FEDERAL LABOR AND EMPLOYMENT LAW 2012–2013 TERM ANALYSIS[*]

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[*] Based on case law from the Supreme Court of the United States, the United States Court of Appeals for the First Circuit and the United States District Court for the District of Puerto Rico, during the 2013–2013 term.

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I. INTRODUCTION

From the several cases labor and employment cases handled by courts during the 2012–2013 term, thirty-nine cases are here summarized and discussed. Of these, five cases were determined by the United States Supreme Court and two others by the Puerto Rico Supreme Court (these will not be part of this term analysis). During this term, there were five cases related to political discrimination, two claims under sexual harassment in the workplace, five retaliation cases, three in the compensation area, one case of age discrimination, one case of freedom of speech and association, two cases under alternate dispute resolution, one for legal fees related to benefits received by an injured employee, six related to benefits, one case of employment contract clauses as well as USERRA, collective bargaining agreements also had one case, three cases of administrative procedures and due process, and one interesting case related to employer successors hip. The areas with the most court determinations are benefits, retaliation and political discrimination.

II. ADMINISTRATIVE LAW

In *Kloeckner v. Solis*,[1] the Supreme Court unanimously reversed both lower courts.[2] The opinion states that a federal employee, who claims that an agency action appealable to the Merit Systems Protection Board (MSPB) violates an antidiscrimination statute under §7702(a)(1), should seek judicial review in the district court, not in the Court of Appeals for the Federal Circuit, regardless of whether the MSPB decided her case based on procedural grounds or based on its merits.

Plaintiff, who worked for the Department of Labor (DOL), claimed that her employer engaged in age and sex discrimination by subjecting her to a hostile work environment. While her complaint was still pending at the Equal Employment Opportunity Commission (EEOC), the DOL dismissed her claim. She then claimed that the decision to dismiss her claim was motivated by unlawful discrimination; thus, making her case a mixed one.

Although the Civil Service Reform Act of 1978 (CSRA) provided to file claims like this one either in the MSPB or in the district court, Plaintiff alleged that requiring appeals of mixed cases that were decided on procedural grounds to be filed in the Federal Circuit would undermine the purposes of anti-discrimination laws by preventing legitimate claims from being heard and placing federal employees at a disadvantage when pursuing discrimination claims. On the other hand, Defendants alleged that Congress wanted the MSPB procedures to develop in a uniform and consistent way to protect the rights of federal employees who file discrimination claims.

The DOL held that a federal employee who claims that an agency action appealable to the MSPB violates an antidiscrimination statute under § 7702(a)(1) should seek judicial review in the district court and not in the Federal Circuit. However, Solís contended that Federal District Courts should be allowed to review MSPB's decisions. The Supreme Court rejected the DOL argument.

III. ALTERNATIVE DISPUTE RESOLUTION

In *Unión de Periodistas de Artes Gráficas y Ramas Anexas v. Telemundo de Puerto Rico, Inc.*,[3] the court affirmed an arbitration award concluding that a layoff due to a technological restructuration did not violate the collective bargaining agreement between the parties, after the Union failed to present evidence about their allegation that there was a need to subcontract technicians.

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[1] Kloeckner v. Solis, 133 S. Ct. 596 (2012).

[2] The district court dismissed the complaint, holding that—because MSPB had not decided the case on its merits—Plaintiff's only appellate forum was the Federal Circuit; the Court of Appeals for the Eighth Circuit affirmed.

[3] Unión de Periodistas de Artes Gráficas y Ramas Anexas v. Telemundo de Puerto Rico, Inc., 926 F.Supp.2d 410 (D.P.R. 2013).

In the absence of exceptional circumstances, a court should not overturn an arbitrator award if the arbitrator's interpretation of the collective bargaining agreement is founded on the agreement text. In this case, the Court found that the arbitrator's conclusions were directly derived from the plain language of the agreement. The agreement granted Defendant the discretion to lay-off unionized employees due to financial hardship or the introduction of new technology.

In this type of claims, the Union has the burden of proof about the employer's hiring subcontractors to substitute laid-off employees. After making such showing, the burden shifts to the employer to show that the challenged subcontracting does not violate the CBA provisions. Nevertheless, the court found that Plaintiff failed to provide enough evidence to shift the burden of proof to the employer.

IV. Plausibility of Pleadings; Bankruptcy Automatic Stay

In *Villafañe Colón v. B Open Enterprises, Inc.*,[4] Plaintiff filed a claim under Title VII of the Civil Rights Act of 1964,[5] the American with Disabilities Act (ADA),[6] and Commonwealth Law, against her employer and several other companies, commonly owned by her employer, and for which he also worked, as well as some coworkers and supervisors as codefendants. The main Defendant filed for bankruptcy debtor protection and asked for the stay of the proceedings which was granted. Codefendants asked for judgment on pleadings pursuant to Fed.R.Civ.P. 12(c). Plaintiff replied, asking for the case not to be stayed pending bankruptcy proceedings.

The Court acknowledged its responsibility of "view[ing] the facts contained in the pleadings in the light most favorable to the nonmovant and draw all reasonable inferences therefrom."[7] Moreover, it found that Plaintiff's allegations surpassed speculative level, giving room to a reasonable inference of Codefendants' liability. Therefore, Plaintiff convinced the court of the plausibility of her allegations.[8] Plaintiff also satisfied the Court's requirement "that the complaint contained well-pleaded allegations that, taken as true, establish an employment relationship between plaintiffs and defendants."[9] On these grounds, Defendants' motion for judgment on pleadings was denied.

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[4] Villafañe Colón v. B Open Enter., Inc., 934 F.Supp. 2d 274 (D.P.R. 2013).
[5] 42 U.S.C. §§ 2000e–2000e-17.
[6] 42 U.S.C. §§ 12101–12213.
[7] Pérez-Acevedo v. Rivera-Cubano, 520 F.3d 26, 29 (1st Cir. 2008).
[8] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 577 (2007).
[9] Meléndez-Fernández v. Special Care Pharmacy Serv., Inc., No. 11-1662, 2012 WL 4813528, at *5 (D.P.R. Oct. 12, 2012).

Since her own allegations pointed out the common ownership of corporate codefendants, the Court denied Plaintiff's motion to lift the stay of the proceedings while the Bankruptcy Court considered the case before it. "Pursuant to 11 U.S.C. § 105, [however], the Court has 'general equity power to stay litigation that could interfere with the reorganization of the debtor.'"[10] The stay may be extended to non-debtor Codefendants or "third parties when 'unusual circumstances' exist, such as, when (i) the non-debtor and debtor enjoy such an identity of interests that the suit of the non-debtor is essentially a suit against the debtor or (ii) the third-party action will have an adverse impact on the debtor's ability to accomplish reorganization."[11] This included the corporate codefendants' insurer. Liability insurance is considered property of a bankruptcy estate under 11 U.S.C. § 541(a)(1).[12]

Title VII and ADA claims against individual codefendants were dismissed, since those laws only apply to employers. But the court kept supplemental jurisdiction over state-law claims against the individual codefendants because the state claims were part of the same controversy of those arising from the Court's original jurisdiction.[13] There was a complete overlap in the factual allegations of state and federal claims.[14]

V. BENEFITS

In *Weiss v. DHL Exp., Inc.*,[15] Plaintiff went to the state court claiming a $60,000 bonus provided by his employment contract. This bonus was subject to the Employment Benefits Committee (Committee) approval.[16] Such benefit could be waived due to a good-cause dismissal of the failure to comply with other requirements. The Defendant removed the case to the district court under diversity of citizenship jurisdiction.

Since Plaintiff was laid-off before receiving the bonus, he alleged that waiving the bonus was the motive for his dismissal. Defendant replied that the Committee denied the bonus after determining that Plaintiff was going to be separated for a just cause. The circuit court determined that the Committee indeed possessed such authority under state law, and its decision couldn't be overruled.

VI. ERISA

[10] Rivera-Olivera v. Antares Oil Serv., 482 B.R. 44, 47 (Bankr. D.P.R. 2012) (quoting In re A.H. Robins Co., Inc., 828 F.2d 1023, 1025 (4th Cir. 1987)).
[11] *Id.* (quoting In re Bora Bora, Inc., 424 B.R. 17, 27 (Bankr. D.P.R. 2010)).
[12] Tringali v. Hathaway Machinery Co., Inc., 796 F.2d 553 (1st Cir. 1986).
[13] 28 U.S.C. § 1367.
[14] *See* Torres Ramos v. Metro Guard Serv., Inc., 394 F.Supp.2d 465, 469 (D.P.R. 2005).
[15] Weiss v. DHL Exp., Inc., 718 F.3d 39 (1st Cir. 2013).
[16] The Committee was the sole arbiter of whether a plan participant was terminated for good cause. *See id.* at 41.

In *Gross v. Sun Life Assurance Co. of Canada*,[17] after being denied benefits by her health insurer, Plaintiff challenged the removal of her claim from state to federal court after Defendant successfully invoked ERISA preemption. The circuit court was faced with the question of whether benefit plans provided by employers should be considered as unitary plans under ERISA provisions.

The circuit court agreed with the district court about the inapplicability of the "safe harbor" exception, acknowledging the ERISA preemption, since the record presented enough evidence to support that the company's benefits package constituted a unified ERISA-governed plan. But subjecting the denial of benefits to *de novo* review, the court reversed and remanded the case with instructions, since the insurer's standard for proving disability was completely arbitrary, disallowing due deference. Also, the court concluded that the evidence on record was inadequate to fairly determine Plaintiff's entitlement to disability benefits. Hence, the district court was instructed to return the record to the insurer for further development.

In *Sun Capital Partners III, LP v. New England Teamsters & Trucking Industry Pension Fund*,[18] the circuit court determined that, as a matter of first impression, a private equity fund was in fact a "trade or business" for the purposes of ERISA's multiemployer plan withdrawal liability provisions.[19] Under ERISA, an employer that withdraws from a multiemployer pension plan is liable for a share of the plan's unfunded vested benefits. The entities subject to this liability are the employer that contributed to the pension plan, as well as any other "trades or businesses"[20] under "common control"[21] with the withdrawing employer.

