loss of certain benefits. These included having a cell phone and using an official car. The Circuit, confirming the USDC-PR, concluded that there is no proprietary right over specific duties of a position, since "Puerto Rico law cedes . . . no constitutionally protected property interest."[193] Therefore, the Court held that the plaintiff did not have a right of due process over that type of decision taken by his employer.[194]

The plaintiff in *Alberti v. UPR* also included a claim "that her removal and termination were executed by the individual defendants in violation of the First Amendment of United States Constitution."[195] The plaintiff further posited her termination "was performed in retaliation for engaging in protected speech as to matters of public concern."[196] The expressions that the plaintiff claims were protected were related to a student and to complaints about internal issues. The plaintiff argued "that these expressions constituted protected free speech regarding a matter of public concern"[197] but the Court held that the expressions made by a public employee, related to issues that are part of their employment, are not protected under the First Amendment.[198] The Court further held those types of comments are not excluded from an employer's disciplinary procedures. The First Amendment protects private citizens' expressions. "To establish an actionable claim of unconstitutional retaliation in a public employee's speech case, [plaintiffs] must meet three requirements."[199] They must (1) demonstrate that they was speaking as a citizen on a matter of public concern, (2) show that their interest in the speech outweighs the government's interest as an employer in avoiding disruption in the workplace, and (3) produce sufficient direct or circumstantial evidence from which a jury reasonably may infer that a constitutionally protected conduct was the substantial or motivating factor behind the adverse employment action. Even if a plaintiff fulfills those requirements, the employer can still defeat the claim by proving, by a preponderance of the evidence, that the governmental agency would have taken the same action against the employee even in the absence of the protected conduct.[200]

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[192] Rojas-Velázquez v. Figueroa-Sancha, 676 F.3d 206 (1st Cir. 2012).
[193] *Id.* at 212.
[194] In this case plaintiff claimed he was politically discriminated by the NPP, the party he was a member of, because he maintained relationships with members of other political parties.
[195] Alberti, 818 F.2d at 471.
[196] *Id.*
[197] *Id.*
[198] *See id.* at 472-477.
[199] *Id.* at 472.
[200] For the case law basis for such requisites and the exception, please see *id.*

## XII. CONCLUSION

Although the First Circuit, the USDC-PR, and the U.S. Supreme Court were very active in labor and employment cases during this term, most of them reaffirmed or were based on well settled standards or principles. In our opinion, the most significant and impactful decisions were *Acosta-Ramírez v. Banco Popular de Puerto Rico*[201] and *Lawson v. FMR LLC*.[202] In *Acosta Ramírez* and *Alvarado-Rivera*, the USDC gave employers a way to avoid their responsibilities under Article 6 of Act 80, which created the successor employer legal doctrine.[203]

Considering that the successor employer is a state law figure, it is interesting that the USDC did not take into account the Puerto Rico Supreme Court case of *Rodríguez v. Urban Brands*.[204] In that case, it was held that buying assets free of liens through the Federal Bankruptcy Court does not by itself eliminate the buying company' liability as a successor employer. Citing a bankruptcy case, *In re American Hardwoods, Inc.*, the Supreme Court reasoned that such transactions under the Bankruptcy Court should not result in higher benefits to its participants than transactions made in the normal process of acquiring an operating business.[205] Considering the similarities between an insolvent bank and a bankrupt business, as well as the Puerto Rico Supreme Court's rationale in *Urban Brands*, it is surprising that the USDC did not at least cite to the case.

If one were to apply *Urban Brands*' rationale to the FDIC cases, the holdings may very well stay the same given the additional factors such as the temporary employee contracts. However, both FDIC cases cited the nature of the transactions -both were carried out after the bank was declared insolvent and liquidated- as the determining factor in their inquiries. That rationale goes against *Urban Brands* and it would have been useful for the USDC to at least justify why it effectively made a distinction between buying assets in an FDIC supervised liquidation and a U.S. Bankruptcy Court supervised liquidation.