The court found that one of two private equity funds in this case was a "trade or business" because, "through layers of fund-related entities [it] was not merely a passive investor, but sufficiently operated, managed, and was advantaged by its relationship with its portfolio company [. . .]"[22] The case was remanded to the district court for a determining on whether or not the

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[17] Gross v. Sun Life Assurance Co. of Canada, 744 F.3d 1 (1st Cir. 2013).

[18] Sun Capital Partners III, LP v. New Eng. Teamsters & Trucking Indus. Pension Fund, 724 F.3d 129 (1st Cir. 2013).

[19] *See* Multiemployer Pension Plan Amendments Act of 1980, incorporated to ERISA, 29 U.S.C. §§ 1381–1453.

[20] "'[T]o be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit.'" *Sun Capital Partners*, 724 F.3d at 139 (citing C.I.R. v. Groetzinger, 480 U.S. 23, 35 (1987)).

[21] "Under Treasury regulations, to be in a parent-subsidiary group under common control, the parent must have an 80% interest in the subsidiary." *Id.* at 149 (citing 26 C.F.R. § 1.414(c)–2(b)(2)(i)).

[22] *Id.* at 133.

remaining private equity fund met the "trade or business" standard, and whether or not the private equity funds were under "common control" along with the portfolio company. The relevance of this case is that before it, private equity funds were viewed and treated as passive investments and not as "trade or business" under ERISA's rules.

In *Hannington v. Sun Life & Health Ins. Co.*,[23] the Court determined that monetary benefits received under the Veteran's Benefit Act (VA) should not be deductible from a long-term disability monthly payment, especially those provided by the service-connected disability compensation. Plaintiff participated in an employer-sponsored long-term disability group plan. The plan provided that monthly payments will be reduced by amounts received as "other income" defined as any amount of disability or retirement benefits under: a) the United States Social Security Act (SSA); b) the Railroad Retirement Act ("RRA"); or c) any other similar act or law provided in any jurisdiction. The plan identified Defendant as the claims fiduciary and granted it the sole and exclusive discretion and power to interpret any and all issues relating to eligibility for benefits. Defendant's determination could not be overturned, except in the case of arbitrary or capricious actions.

Defendant made an adjustment in the Plaintiff's monthly benefits after he started receiving service-connected disability compensation under the VA. After the Plaintiff's administrative appeal was denied, he filed a claim in the district court. The court found that the VA followed a different definition of disability and that the VA does not provide employment-related benefits. It also ruled that the "other income" provision in the plan was intended to identify sources of income comparable to the SSA and the RRA. Since VA benefits are not linked to employment but to past service in the Armed Forces, it should not be considered as "other income" for purposes of reducing the monthly payment that the long-term disability owes Plaintiff under the plan.

The central question before the court in *Colby v. Union Sec. Ins. Co. & Mgmt Co. for Merrimack*,[24] was whether a risk of relapse into an addiction could be considered a current disability. Plaintiff, an anesthesiologist, started self-administering an opiate used in her practice to ameliorate her back pain. When her addiction became evident, Plaintiff took a leave of absence to enter an inpatient substance abuse treatment program. After leaving the treatment program, Plaintiff followed-up her condition on an outpatient basis and had not resumed her substance abuse. However, her license to practice medicine was eventually revoked.

Plaintiff's group employee benefit plan was governed by ERISA. The plan administrator suspended her benefits after her release from the inpatient clinic. To the plan administrator, the risk of relapse was not the

[23] Hannington v. Sun Life & Health Ins. Co., 711 F.3d 226 (1st Cir. 2013).
[24] Colby v. Union Sec. Ins. Co. & Mgmt Co. for Merrimack, 705 F.3d 58 (1st Cir. 2013).

functional equivalent of a current disability. Only claimants under the regular care of a doctor for an illness or injury that prevented them from performing at least one of the material duties of their regular occupations could enjoy benefits.[25] But plan definitions made clear that substance abuse, dependency, and addiction were conditions that could give rise to sickness within the purview of the plan.

Plaintiff replied that she remained under the regular care of a series of doctors. Moreover, she expressed her fear of relapsing into addiction, since returning to work would give her easy access to opiates and other addictive substances; thus, impairing her from fulfilling her duties. Her assertions were, indeed, supported by evidence. For instance, she was arrested six months after her release from the inpatient program for driving under the influence of alcohol. The court also noted that Plaintiff's addiction was associated to several other physical and mental conditions, *i.e.*, back pain and depression. The district court granted judgment in favor of Plaintiff and the appeal followed.

Notwithstanding its departure from other circuits' precedent, the circuit court concluded that the exclusion of the risk of relapse into addiction as a long-term disability was unreasonable. More specifically, the plan administrator's reliance on an unwritten exclusion was deemed weak, as the risk of relapse persists for other kinds of illnesses.[26]

A. Attorney's Fees

In US Airways, Inc. v. McCutchen,[27] the Defendant suffered serious injuries in a car accident and the benefit plan administered by Plaintiff paid $66,866 to cover his medical expenses. Defendant recovered $110,000 in a separate suit against the third party, keeping $66,000 after attorneys' contingency fees were deducted. The plan administrator required the beneficiary to pay back the full amount of the medical expenses covered under the plan out of any amount recovered from his suit against the third

[25] According to plan documents, the material duties of a physician included working full-time, reviewing and evaluating medical records, diagnosing patients' medical conditions, prescribing diagnostic measures and treatment, as well as recording and reporting facts and findings. *See Colby*, 705 F.3d at 62.

[26] "For example, an air traffic controller with a seizure disorder may be totally disabled with respect to her regular occupation because the radar illumination and the runway's flickering lights put her at grave risk of convulsive episodes. It is not that she is physically unable to go through the motions required by an air traffic controllers job but, rather, that her risk of relapse is prohibitively impairing and thus becomes, for all practical purposes, a current disability." *Id.* at 66.

[27] US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013).

party.[28] Defendant argued that Plaintiff ignored the fact that his lawyers' contingency fees amounted 40% of his award. In a suit seeking appropriate equitable relief under ERISA, Plaintiff contended that a proportional adjustment must be performed over the amount to repay. The district court ordered Defendant to pay the full amount of $66,866. The circuit court vacated the district court's judgment, holding that ERISA is subject to equitable limitations and that to be able to determine appropriate equitable relief, the district court must take into account the reduction of the amount recovered after deducting attorney's fees.

Plaintiff argued that the language of § 502(a)(3) of ERISA requires courts to enforce the exact terms of health benefit contracts, including terms guaranteeing full reimbursement.[29] Defendant argued that the circuit court properly applied equitable doctrines to provide a fair remedy and that since courts are vested authority to determine what constitutes "appropriate equitable relief" within the meaning of § 502(a)(3), they are not bound by express insurance plan terms. Plaintiff replied that the term "appropriate" in § 502(a)(3) of ERISA requires the "equitable relief" sought by Plaintiff to be consistent with the provisions of the benefit plan and thus, does not grant courts unbridled discretion to rewrite contractual terms. Defendant insisted on applying the equitable principle of unjust enrichment to the case. Otherwise, in his view, he would be left in a worse position than that if he had not sought third-party recovery.

The Supreme Court held that equitable limitations do not apply to the benefit plan, a valid contract. Here, the Court said Plaintiff was only demanding what was agreed under that contract. The common fund doctrine,[30] however, may provide relief in this case because the benefit plan was silent about the allocation of attorneys' fees. The common fund doctrine allows a litigant to recover attorney's fees from a fund that is created, increased or protected by the same litigant. Because the parties did not contract otherwise, the common fund doctrine fills the void. "[I]f [Plaintiff] wished to depart from the well-established common-fund rule, it had to draft its contract to say so—and here it did not."[31] Thus, although the equitable relief doctrine cannot override express contractual terms, the common-fund doctrine is applicable to the same in the absence of provisions about attorneys' fees allocation. For this reason, the Court ruled in part for one party and in part for the other. Therefore, the circuit court decision was vacated and the case was remanded to the district court with instructions to

[28] *See* 29 U.S.C § 1132(a)(3).
[29] *Id.*
[30] "'The [common-fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched.'" *U.S. Airways*, 133 S. Ct. at 1545, n. 4 (quoting Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970)).
[31] *Id.* at 1548.

adjust the Defendant's reimbursement amount by applying common-fund rules.

VII. COLLECTIVE BARGAINING

In *N.L.R.B v. Solutia, Inc.*,[32] as part of a consolidation plan, a company transferred part of its operations from one building to another. Different labor unions represented the employees of each building within the same landsite. The Company notified its plan to the affected Union. The Union promptly objected, demanding negotiation, but the Company refused, calling its decision a managerial prerogative. The Union filed an unfair labor practice claim before the National Labor Relations Board (NLRB) and a grievance with the Company for violating the collective bargaining agreement (CBA) between them.[33]

An NLRB administrative law judge (ALJ) found that the company's unilateral decision did not violate the CBA, but did violate sections 8(a)(1)[34] and 8(a)(5)[35] of the National Labor Relations Act (NLRA). The ALJ ordered the company to revert its decision, returning the work to its previous building and indemnifying all the employees adversely affected, as well as the Union. After both parties filed exceptions to the ALJ's ruling, a three-member panel of the NLRB adopted it in full. The NLRB petitioned the enforcement of its order to the circuit court. The Company cross-petitioned for review.

The Court agreed with the NLRB finding that its decision was supported by substantial evidence on record. It further stated that an employer violates section 8(a)(5) of the NLRA when it unilaterally changes a term or condition of employment. It also recognized considerable deference to the NLRB is entitled when determining what constitutes "terms or conditions of employment".

The Court then examined the case law looking for an answer to such a novel matter. It found that the Supreme Court had identified business decisions that have a "direct impact on employment . . . [but] ha[ve] as [their] focus only the economic profitability" of the company.[36] According to that ruling, collective bargaining is mandatory for these decisions "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."[37]

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[32] N.L.R.B v. Solutia, Inc., 699 F.3d 50 (1st Cir. 2012).
[33] The grievance was later dropped.
[34] 29 U.S.C. § 158(a)(1).
[35] 29 U.S.C. § 158(a)(5).
[36] First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 677 (1981).
[37] *Id.* at 679.

The NLRB had already adopted a test to determine "whether a decision to relocate unit work is a mandatory subject of bargaining."[38] If the transfer of work is an allocation, instead of relocation, the NLRB has determined that it is subject to mandatory collective bargaining, regardless of any consideration of profitability for the company.[39] Since "there was no change in the scope or direction of the business, the type of work being performed, or the site where the work was performed [. . .] the decision was necessarily a mandatory subject of bargaining."[40] Here, the Company was seeking to enhance its operational efficiency by having employees working at more than one building, not changing the actual operations. Workforce reduction was also a main objective.

CBA provisions about employer control over its operations yielded to the long-standing use and practice. Although the plain language of the clause acknowledges company control over general personnel matters, it does not contemplate "remov[ing] work from bargaining unit employees and reassign[ing] it to managers."[41] Besides, bargaining history showed that the company—and its predecessor—had previously negotiated similar matters with the Union, under the same management rights language. The court also found that Defendant did not provide the Union with the information over the effects of its proposed transfer and that its effects weren't foreseen by the CBA.

Contrary to what the union contested, the bargaining history also demonstrated the geographical definition of the unit, so the transfer did not change or extend its jurisdiction to the building where its employees were transferred, as the NLRB determined.

Affirming the administrative ruling again, the court deemed reasonable a CBA interpretation that stated that moving a task from one building to another "without moving any employees would be subject to bargaining with the Union, since it would maintain each Union's representation of all employees on its respective side."[42] The remaining objections from the Union and the employer were all dismissed as premature, unnecessary or unmeritorious. That way, the NLRB's petition of enforcement was granted and the Union and the employer's petitions for review, denied.

VIII. COMPENSATION

A. Fair Labor Standards Act

[38] Dubuque Packing Co. & United Food and Commercial Workers International Union Local No. 150A, 303 N.L.R.B. 386 (1991).
[39] *See* Westinghouse Elec. Corp. & Salaried Employees Association of the Baltimore Division, 313 N.L.R.B. 452, 453 (1993).
[40] *Id.*
[41] Regal Cinemas, Inc. v. N.L.R.B., 317 F.3d 300, 312–13 (D.C. Cir. 2003).
[42] *Solutia, Inc.*, 699 F.3d at 72.

In *Genesis Healthcare Corp. v. Symczyk*,[43] the respondent filed a complaint on behalf of herself and all other persons similarly situated, claiming that the petitioners violated the Fair Labor Standards Act (FLSA) by automatically deducting the employees' 30-minute meal break on every shift, even when they performed compensable work during those breaks. Respondent was the only plaintiff throughout all the proceedings. The complaint was answered and the employer made an offer for unpaid wages and attorneys' fees. Respondent didn't accept the offer and petitioners filed a motion to dismiss for lack of subject-matter jurisdiction. The district court found that there were no other individuals in the suit and that the offer Respondent received from her employer fully satisfied her individual claim. The court of appeals reversed, finding that since it was not established, the collective action was not moot.

In his Opinion, Justice Thomas stated that a complaint cannot be safe from mootness for the presence of collective action allegations when the individual that filed the action has received or accepted a remedy that satisfies its claim. The Opinion was based on the fact that there were no other plaintiffs in the lawsuit to sustain the continuance of the case when the employer offered to satisfy the amount owed to the only plaintiff in the case. In addition, the Supreme Court determined that "conditional certification" under the FLSA didn't provide independent status to the collective action, unlike a certification under the rules of Federal Civil Procedure. And because it wasn't certified correctly as required by the FLSA, the collective action became moot as the action of the respondent.

Respondent's suit was appropriately dismissed for lack of subject-matter jurisdiction, as well as the collective action.

Judges J. Kagan, Ginsburg, Breyer and Sotomayor dissented. They wrote that the Court should have corrected that the unaccepted settlement offer mooted Symczyk's individual claim, not the others rights.

In *Manning v. Boston Medical Center*,[44] plaintiffs brought a wage-and-hour action against defendants. Along with the company, the CEO and the Senior Human Resources Director were also named as defendants. The Plaintiffs alleged that their timekeeping policy and practices violated the Fair Labor Standard Act (FLSA) and Massachusetts common law. Defendants filed a dismissal motion alleging that the issue had to be submitted to a grievance processes under collective bargaining agreements (CBA) that existed between employer and employees.

Regarding the defendants, the court stated that the FLSA provides for personal liability as its definition of "employer" includes "any person acting

[43] Genesis Healthcare Corp. v. Symczyk , 133 S. Ct. 1523 (2013).
[44] Manning v. Boston Medical Center, 725 F.3d 34 (2013)

directly or indirectly in the interest of an employer in relation to an employee."[45] In prior cases courts have normally agreed that "a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable [. . .] for unpaid wages."[46] As a result, class could hold several individuals liable to their claims, depending on the position they hold and influence on the acts that affect the Plaintiffs.

The first circuit refused to dismiss the case under the grounds that Plaintiffs did not follow the grievance procedure established in the collective bargaining because its wording was too general. They pointed out that "[r]ights conferred by Congress are conceptually distinct from those created by private agreement, and there is no authority for the proposition that rights under the FLSA merge into contractual ones whenever the two overlap."[47] As a consequence, FLSA claims are not subject to CBA's grievance and arbitration procedures simply because they address similar subject matter or because the CBAs define the concept of compensable "work." The court also stated that "in order for a collective bargaining agreement to subject a federal statutory claim to arbitration, any such waiver must be 'clear and unmistakable' on its face."[48]

The first circuit upheld the dismissal of individual charges against the senior human resources director, but overturned the dismissal claims against the former president and CEO, finding that she had sufficient control over working conditions in order to establish individual liability.

B. Distribution Tips

In *Matamoros v. Starbucks Corp.*,[49] the district court found that Starbucks infringed Massachusetts' law in a class-action diversity case. It was concluded that the most recent version of the Tips Act,[50] precludes an employer of dividing tips with employees who perform managerial tasks. The company was dividing tips between "wait staff" employees ("baristas") and shift supervisors. Both employees were classified as hourly employees, shift supervisors also served customers within other duties including some managerial functions.

The district court certified the class, and awarded damages in an amount exceeding $14,000,000.00. The circuit court upheld the damages awarded. The appellate court rejected the defendant's allegation that the class could not include over 450 former baristas who became shift

[45] 29 U.S.C. § 203(d).
[46] Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983).
[47] O'Brien v. Town of Agawam, 350 F.3d 279, 285 (1st Cir. 2003).
[48] *Id.*
[49] Matamoros v. Starbucks Corp., 699 F.3d 129 (1st Cir. 2012).
[50] MASS. GEN. LAWS ch. 149, § 152A.

supervisors at some point during the class period, and ruled that a barista-turned-shift supervisor will only be considered a member of the class and entitled to damages for the period during which they were baristas. And inasmuch as shift supervisors are not named as defendants, a barista-turned-shift supervisor will not be required to reimburse any funds that he or she received from the tips pools after promotion.

The court also stated that if a barista-turned-shift supervisor is uncomfortable with the attack launched by the plaintiff class on Starbucks' tips policy, they, like other class members, have the right to opt out of the class. The availability of this option is an important factor in weighing the effect of a largely hypothetical conflict on a class-certification decision.[51]

IX. WORKERS' COMPENSATION

In *Truczinskas v. Dir., Office of Workers' Comp. Programs*,[52] while working abroad for a military contractor, Mr. Truczinskas committed suicide. His widow sought benefits under the Defense Base Act ("DBA")[53] for herself and her three children. DBA provides disability, medical, and death benefits to employees working in military bases or with government contractors outside the United States who are injured or killed in the course of employment, whether or not the incident was during working hours.

Her claim was rejected by an administrative law judge of the Office of Workers' Compensation. On review, the circuit court affirmed the administrative decision—previously affirmed by a three-judge panel of the Department of Labor's Benefits Review Board—stating that in order to be awarded benefits under the DBA, it is necessary to relate the harm suffered by the employee to his job. Otherwise, the harm should have arisen "out of a 'zone of special danger' created by 'the obligations or conditions of employment.'"[54] The law bars compensation when the harm is caused by intoxication or when the worker intends to injure/kill himself or another. The burden to show that the harm or death was covered by the DBA rests on the Plaintiff.

X. DISCRIMINATION

A. Age Discrimination

[51] *See* Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 43 (1st Cir. 2003).
[52] Truczinskas v. Dir., Office of Workers' Comp. Programs, 699 F.3d 672 (1st Cir. 2012).
[53] 42 U.S.C. §§ 1651–1654 (2006).
[54] *Truczinskas*, 699 F.3d at 677 (quoting O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 507 (1951); Gondeck v. Pan Am. World Airways, Inc., 382 U.S. 25, 27–28 (1965); O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc., 380 U.S. 359, 362–64 (1965)).

In *Acevedo-Parrilla v. Novartis Ex-Lax, Inc.*,[55] the Court had the chance to address the issue of the reasonability of statistical inference to prove a discriminatory animus. The court held that, when considered in isolation and outside of context, statistical data is not probative of age discrimination.[56] Plaintiff brought claim asserting that the Defendant terminated him due to his age, in violation of ADEA and state law.[57]

The only evidence offered to support Plaintiff's age discrimination claim was a statistical analysis of Defendant's employment records. But to the court, in order to contextualize such data, a plaintiff needs to submit complementary evidence about the relevant labor market.[58] Moreover, the Court concluded that "[an] offer of early retirement . . . is not, by itself, evidence of . . . discriminatory animus . . . [s]omething more must be shown that would tie the decision to offer early retirement to discrimination."[59] Notwithstanding, Defendant's motion for summary judgment was not granted since all plausible inferences must be drawn in favor of the non-movant party.[60] More specifically, the court concluded that "based on the totality of the record, there was sufficient evidence from which a jury could draw a permissible inference that the defendant reasons for terminating Acevedo were pretextual and that the decision was the result of discriminatory animus."[61]

B. Racial Discrimination and Retaliation

In *Pearson v. Massachusetts Bay Transp. Authority*,[62] an African–American employee was terminated due to a history of absenteeism, discourtesy, and insubordination. Management suggested a demotion instead of termination; but, the labor relations department recommended the termination. Plaintiff wrote a letter to Senator Kennedy complaining of racial unrest. He challenged the decision through arbitration were he prevailed and was reinstated. After his reinstatement he was disciplined at least three or more times before being terminated once again. He later filed a complaint in