In *Lawson*, the First Circuit effectively and significantly narrowed the protection Congress had attempted to provide for whistleblowers with the

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[201] Acosta-Ramírez v. Banco Popular de Puerto Rico, No. 10-2131, 2012 WL 1123602 (D.P.R. 2012).
[202] Lawson v. FMR LLC, 670 F.3d 61 (1st Cir. 2012).
[203] Wrongful Discharge Act, Act No. 80 of May 30, 1986, P.R. LAWS ANN. tit. 29, § 185a-185m.
[204] Rodríguez v. Urban Brands, 167 D.P.R. 509 (2004).
[205] *Id.* at 521 (citing In re American Hardwoods, Inc., 885 F.2d 621 (9th Cir. 1989)).

enactment of Sarbanes–Oxley Act.[206] In aspects so serious and delicate as the trust investors place on the financial information provided by companies where they invest, whistleblowers should have complete protection regardless of whether they work for public or private companies. Also, contractors should be protected if, during the process of providing services to a public company, they find and report illegal practices by said company. It will ultimately come down on how the U.S. Supreme Court construes the statutes and how much weight is placed on its legislative history.[207] The Supreme Court's opinion should be eagerly anticipated and have wide reaching repercussions.

With respect to the other cases that took place during the term, several interesting situations arose. For instance, it was also interesting to see in *Mena Valdez v. E.M. T-Shirt Distributors, Inc.*,[208] how a claim was filed under the ADA's "association provision" arguing that an employee was discriminated against by being denied a reasonable accommodation due to the stress caused by a medical condition of a daughter. Although a creative argument, the proper statute to bring the claim under was the FMLA. In our opinion, this was a longshot argument that was made as an alternative to the FMLA claim.

As to disability cases, the First Circuit set a firm precedent by finally joining most of the other circuits and explicitly rejecting individual liability in ADA claims in *Román-Oliveras v. PREPA*.[209] It is also worth mentioning with respect to that case that although the plaintiff failed to state a claim upon which relief could be granted, he did allege a mistake employers constantly repeat: not allowing workers to return to work after being authorized to do so by their health specialists. It is a mistake that could very well have cost PREPA a significant amount of money. Also, in *Ramos–Echevarría v. Pichis, Inc.*, it was interesting to see the extremely adverse effect that moonlighting with another employer in similar duties had on a plaintiff's ADA case.[210]

Another pattern that stood out to us was the number of Title VII and ADA cases that were filed in the federal courts without first exhausting administrative remedies. The fact that this is such a common occurrence, despite the law being so clear, is startling as it represents a waste of already stressed judicial resources and energies. These cases were usually resolved with summary judgment being granted for the defendant.

Another pattern that jumps out is that the majority of retaliation cases failed in the summary judgment stage. This may be a sign than courts are

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[206] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).
[207] *See* Lawson v. FMR LLC, 133 S. Ct. 470 (2012) (granting of certiorari).
[208] Mena Valdez v. E.M. T-Shirt Distributors, Inc., 869 F. Supp. 2d 252 (D.P.R. 2012).
[209] Román-Oliveras v. PREPA, 655 F.3d 43(1st Cir. 2011).
[210] Ramos–Echevarría v. Pichis, Inc., 659 F.3d 182 (1st Cir. 2011).

applying stricter standards in evaluating adverse actions and their effect on the plaintiff, especially in claims that involves working environment conditions and discrimination as we saw in *Colón–Fontánez v. Municipality of San Juan*, *Ayala Sepúlveda v. Municipality of San Germán* and in *Gómez Pérez v. John E. Potter*.[211] However, it could also in part be due to lawyers submitting cases with no possibilities of success or without completely ascertaining the facts.

Although we understand that law is a dynamic field that changes over time, lawyers must place more attention on not consuming the courts' and parties' time and resources in cases that are bound to fail when the legal standards are very clear and well settled. If you are a plaintiff's lawyer, we exhort you to make an exhaustive legal analysis before filing a complaint that is doomed to fail and creating wrongful expectations in your clients. On the other hand, if you are defendant's lawyer, always be alert for ways to dismiss clearly frivolous cases as early as possible so as to save the Courts and your client money and resources.

[211] Colón–Fontánez v. Municipality of San Juan, 660 F.3d 17 (1st Cir. 2011); Ayala Sepúlveda v. Municipality of San Germán, 661 F. Supp. 2d 130 (D.P.R. 2009); Gómez Pérez v. John E. Potter, 452 F. App'x 3 (1st Cir. 2011).