[55] Acevedo-Parrilla v. Novartis Ex-Lax, Inc., 696 F.3d 128 (2012).
[56] *Acevedo*, 696 F.3d at 146; *see, e.g.* Cruz-Ramos v. P.R. Sun Oil Co., 202 F.3d 381, 385 (1st Cir. 2000) (noting that appellant's burden to show employer's discriminatory animus cannot be carried simply by a comparison of ages within a sample that lacks statistical significance).
[57] *Acevedo*, 696 F.3d at 136.
[58] Id. at 146; *see, e.g.*, *Cruz-Ramos*, 202 F.3d at 385 (where failing to point out "whether 'qualified older employees were available or applied for those jobs'" was deemed a "flaw in the statistical evidence" that recent hires were younger than the plaintiff for discriminatory reasons (quoting Simpson v. Midland-Ross Corp., 823 F.2d 937, 943 (6th Cir. 1987))).
[59] *Acevedo*, 696 F.3d at 147; *see also* Álvarez-Fonseca v. Pepsi Cola of P.R. Bottling Co., 152 F.3d 17, 27 (1st Cir. 1998).
[60] *Acevedo*, 696 F.3d at 147.
[61] *Id.*
[62] Pearson v. Massachusetts Bay Transp. Authority, 723 F.3d 36 (2013).

the district court, alleging racial discrimination and retaliation. In his claim, Plaintiff described a series of events that, he argued, showed that his firing was pretextual to cover the real reason: racial discrimination. His arguments were: (1) in two incidents, white co-workers received a better treatment in imposing discipline; (2) he had been active in supporting African–American employees in asserting their civil rights; (3) Defendant ignored his supervisors recommendation that he be demoted, not fired; (4) he was left in "employment limbo" for six months after his recommended termination; (5) he was informed that "someone in labor relations" did not like him; (6) the arbitrator did not find just cause for his termination; and (7) it was unclear who within labor relations made the decision to fire him. With these allegations, employer filed a summary judgment. The United States District Court granted a summary judgment filed by Defendant.[63]

The First Circuit confirmed the district court's decision regarding whether the Plaintiff had raised a genuine issue of fact as to whether the termination of his employment was motivated by discrimination, in order to defeat the summary judgment. The First Circuit found that the record established a legitimate non-discriminatory reason for the termination and that the employee had failed to prove that the employer's reason was pretextual. The Court also rejected both retaliation claims. They found no causal link between the termination and the employee's letter to Senator Kennedy, which was sent after the recommendation to fire him, and found that the employee had failed to allege a materially adverse employment action after his reinstatement, causally related to his administrative charges. It is important to mention that some of the plaintiff's allegations in his second claim were issues addressed by the arbitration process in the first termination.

C. Political Discrimination

In *Albino v. Municipality of Guayanilla*,[64] Plaintiff engaged in political activities, supporting the incumbent's candidacy in a primary election. She was later promoted to the position of Director of the Citizens' Services Office while simultaneously occupying her previous office clerk position. The fact that her husband supported another candidate in the primaries was well-known and, after public appearances alongside her husband, Plaintiff was removed from her position. After an administrative hearing, Plaintiff was dismissed under allegations of information theft.

Granting Defendant's motion to dismiss, the district court restated: "Section 1983 does not confer substantive rights." It rather "provides a venue

[63] *Pearson*, 723 F. 3d at 41.
[64] Albino v. Municipality of Guayanilla, 925 F.Supp.2d 186 (D.P.R. 2013).

for vindicating federal rights elsewhere conferred."[65] It further emphasized on the standard to meet in order to succeed in a claim pursuant to Section 1983: "a plaintiff must plausibly plead (1) that he or she was deprived of a constitutional right; (2) that a causal connection exists between [defendants' conduct] and the [constitutional deprivation]; and (3) that the challenged conduct was attributable to a person acting under color of the state law."[66]

Municipalities, although considered persons for the purposes of section 1983, and therefore, subject to claims under the statute, cannot be held vicariously liable for actions of its employees under the theory of respondeat superior. Therefore, a plaintiff has to show that a "municipal 'policy' or 'custom' harmed him or her.[67] Otherwise, municipal liability can be established by convincing the court that "a person with final decision making authority took the action that violated the constitutional right."[68] But to the court, Plaintiff failed to state that a municipal custom or policy or a person vested with authority caused her termination.

The Court repeated the four elements of a prima facie case for a political discrimination cause of action under the First Amendment: "(1) that the plaintiff and defendant have opposing political affiliations, (2) that the defendant is aware of the plaintiff's affiliation, (3) that an adverse employment action occurred, and (4) that political affiliation was a substantial or motivating factor for the adverse employment action."[69] Though Plaintiff plausibly established the first three elements of her cause of action, she failed to plausibly connect her husband's political affiliation as motive for her dismissal.

Plaintiff's political harassment claims pursuant to the First Amendment were dismissed with prejudice as well. Since claims under section 1983 are not provided with a statute of limitations, the Courts apply the appropriate state personal injury statute of limitations to such actions. In the case of Puerto Rico, the statute of limitations consists of one year. Because the alleged facts took place a year before filing suit, Plaintiff's cause of action was dismissed with prejudice.

Plaintiff's claim under the Fourteenth Amendment's Equal Protection Clause was also dismissed with prejudice citing the circuit court holding that for such claims, Plaintiff must show that he or she was "(1) deprived of a property interest, (2) by defendants under color of state law, and (3) without the availability of a constitutionally adequate process."[70] Since Plaintiff was extended an impartial administrative hearing procedure, the due process requirement was met; thus, barring her claim.

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[65] Marrero-Sáez v. Municipality of Aibonito, 668 F.Supp.2d 327, 332 (D.P.R. 2009).
[66] Sánchez v. Pereira-Castillo, 590 F.3d 31, 41 (1st Cir. 2009).
[67] Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 403 (1997).
[68] Kelly v. LaForce, 299 F.3d 1, 9 (1st Cir. 2002).
[69] Lamboy-Ortiz v. Ortiz Vélez, 630 F.3d 228, 239 (1st Cir. 2010).
[70] Maymí v. P.R. Ports Auth., 515 F.3d 20, 29 (1st Cir. 2008).

Claims against the Mayor, in his official and personal capacities, were also dismissed with prejudice, since the Court found that Plaintiff "fail[ed] to sufficiently plead a section 1983 claim against" him.[71] Claims against unknown defendants were also dismissed (without prejudice) for failure of service after more than a year of filing suit.

Plaintiff's supplemental state law claims were also dismissed without prejudice. The court declined to exercise its supplemental jurisdiction over them since they were intricately related to those brought upon its original jurisdiction, all of which were dismissed.

In *Dávila Torres v. Feliciano Torres*,[72] Plaintiff sued his newly-appointed supervisor both in her personal and official capacities for political discrimination, claiming that he was deprived of a supervisory position in violation of his due process.[73] The administrative nullification of his promotion—allegedly against state law—meant a considerable pay cut. He also claimed that due to the severe diminishing of his duties, he was able to perform his daily tasks in just an hour. He also alleged being excluded from staff meetings because of his political affiliation.

Prior to filing suit, Plaintiff allegedly told the Defendant—head of the agency—that he was experiencing political discrimination and asked to be assigned tasks commensurable with his previous position. According to Plaintiff, Defendant did not take action on his grievance. Plaintiff admits, however, that he did not levy a discrimination claim against Defendant at any point prior to the formal complaint in this case.

In order to establish a continuing violation, a plaintiff must allege that a discriminatory act occurred—or that a discriminatory policy existed—within the period prescribed by the statute. The court made reference to the plausibility standard.[74] As written by the Court, in order to state its claim, Plaintiff must have plausibly plead that he or she was deprived of a constitutional right.[75] In addition, he also had to state that a causal connection exists between Defendant's conduct and the constitutional deprivation, and that the challenged conduct was attributable to a person acting under color of the state law.

As in *Albino*,[76] the Court stated that a political harassment claim can only prevail against a supervisor if the behavior of his subordinates results in a constitutional violation and the supervisor's action or inaction was affirmatively linked to the behavior in the sense that it could be characterized

[71] *See Albino*, 925 F.Supp.2d at 198.
[72] Dávila Torres v. Feliciano Torres, 924 F.Supp.2d 359 (2013).
[73] Plaintiff and Defendant were affiliates of adversarial political parties.
[74] *Dávila Torres*, 924 F. Supp. at 367.
[75] *Id.* at 373.
[76] *Albino*, 925 F.Supp.2d 186 (2013).

as supervisory encouragement, condonation or acquiescence or gross negligence, amounting to deliberate indifference.[77]

In the specific case, the Court found that Plaintiff failed to point to evidence that directly ties Defendant to any allegedly discriminatory act prior to Defendant's appointment as Plaintiff's supervisor. Since it was known that the parties were affiliated to adverse political parties, the prima facie analysis suited. In contrast to Albino,[78] in this case, the Court ruled that even though record does not clearly indicate if Plaintiff's political affiliation substantially motivated Defendant's action, Plaintiff's allegations and their corresponding submissions round out a prima facie case. Circumstantial evidence, such as knowing he was affiliated to the new administration's rival party and depriving him of much of his duties, made relevant to ponder whether his political affiliation was a substantial or motivating factor in the adverse employment decision.

The court noted that Defendant merely recited the governing doctrine for the qualified immunity defense, failing to cite any precedent specifically supporting her request in relation to the facts. Precisely, the court must grapple with the constitutional question before concluding whether Defendant is entitled to qualified immunity. But it didn't allow such immunity to the Defendant based on *Agosto de Feliciano*.[79] There, the circuit court determined that the right of the plaintiffs to be protected from politically-motivated changes in work conditions and responsibilities was established clearly enough to reject the qualified immunity defense of the Defendants.[80]

The Court determined that the summary judgment related to the existence of political discrimination didn't proceed, but it granted the other claims of the defendant. The Court concluded that no unlawful deprivation took place since a hearing was held and Plaintiff was given the corresponding due process. The Court granted summary judgment as to Plaintiff's due process claim in favor of the Defendant. The Court also found that Plaintiff did not offer legal justification for finding an equal protection violation and granted summary judgment in this claim.

In *Grajales v. Puerto Rico Ports Authority*,[81] Plaintiffs filed a wrongful dismissal complaint in the Federal District Court of Puerto Rico that included a general claim for civil rights violations.[82] It also included state claims for damages and discrimination under Law No. 100 of the Commonwealth of Puerto Rico.[20] After several amendments, in which the plaintiffs added litigants to the complaint, one of the defendants filed a motion for summary

[77] *See* Martínez Díaz v. Unknown Officers of P.R. Police Dept., 600 F.Supp.2d 318 (D.P.R. 2008).
[78] *Albino*, 925 F.Supp.2d 186 (2013).
[79] Agosto de Feliciano v. Aponte Roque, 889 F.2d 1209 (1st Cir. 1989).
[80] *See* Acevedo-García v. Vera-Monroig, 204 F.3d 1, 6 (1st Cir 2000).
[81] Grajales v. P.R. Ports Auth., 922 F.Supp.2d 20 (2013).
[82] *See* 42 U.S.C. §§ 1983–1985 (West 2013).

judgment. Puerto Rico Ports Authority filed motion with the purpose of dismissing the complaint on the basis of the *res judicata*, collateral estoppel, and fragmentation estoppel doctrines.

The motion for summary judgment and its response were not granted. As a result, the Court found that neither party put the Court in a position to determine the merits of the motion. The filings of both parties were insufficient. One of the elements for such denial discussed by the Court was the lack of providing certified translation of Puerto Rico Supreme Court cases used to support their respective motions. This responds to the fact that "[a]ll pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language."[21]

Another controverting factor was the lack of citing relevant authority. The Court stated that parties should not expose their arguments in a vague or "skeletal way, [because this leaves] the Court to do counsel's work."[22] A result of such insufficiencies in structure and the lack of support for their arguments resulted in the denial of the motion for summary judgment.

Former Governor Luis Fortuño's administration passed Act No. 7 of March 9, 2009.[23] It provided for serious government spending cuts to palliate the Commonwealth's nine-figure structural deficit. For those purposes, it mandated a 30% reduce the size of the governmental structure.

In *Sauri Cortes v. Fortuño Burset*,[83] Plaintiffs alleged that their layoff was motivated due to their political beliefs. They claimed that they were members of the Popular Democratic Party ("PDP"), the administration's opposing party.

Defendants responded that most of La Fortaleza employee's salaries were funded by the Salary Incentive Program which expired on December 31, 2008 and there were no other identified funds to pay those employees beyond that date. They were all informed of this by the Human Resources Department in 2008. In the process, Plaintiffs consistently stated that they never saw any political propaganda at La Fortaleza nor heard any of the Defendants making any disparaging remarks about the prior administration or any other similar politically colored remarks during their service under the Fortuño administration. Although Plaintiffs were fully aware that they were employees in trust positions, as opposed to career employees, they claimed that they were not given their right to a due process before being dismissed of their duties. As such, they claimed that they were not provided with a pre-termination hearing and that there was a failure to comply with the proper notice requirement.

Analyzing each of the plaintiffs' claims in an individual factual basis, the court concluded that the record showed that Plaintiffs failed to establish a

[83] Sauri Cortes v. Fortuño Burset, 909 F.Supp.2d 91 (D.P.R. 2012).

political discrimination claim. The Court found that Plaintiffs' termination was unavoidable since the funding of their salaries expired on December 31, 2008 and there were no other identified funds available to continue paying their salaries. The Court also stated that Act. No.7 prohibited new contracts and it mandated the elimination of 30% of all authorized trust services positions within all government agencies.

In *Aguiar-Serrano v. P.R. Hwys. & Transp. Auth.*,[84] Plaintiff claimed that she was deprived from her position as Director of the Legal Division–Property Acquisition because she was a well-known supporter of the administration's political opposition. Defendant alleged that Plaintiff was notified about their intention to dismiss her because her hiring process violated article 10.6(3) of the personnel manual and procedural requirements, according to an audit performed. After an informal administrative hearing, Plaintiff's dismissal was affirmed.[85]

The District Court went over the elements that a plaintiff needs to meet in order to prove a *prima facie* case under a political discrimination claim, based on the First Amendment of the United States Constitution.[86] The four elements are: (1) that Plaintiff and Defendant are affiliated to opposing political organizations; (2) that Defendant is aware of Plaintiff's affiliation; (3) that an adverse employment action was taken; and (4) that political affiliation was a substantial or motivating factor for the adverse employment action. Moreover, each defendant's role must be sufficiently alleged to make him or her a plausible defendant.[87]

The Court found that Plaintiff was given notice of her termination as well as the opportunity to be heard at an informal hearing, so it granted the Defendants' motions to dismiss. To the Court, Plaintiff failed to state a *prima facie* case of political discrimination under the First Amendment, since she did not plead adequate facts to show that the Defendants themselves knew of her political affiliation or that political affiliation was a substantial or motivating factor for the alleged adverse employment action taken against her.[88] Establishing that a plaintiff has a different political preference is not enough to meet this burden.

D. Age Discrimination and Retaliation

In *Trainor v. HEI Hospitality, LLC*,[89] the U.S. Court of Appeals for the First Circuit affirmed a jury verdict finding Defendant liable for retaliation. Plaintiff was hired under the condition that he was going to relocate. After

[84] Aguiar-Serrano v. P.R. Highways and Transp. Auth., 916 F.Supp.2d 223 (D.P.R. 2013).
[85] *Aguiar*, 916 F.Supp.2d at 228.
[86] U.S. CONST. AMEND. I.
[87] *Aguiar*, 916 F.Supp.2d at 229.
[88] *Id.* at 230.
[89] Trainor v. HEI Hospitality, LLC, 699 F.3d 19 (1st Cir. 2012).

Plaintiff refused to relocate due to his wife's health condition, Defendant agreed to a work arrangement to keep him as an employee. Two years later, Defendant's new Senior Vice-President of Operations deemed Plaintiff's relocation necessary, allegedly in order to promote him to a Regional Senior Vice-President position. In the alternative, Plaintiff would have had to accept a general manager appointment with a substantial salary cut and the loss of other employment benefits.

Plaintiff's attorney wrote to the Defendant suggesting that age discrimination was the motive for the change. A meeting between Plaintiff and the Senior Vice-President of Operations followed, on which the elimination of Plaintiff's position was notified. Afterwards, a deadline was set for Defendant's offer acceptance. On the same day, Plaintiff filed an age discrimination charge before the appropriate state body, duly notifying the Defendant. Three hours later, Plaintiff was summarily discharged.

On trial, a jury dismissed the age discrimination claim but granted a 2.25 million dollar award. The Court doubled the award after the jury found that the Defendant had purposely violated state law.

Defendant's appeal was founded on the absence of direct evidence of retaliation and Plaintiff's failure to show—under federal or state law—that "(1) [the plaintiff] engaged in protected conduct under federal or [state] law; (2) [he] suffered an adverse employment action; and (3) a causal connection existed between the protected conduct and the adverse action."[90]

The circuit court replied that in order to make a prima facie showing of these elements, the Plaintiff is not required to succeed in the underlying discrimination claim. It is enough that the Plaintiff had a reasonable good-faith belief that a violation occurred; that he acted based on it; that the employer knew of the Plaintiff's conduct; and that the employer lashed out as a result of it.[91] In the court's view, the record contained vast evidence about Plaintiff's engagement in protected conduct. The record also showed that Defendant's challenge to the sufficiency of Plaintiff's proof of retaliation focused on the causation element. The court deemed weak the Defendant's argument that the elimination of Plaintiff's position and his eventual termination were part of a larger plan set in motion long before Plaintiff engaged in any protected activity. In contrast, the court noted that a jury could have reasonably found that the Defendant never considered the outright elimination of Plaintiff's position before being notified of his legal action.[92] Finally, the close temporal proximity between the state-filed charge

[90] *Trainor*, 699 F.3d 19 at 26; *see also* McMillan v. Mass. SPCA, 140 F.3d 288, 309 (1st Cir.1998).
[91] *See Trainor*, 699 F.3d 19 at 26; *see also* Mesnick v. Gen. Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991).

notification and Plaintiff's summary dismissal supported an inference of retaliation.

XI. DUE PROCESS

In *Clukey v. Town of Camden*,[93] Plaintiff was a senior officer, state employee who was laid-off when his department was eliminated. CBA between Plaintiff's union and the Defendant granted Plaintiff first priority to recall if a new position became available within twelve months after his layoff. He was bumped by new hires for two of those positions without notification. He filed suit in federal court under 42 U.S.C. § 1983, alleging deprivation of his property interest in his right to be recalled without providing him the due process of law in violation of the Constitution's procedural due process guarantees. Defendant filed a motion to dismiss and argued the absence of a constitutionally protected property interest in Plaintiff's right to be recalled.

The district court found that Plaintiff did have a property interest in his right to be recalled, but ultimately concluded that Plaintiff's claim was one for breach of contract and therefore, dismissed.

The court of appeals reversed and remanded. In a procedural due process claim under 42 U.S.C. § 1983, the Plaintiff must allege facts which, if true, establish that the he or she (1) had a property interest of constitutional magnitude and (2) was deprived of that property interest without due process of law. In this case, finding if the plaintiff had a legitimate claim of entitlement grounded in the state law was critical. Whether or not he was currently employed at the time of the claim was immaterial. Although the Court had not ruled on this matter before, it previously recognized property interests in the right of employees to return to their positions after a sick leave. The court found that applicable state law recognized the creation of a constitutionally protected property interest by means of a public employment contract.

In general, a benefit is not a protected entitlement if government officials may grant or deny it under their discretion. Property interests exist when an employer's discretion is clearly narrowed so that the employee cannot be denied employment unless specific conditions are met. The Court extracted from the language of the CBA that the defendant's discretion over the right of recall was expressly limited by the words "employees shall be recalled."[94] The qualification thereby required was only as to the seniority of the laid-off employees.

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[92] Evidence showed that the possible elimination of Plaintiff's position was not mentioned before receiving Plaintiff's attorney first written communication.

[93] Clukey v. Town of Camden, 717 F.3d 52 (1st Cir. 2013).

[94] *Clukey*, 717 F.3d 52 at 54.

Grievance procedures provided by the CBA only satisfy a constitutional due process claim if they meet or exceed constitutional standards. Failing to provide Plaintiff with notice of the new job opportunities, Defendant did not meet due process minimums upon the Defendant's property right over the job position.

In *Senra v. Town of Smithfield*,[95] after a number of extensions, Plaintiff did not obtain a technical certification, required to pass his probationary period. He was terminated after an administrative hearing. A post-termination arbitration was held, which granted Plaintiff more time to obtain his certification. Suit was filed in the state court and removed at Defendant's request to the federal court. The district court granted summary judgment in favor of Defendant. The circuit court affirmed.

The circuit court found that a pre-deprivation hearing with previous notice and union representation and a post-termination arbitration proceeding—where plaintiff was represented by counsel and was able to participate and present evidence to a neutral arbiter—satisfied due process requirements in his termination proceedings. The Court reinforced that previous notification and the opportunity to respond satisfies procedural due process requirements. The Court explained once again the close relationship between federal and state claims to exercise its supplemental jurisdiction.

XII. Freedom of Speech and Association

In *Magriz Marrero v. Unión de Tronquistas de Puerto Rico*,[96] a collective action, Plaintiffs filed a complaint against the Union of which they were members. Such action was brought up on the grounds of the Labor Management Reporting and Disclosure Act (LMRDA).[97] Plaintiffs alleged that the Union violated their rights of freedom of speech and association, which are covered by the LMRDA. All this after participating in a strike against the Union due to their rejection of the Union's new slate. They were the only Union's members participating in the strike that were sanctioned. The Union also failed to inform union members that the strike was illegal.

The Court determined that the Union violated its members' rights of free association and speech under the LMRDA. The violations were a result of several actions such as the expelling of the Plaintiffs and the denial of their memberships for a period of six years. There were also violations when the

[95] Senra v. Town of Smithfield, 715 F.3d 34 (1st Cir. 2013).

[96] Magriz Marrero v. Unión de Tronquistas de Puerto Rico, 933 F.Supp.2d 234 (D.P.R. 2013)

[97] The Labor Management Reporting and Disclosure Act of 1959 (also known as the "Landrum-Griffin Act"), is a federal act that regulates labor unions' internal affairs and their officials' relationships with employers. Its bill of rights guarantees freedom of speech and periodic secret elections of officers. *See* McCafferty v. Local 254, Service Employees International Union, 186 F.3d 52, 57 (1st Cir. 1999).

Union removed the Plaintiffs from their positions, including elected ones as shop stewards. There were violations from the Defendants when they fined the Plaintiffs with $10,000 in penalties.

The Court discussed that such violations were based on the fact that the LMRDA provided protection to the union members in section 101(a)(2). This statute states that every union member should enjoy the right to meet and assemble freely with other members to express any views, arguments or opinions and to express at union meetings their views upon candidates and other matters brought to the assembly's attention. This protection applies to the complaint brought by the Plaintiffs.

The Court also pointed out that Section 101(a)(5) states that no union member should be fined, suspended, expelled or disciplined without a due process.[98] This requirement was not followed in this case, according to the Court.

The Court confirmed the allegations held by the Plaintiffs, in terms of free speech and association, as a result of Congress' enactment of the LMRDA. In particular, "Congress modeled Title I [of the LMRDA] after the Bill of Rights" in order to "restate a principal First Amendment value of the right to speak one's mind without fear of reprisal."[99] Congress intended that the LMRDA Bill of Rights set forth in Title I should provide union members with the protection "necessary to bring an end to abuses by union leadership that had curtailed union democracy."[100]

The Court concluded that the Bill of Rights, as well as part of the LMRDA had the intention of protecting Union member's First Amendment constitutional rights. Also, Section 609 of the Law prohibits retaliation against union members who exercise their rights under the law. And for that matter, the Court found that the Union violated such rights provided by the LMRDA with respect to the expelling and fining of the Plaintiffs in comparison to other union members.

XIII. HARASSMENT

A. Sexual Harassment

In *Miranda v. Deloitte, LLP*,[101] Plaintiff—a female employee—filed a sexual harassment claim against her employer and her new supervisor. Allegedly, her supervisor enjoyed making offensive jokes of sexual content to female employees. Before going to the court, Plaintiff reported the alleged

[98] Due process includes being served written notice of specific charges, given a reasonable time to prepare a defense, and afforded a full and fair hearing.
[99] G.P. Reed v. United Transportation Union, 488 U.S. 319, 325 (1989) (internal quotations omitted).
[100] *Id.*
[101] Miranda v. Deloitte, LLP, 922 F.Supp.2d 210 (2013).

behavior and later submitted an internal sexual harassment complaint. As a consequence, her supervisor confronted her about the complaint. Plaintiff alleged that placing her on a Performance Improvement Plan ("PIP") constituted retaliation for filing a complaint. She also alleged being subject to a hostile work environment. Afterwards, she was verbally terminated from employment.

Defendants moved to dismiss claims under Title VII and ADEA,[102] contending that Plaintiff failed to exhaust the proper administrative remedies and that she did not engage in any protected conduct under state law. Plaintiff opposed, arguing that Defendants may be individually liable under ADEA and denying the allegation about the exhaustion of proper administrative procedures.

The district court adhered to its precedent, restating that liability does not exist under ADEA, unless a notable exception exists. Such exception applies to corporate officers and managers with authority over ordinary business operations. Generally, to sue under Title VII or ADEA, the Defendant must be a named party in an EEOC administrative charge, unless there is substantial identity between a named party in the EEOC complaint and a defendant in the civil action. Plaintiff's claim against her supervisor was dismissed since Title VII[103] does not provide for individual liability.[104]

To establish a prima facie retaliation case under Puerto Rico's Act No. 115 of December 20, 1991 ("Act 115"),[105] a plaintiff must establish that he or she "(a) participated in an activity protected . . . and (b) was subsequently discharged due to the activity."[106] The court found that Plaintiff failed to show that she participated in an activity protected by Act 115, since she did not offer nor attempted to offer testimony or information about her allegations before a legislative, administrative or judicial forum in Puerto Rico. Filing a claim at the EEOC constitutes a protected activity by Act 115. Nevertheless, since Plaintiff filed her claim after termination, it results an unprotected activity.[107]

Notwithstanding, Plaintiff's ADEA and Title VII claims avoided dismissal under the managerial control exception test. The court also found

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[102] Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2008). Since Plaintiff was 42 years old at termination and her clients were reassigned to two younger males, she claimed both age and sexual discrimination.
[103] Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e–2000e17 (2008).
[104] *See* Fantini v. Salem State College, 557 F.3d 22 at 30 (1st Cir. 2009).
[105] P.R. LAWS ANN. tit. 29, §§194–194b (2009).
[106] Miranda, 922 F.Supp.2d at 224 (citing Lupu v. Wyndham El Conquistador Resort and Golden Door Spa, 524 F.3d 312, 313 (1st Cir. 2008)). *See also* Uphoff Figueroa v. Alejandro, 597 F.3d 423 (1st Cir. 2010).
[107] *Miranda*, 922 F.Supp.2d at 224.

that Plaintiff properly exhausted the administrative remedies before filing suit.

B. Sexual Harassment and Sex Discrimination

In *Talavera-Ibarrondo v. Municipality of San Sebastian*,[108] the district court refused to reduce a 3.6 million-dollar award under Puerto Rico Act No. 17 od April 22, 1988[109]—prohibiting sexual harassment in employment—and Act No. 69[110]—prohibiting gender discrimination in the employment setting, as requested by Defendant. In the previous case, Plaintiff demonstrated having been subject to a hostile work environment based on the pervasiveness, frequency, and inappropriateness of the supervisor's conduct.[111]

The defendant based its motion on art. 15.04 of the Puerto Rico Autonomous Municipalities Act.[112] The court disagreed and concluded that neither statutory language nor case law supported Defendant's proposition. To the contrary, Act No. 17 and Act No. 69 impose double liability[113] on every employer—public or private—that intentionally discriminates against its employees. With no explicit language excluding certain employers from the double liability provisions of Act No. 17[114] and Act No. 69,[115] the court refused to reduce Plaintiff's award.

C. Employer Liability for Employee Racial Harassment

In *Vance v. Ball State University*,[116] Plaintiff, an African-American catering assistant, was allegedly harassed by a white catering specialist because of her race. During her employment, Plaintiff submitted numerous complaints of racial discrimination and retaliation. Vance filed suit in the federal court under Title VII of the Civil Rights Act of 1964,[117] for alleged racially hostile work environment and argued that the catering specialist was her supervisor, based on her leadership role. The district court granted summary judgment, dismissing Plaintiff's claim. The Court of Appeals for the Seventh Circuit affirmed.

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[108] Talavera-Ibarrondo v. Municipality of San Sebastian, 901 F.Supp.2d 306 (D.P.R. 2012)
[109] P.R. LAWS ANN. tit. 29, §§ 155–155m (2009).
[110] *See id.* at §§ 1321–1341.
[111] *See* Talavera-Ibarrondo v. Municipality of San Sebastian, 887 F.Supp.2d 419, (D.P.R. 2012); Talavera v. Municipality of San Sebastian, 865 F.Supp.2d 150 (D.P.R. 2011); Talavera-Ibarrondo v. Municipality of San Sebastian, 824 F.Supp.2d 254 (D.P.R. 2011).
[112] 21 P.R. Laws Ann. § 4704 (2011).
[113] *Talavera*, 901 F.Supp.2d at 309.
[114] *Id. at* note 28.
[115] *Id. at* note 29.
[116] Vance v. Ball State University, 133 S. Ct. 2434 (2013).
[117] 42 U.S.C. §§ 2000e–2000e-17.

The Supreme Court determined that under Title VII, an employer's liability for harassment depends on the employment category of the alleged harasser. If he or she is the victim's co-worker, the employer is liable only if it negligently failed to provide appropriate working conditions. In cases in which the alleged harasser is a supervisor, the employer is strictly liable if the harassment culminates in a tangible employment action. Such actions are understood as those that result in 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."[118] If no tangible employment action is taken, the employer may elude liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the Plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.[119]

D. Racial and Religious Harassment

In *University of Texas Southwestern Medical Center v. Nassar*,[120] Plaintiff, a physician of Middle Eastern descendent, brought a Title VII action against his former employer, an academic medical institution. Plaintiff alleged that Defendant retaliated against him for complaining about his

[118] *Vance*, 133 S. Ct. 2434, 2456.

[119] Most notably, by means of a non-precedential sentence, the Supreme Court of Puerto Rico applied the Vance test, but with a rather dissimilar outcome. In Ortiz-González v. Burger King, 2013 SCPR 77, an employer was found vicariously liable, even after taking action to stop the alleged illegal conduct of one of its managers.
The trial court found that Plaintiff was submitted to sexual harassment and retaliation under P.R. LAWS ANN. tit. 29, §§ 155–155m. Although the employer took measures to deter the illegal conduct, it was found vicariously liable. The store manager and the harasser himself were also found jointly liable. All the parties appealed the decision. The Plaintiff requested an increase in the award and the imposition of the double penalty, as provided by law. The employer denied its vicarious liability based on the cautionary measures taken, while the harasser denied that his conduct constituted harassment. In the alternative, he argued that this was a case of strict employer liability as stated in P.R. LAWS ANN. tit. 29, §§ 155–155m. The court of appeals exonerated the employer, noting its promptly response to the inappropriate conduct of its employee, thus, holding the harasser as the only responsible for indemnification. The rest of the trial court's sentence was affirmed. Vacating the court of appeals decision, the Supreme Court reinstated the trial court's ruling. Defendants were found jointly liable before Plaintiff. Since the alleged harasser did not have the power to take tangible employment actions against Plaintiff, he did not qualify as her supervisor. Defendant, thus, was found vicariously liable for the harasser's unlawful conduct. In a separate opinion, Justice Rodríguez pointed out that art. 5 of Act 17 clearly states that the employer is vicariously liable when the harasser is a supervisor and/or represents the company.

[120] University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013).

supervisors' racial and religious harassment, which ended in his constructive discharge. The opinion delivered by Justice Kennedy, emphasized that when claiming compensation for injury from wrongful conduct, Plaintiff must demonstrate connection, between the injury sustained and the wrong alleged. The requirement is governed by the principle of causation. When alleging the existence of discrimination under Title VII, Plaintiff does not need to show that the causal link between injury and wrong is so close that the injury would not have occurred without the action. The plaintiff only has to show "that the motive to discriminate was one of the employer's motives, even if the employer also had other legal motives in taking the decision."[121] If there was also a legal motive and Plaintiff fails to prove his discrimination case, he will not receive compensatory damages nor will he be reinstated in his job, since the employer also had legal reasons to bring the action.

After revisiting the trajectory of the "but for" and "motivating factor" requirements, the Court found that the first is the only applicable to retaliation claims under Title VII and the latter, to discrimination claims. For the purposes of the case before the Court, under the "but for" standard, a claim could be dismissed even if the employer admits taking an adverse action under Title VII, if a jury[122] believes that the employer would have taken the same action for other legitimate reasons.

In a dissenting opinion, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, pointed out that the Court had previously considered retaliation as a form of "discrimination" and that the majority ignored the reasonable interpretation of the Equal Employment Opportunity Commission (EEOC) and the underlying purposes of the "motivating factor" amendment. The dissenting Justices finished by inviting Congress to amend the Law to revoke the majority's opinion by statute.

XIV. LEGAL FEES

In Rishell v. Medical Card System, Inc.,[123] after being targeted as part of an investigation by the U.S. Department of Health & Human Services and the U.S. Attorney's Office for the District of Puerto Rico, Plaintiff requested prepayment of legal expenses as stated in the employment agreement signed by the parties. Defendant denied payment and Plaintiff sought remedy from the court.

After reviewing the bylaws of the Defendant-company and the employment contract, the court found that the Defendant was not liable since the benefit of prepaid legal expenses applied only to current directors or

[121] University of Texas, 133 S.Ct. at 2520; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[122] Civil cases by jury are common in federal courts. U.S. CONST. AMEND. VII. Puerto Rico's courts limit the right to be tried by jury to felony cases. P.R. CONST. art. 2, § 11.

[123] Rishell v. Medical Card System, Inc., 925 F.Supp.2d 211 (D.P.R. 2013)

officers. Plaintiff was terminated during the investigation process and as a result, the applicable bylaws and contract clauses had no effect. Under state corporate law, "[t]he expenses incurred by other directors, officers, and other employees or [16] agents may be paid in this manner, pursuant to the terms and conditions which the board of directors deems convenient."[124] This statute provides ample deference to the company to decide to which employees it gives such benefits. All of this goes in favor of the Defendant's allegation, as the Court decided.

XV. MOTION FOR SUMMARY JUDGMENT

In C*ruz v. Bristol-Myers Squibb Co., PR, Inc.*,[125] the employer informed its employees of its plant-closing plans. During the gradual closing, a professional skills and seniority plan was developed. The later they were to be discharged, the higher a bonus payment they would receive, plus the applicable severance. Cruz never received a severance payment under the Employee Retirement Income Security Act (ERISA)[126] because he did not sign a waiver to any claim against his former employer. At the time of his dismissal, the two remaining employees in a similar position were older than him. No one else was hired to replace him.

Alongside two other dismissed employees, Plaintiff filed suit in federal court pursuant to ERISA, the Age Discrimination in Employment Act (ADEA),[127] ADA,[128] the Worker Adjustment and Retraining Notification Act (WARN),[129] the Consolidated Omnibus Budget Reconciliation Act (COBRA),[130] and under Commonwealth Laws No. 80[131] and No. 100.[132] The court denied their motion for failing to assert a common question of law or fact. The remaining Plaintiff filed an untimely motion to withdraw the ADA, COBRA, and WARN claims from his complaint. After discovery, Defendant filed motion for summary judgment on the remaining claims based on undisputed facts. Defendant's motion was granted. Plaintiffs appealed.

The circuit court affirmed the district court's judgment in full, for the following reasons: (1) "[U]nsupported assertions . . . [and] conclusory allegations were insufficient to warrant the certification of a collective

[124] P.R. LAWS ANN. tit. 14, § 3568(e).
[125] Cruz v. Bristol-Myers Squibb Co., PR, Inc., 699 F.3d 563 (1st Cir. 2012).
[126] 29 U.S.C. §§ 1001–1461.
[127] 29 U.S.C. §§ 621–634.
[128] 42 U.S.C. §§ 12101–12213.
[129] 29 U.S.C. §§ 2101–2109.
[130] 29 U.S.C. §§ 1161–1169.
[131] P.R. LAWS ANN. tit. 29, §§ 185a–185m.
[132] P.R. LAWS ANN. tit. 29, §§ 146–151.

action."[133] (2) Under ADEA, an employee must establish by preponderance of evidence that his dismissal was because of his age. Plaintiff was unable to show that Defendant did not treat age neutrally or that younger employees were retained in his position. (3) Laws No. 80 and No. 100 require a similar showing from Plaintiff. "[A] dismissal is for just cause if it results from the '[f]ull, temporar[y] or partial closing of the operations of the establishment."[134] Moreover, Plaintiff could not rebut Defendant's treatment of age during its plant-closing. (4) Plaintiff was unsuccessful at proving that Defendant's severance plan was not a bona fide ERISA plan. (5) A breach of contract couldn't be detected from the facts. Without considering if the Defendant's severance plan offer constituted a contract, since Plaintiff received a six-month payment, he could not assert that such payment was lower than the amount awarded by Puerto Rico's law.

XVI. RESTRICTIVE COVENANTS IN EMPLOYMENT CONTRACTS

In Corporate Technologies, Inc. v. Harnett,[135] Defendant signed an agreement that prohibited "solicit[ing], divert[ing] or entic[ing] away existing [Plaintiff's] customers or business" as an employment condition.[136] He worked as an account executive/salesman and after ten years, he went to work with one of the Plaintiff's competitors. Defendant sent targeted emails to former customers about his change of employer, held meetings with them, and sought exclusive price discounts from third-party suppliers. Plaintiff brought suit in state court asking for a preliminary injunction against Defendant. Defendant obtained removal to federal district court under its diversity of citizenship jurisdiction. The district court granted the preliminary injunction, restraining Defendant from engaging in communications and related marketing or sales activities with former customers for twelve months and required his new employer to withdraw all bids that Defendant helped to formulate.

On review, an issue about the initial contact between the Defendant and his former customers arose. Not finding precedential force or consensus among state courts' interpretations of the governing law, the court of appeals refused to adopt a "per se rule" about the weight of such factor. "[T]he weight that initial contact should be given depends to some extent on the setting in which a particular case arises."[137]

Affirming the district court's decision, the court of appeals recognized that "[i]n the employment context, restrictive covenants are meant to afford

[133] *Cruz*, 699 F.3d at 569 (citations omitted).
[134] *Id.* at 571 (quoting P.R. LAWS ANN. tit. 29, § 185b(d)).
[135] Corporate Technologies, Inc. v. Harnett, 731 F.3d 6 (1st Cir. 2013).
[136] *Corporate Technologies*, 731 F.3d at 10.
[137] *Id.* at 11.

the original employer bargained-for protection of its accrued good will."[138] With this statement, the Court reaffirmed the validity of restrictive covenants in the employment context to protect companies from former employees' unfair competition.

XVII. SUCCESSOR EMPLOYER

In *Alvarado-Rivera v. Oriental Bank and Trust*,[139] Plaintiffs—former employees of a failed bank—were hired by the Defendant, another bank, which purchased the assets of the failed one as part of a regulatory intervention. Plaintiffs were terminated during their probationary working period for the Defendant. Suit followed in the state court, where Plaintiffs claimed their severance payment under the assertion that the Defendant became their successor employer.

Considering the failed bank's liquidation by the state financial regulator and the FDIC appointment as its receiver, the court denied to apply the successor employer doctrine to the case. The FDIC terminated Plaintiffs as part of the liquidation process. The Defendant hired them afterwards. Furthermore, the agreement between the FDIC and the Defendant provided indemnity for claims arising out of the failed bank's liabilities. Claims arising from the employment relationship between Plaintiffs and Defendant were dismissed as well, as the Defendant asked Puerto Rico's Department of Labor for an extension of the probationary period, notifying Plaintiffs accordingly. The only controversy not summarily dismissed was the alleged termination without just cause of a Plaintiff who became a regular employee of the Defendant after the probationary period.

XVIII. USERRA

In *Rivera-Meléndez v. Pfizer Pharmaceuticals, LLC*,[140] Plaintiff had worked for the Defendant for a period of fifteen years at the time he filed suit, being promoted several times during that time period. After ten years of service, Defendant was promoted to a non-exempt supervisory "group leader" position. As a member of the United States Naval Reserve, he was called to active duty, which lasted eleven months. During his military leave, Defendant restructured the department where Plaintiff worked and eliminated the "group leader" position. Those affected by the restructure were invited to apply to one of the seven exempt supervisory "team leader" positions. If not selected, their alternatives would be (1) to apply for the new

[138] *Id.*
[139] Alvarado-Rivera v. Oriental Bank and Trust, 914 F.Supp.2d 198 (D.P.R. 2012).
[140] Rivera-Meléndez v. Pfizer Pharmaceuticals, LLC, 730 F.3d 49 (D.P.R. 2013).

non-exempt position of "service coordinator", (2) to be demoted to the "senior operator" position or (3) to participate in a voluntary separation process.

Upon Plaintiff's return to work, he was assigned to a "special tasks" position and was later appointed "service coordinator", with the same compensation and benefits of his previous "group leader" position, but without any supervisory duties. He asserted entitlement to the "team leader" position under USERRA,[141] a law protecting the employment and reemployment rights of veterans. Defendant refused, having filled all the seven positions with Plaintiff's coworkers during his military leave. Plaintiff sued in federal court pursuant to USERRA, in addition to a state law claim. Under 38 U.S.C. § 4313(a)(2), a service member is to be reemployed in a position into which, if not for his deployment of more than ninety days, he could have been promoted. This rule is known as "the escalator principle."

The district court issued summary judgment in favor of Defendant, deeming USERRA's "escalator principle" inapplicable to automatic promotions (those dependent on seniority), but under the discretion of the employer to assess the employee's fitness and ability, noting that USERRA "should be broadly construed in favor of military service members as its purpose is to protect such members" and incorporating the Department of Labor's regulations under the statute; the Court of Appeals reversed.[142] The court emphasized that the "escalator principle" and its "reasonable certainty" test apply to all possible promotions that an employee qualifies for, but doesn't obtain because of his or her military leave. Specifically, "the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service."[143] Such position should reflect, "the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service."[144]

If after returning from service, and despite the employer's efforts to qualify him or her, a veteran does not qualify for a promotion, he or she would keep his or her previous job or another of similar seniority, status, duties, pay and benefits. But out of fairness, the "escalator principle" could also work against the protected veteran if the employee's seniority or the job classification would have resulted in his or her demotion—or even layoff—and it continued after his or her return from uniformed service.

XIX. WHISTLEBLOWER/RETALIATION

[141] United States Employment and Reemployment Rights Act, 38 U.S.C.A. §§ 4301–4335.
[142] *Rivera-Meléndez*, 730 F.3d at 54.
[143] *Id.*
[144] *Id.*

In Colón v. Tracey,[145] Plaintiff filed a claim alleging being subject to several adverse employment actions, including demotion and suspension, which compelled her to resign after three years working as a human resources generalist. She identified those adverse employment actions as retaliation for being a whistleblower about her former employer's purportedly discriminatory employment practices.

The district court granted Defendant's motion for summary judgment and determined that the adverse employment actions taken against Plaintiff were for bona fide business reasons and that her resignation resulted from her own overreaction to a well-warranted disciplinary action.

Under McDonnell Douglas,[146] a plaintiff must first establish a prima facie case of retaliation by showing that: (1) he or she engaged in a protected conduct, (2) he or she was subject to an adverse employment action, and (3) a causal connection existed between the first and second elements. If these requirements were met, then the burden of proof shifts to the Defendant, who would need to articulate a legitimate nondiscriminatory reason for its challenged actions. If the Defendant does so, the ultimate burden falls on the Plaintiff to demonstrate that the proffered legitimate reason is in fact a pretext and that the action was the result of the Defendant's retaliatory animus.

In the first stage of the McDonnell Douglas test, the district court found that Plaintiff's conduct was not protected. Moreover, the court deemed Plaintiff's actions as a direct violation of legitimate policies and requirements adopted by the company. In the third stage, Colón failed to convince the court that pretext had been the reason for her suspension.

About the alleged demotion, the Court found that it was a temporary change in job responsibilities with no effect on the employee's salary or job title and that it had been applied to similarly situated employees without complaint. The Defendant's independent rationale for Plaintiff's reassignment was to create a more flexible human resources staff and to ensure that all functions of the Human Resources Department could be performed, even in the absence of the employee who usually performed them.

The circuit court affirmed the district court's determination about Defendant's showing of an independent and legitimate basis for their actions and about Plaintiff's failure to rebut it.

XX. THE *YOUNGER* ABSTENTION DOCTRINE

[145] Colón v. Tracey, 717 F.3d 43 (1st Cir. 2013).
[146] *See* McDonell Douglas Corp. v. Green, 411 U.S. 792 (1973).

In *Casiano Montañez v. State Ins. Fund Corp.*,[147] while administrative review was still pending, employees of a state workers' compensation corporation sued their employer and several of its officers alleging political discrimination and due process violations stemming from adverse employment actions. Applying *Younger*, the circuit court reversed the district court's order of dismissal and remanded the case with instructions to stay[148] further proceedings until a related case awaiting decision before the Puerto Rico Supreme Court was solved.[149]

The *Younger* abstention is appropriate only when the requested relief would interfere (1) with an ongoing state judicial proceeding; (2) that implicates an important state interest; and (3) that provides an adequate opportunity for a federal plaintiff to advance his federal constitutional challenge. To satisfy the first prong of the *Younger* test in the context of a state administrative proceeding, it must be coercive and in most-cases, state-initiated, in order to warrant abstention. In this case, since Plaintiffs voluntarily initiated the administrative proceedings and those proceedings are remedial in nature, not of the type to which deference under *Younger* applies, the court stated that pendency of an action in state court is not a *per se* bar to related federal court proceedings.

On the other hand, the *Pullman* abstention doctrine[150] serves to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues. Under *Pullman*, federal courts should restrain when (1) substantial uncertainty exists over the manning of the state law in question and (2) settling the question of state law will or may well obviate the need to resolve a significant federal constitutional question.[151] The fact that a state proceeding is actually pending strengthens the case for *Pullman* abstention and not the *Younger* abstention.[152] These abstention doctrines have the purpose of balancing state and federal sovereignty.[153]

The circuit court emphasized that "from the standpoint of federalism and comity, there is something particularly offensive about hijacking a case that is pending on the docket of a state's highest tribunal."[154] Otherwise, the district court would be forced to rule on a due process claim intertwined with a complex state-law controversy not yet solved by the state's highest court. The court stated that: "[a] contrary ruling from the Commonwealth court

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[147] Casiano Montañez v. State Ins. Fund Corp., 707 F.3d 124 (1st Cir. 2013)
[148] Stay is the act of temporarily halting a judicial proceeding through the order of a court.
[149] González Segarra v. State Ins. Fund Corp., 2013 SCPR 77.
[150] R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941).
[151] *Casiano Montañez*, 707 F.3d at 129; Batterman v. Leahy, 544 F.3d 370, 373 (1st Cir. 2008).
[152] *Casiano Montañez*, 707 F.3d at 129; Rivera-Feliciano v. Acevedo-Vilá, 438 F.3d 50, 61 (1st Cir. 2006)
[153] *See* Mathew D. Staver, The Abstention Doctrines: Balancing Comity with Federal Court Intervention, 28 SETON HALL L. REV. 1102, 1102 (1998).
[154] Cruz v. Melecio, 204 F.3d 14, 24 (1st Cir. 2000).

would render the federal court's opinion merely advisory; an outcome that the Court seeks to avoid in any case."

In *Verizon New England, Inc. v. Rhode Island Dept. of Labor & Training*,[155] the director of a state unemployment office denied benefits to members of a union who went on strike after a new CBA could not be reached. The director's determination was reversed on appeal to the Board of Review. The employer challenged the Board's ruling in the district court, while seeking declaratory and injunctive relief. The employer's main argument was that the Board's ruling was unenforceable as preempted by the National Labor Relations Act (NLRA).

The district court discarded the employer's preemption argument, dismissing the claim under the *Younger* abstention doctrine.[156] Under *Younger*, federal courts restrain themselves from intervening on issues that may interfere with a state's good faith effort to enforce its own laws in its own courts.[157] The issue in this case was whether the district court should interfere with ongoing state court litigation, or, as in some other cases, with state administrative proceedings,[158] giving due deference to the proceedings before a state board.

The Court made clear that in the absence of extraordinary circumstances, abstention would be appropriate when the doctrine elements are met,[159] but it would otherwise not be so if it is 'facially conclusive' or 'readily apparent' that the state proceedings are preempted by federal law.

XXI. AFTERWORD

This was a very active term in the Labor and Employment Law area. In cases as University of Texas and Vance, we see a Supreme Court making it harder for employees to present their claims successfully. On the other hand, in USERRA, we saw a court protecting soldiers' rights when returning to work and placing them in a comparable position with employees that do not serve to the country. From the six cases that treated issues related to benefits, in five of them the courts protected employees' benefits. Along the years, courts have emphasized the need to protect employees' benefits and have decided in repeated occasions that employees have an expectation over the

[155] Verizon New Eng., Inc. v. R.I .Dept. of Labor & Training, 723 F.3d 113 (1st Cir. 2013).
[156] *See* Younger v. Harris, 401 U.S. 36 (1971).
[157] *See* R. Gary Winger, *Younger Abstention Doctrine: A Morass of Confusion*, 1991 BYU L. REV. 1445–74.
[158] *Casiano Montañez*, 707 F.3d at 128.
[159] "[W]hen the requested relief would interfere (1) with an ongoing state judicial proceeding; (2) that implicates an important state interest; and (3) that provides an adequate opportunity for the federal plaintiff to advance his federal constitutional challenge." *Verizon New Eng.*, 723 F.3d at 116.

benefits their employers promised, and only under certain circumstances, employees can be left without their benefits. It has been allowed when in advance, an employer announces that due to business necessity, a benefit has to be terminated, reduced or modified. This shows that employees' benefits receive a great attention from courts.

We can also appreciate that a well-documented motion for summary judgment well document continues to be a vehicle frequently used the by district court and the First Circuit to dismiss cases, a resource that is not used frequently by the courts of Puerto Rico.