

**CIVIL RIGHTS AND RESTRAINTS ON JUDICIAL EXCESS - RECENT  
TRENDS IN THE FIRST CIRCUIT ON CASES FROM THE U.S.  
DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO**

ARTICLE

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**INTRODUCTION**

**T**HIS ANALYSIS OF RECENT DECISIONS OF THE UNITED STATES COURT OF AP-  
peals for the First Circuit of cases on appeal from the United States  
District Court for the District of Puerto Rico focuses on cases related  
to civil rights and constitutional protections. In particular, it examines a major  
wave of reversals by the First Circuit of cases on appeal from the United States

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District Court for the District of Puerto Rico, in which judges of the District Court disposed of civil rights cases in summary fashion.

In point of fact, the First Circuit is, for most cases, the court of last resort within the federal judiciary for residents of Puerto Rico. The chances a case has of reaching the United States Supreme Court are miniscule, and it is the First Circuit that sets the tone of federal litigation on the island.<sup>1</sup> Moreover, given the particular background and ideological bent of the current judges of the federal court in Puerto Rico, it is often necessary to invoke the intervention of the court of appeals in civil rights cases in order to assure that litigants in Puerto Rico actually benefit from access to the federal judiciary, which far too often fails to protect critical constitutional and civil rights and guaranties.

In Puerto Rico, litigants who seek to raise issues of constitutional import or related to the civil rights of citizens often look to the federal court, a tribunal which is presumed to be more amenable to plaintiffs seeking vindication of rights of that nature. The notion stems in large part from the fact that there are no juries in civil cases in the courts of Puerto Rico. The idea is that the federal court will present a more sympathetic forum for this litigation, and that the awards will be more favorable for civil rights plaintiffs.

Reality, however, often belies these preconceived notions. Summary judgment practice in the federal court system is alive and well and often results in a disposition favorable to the defense. Equally perilous for civil right plaintiffs is Rule 12(b)(1) and 12(b)(6) practice,<sup>2</sup> the dreaded motion to dismiss which represents a minefield for the civil rights practitioner. In order to reach trial by jury, plaintiffs have to get past the district judges, who almost without exception come from corporate or prosecutorial backgrounds and, as a general rule, show little or no sympathy to civil rights claims. While the aspiration to achieve adjudication by a jury of one's peers can be a powerful motivator, the reality is that this goal is beyond the reach of many a civil rights plaintiff, who must surpass major obstacles at different stages of the litigation. Such cases are often resolved against plaintiffs through a motion to dismiss or when they are thrown out on summary judgment after a considerable expenditure of time and expense, often just days before a scheduled trial or after the plaintiff presents his/her evidence at the close of the case or post-verdict. The extreme difficulties that a plaintiff must overcome in order to reach his or her cherished jury trial or to preserve a verdict cannot be underestimated.

In recent years, the litigation process has been made more difficult for plaintiffs as a result of the new *plausibility* pleading standard enunciated by the Unit-

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<sup>1</sup> In the 109 years since the federal court was first established in Puerto Rico, the Supreme Court has entertained appeals or petitions for *certiorari* from the First Circuit in cases initiated in the U.S. District Court of the District of Puerto Rico only 75 times, according to a study conducted by University of Puerto Rico law student Tzeitel Andino Caballero. In that same period, thousands of appeals as of right have been heard by the First Circuit on cases originating in federal court in Puerto Rico.

<sup>2</sup> FED. R. CIV. P. 12(b)(1), (b)(6).

ed States Supreme Court in *Iqbal v. Ashcroft* and *Bell Atlantic v. Twombly*.<sup>3</sup> As explained in more detail below, through these cases, the Supreme Court invited the lower court judges to apply their own *common sense* and *experience* in determining whether or not a plaintiff's claim can proceed. The new pleading rules, in addition to the robust development of the qualified immunity doctrine, which protects all but the most careless of public officials from suit,<sup>4</sup> have further complicated the tortuous path a civil rights plaintiff must negotiate when addressing government abuse in the context of constitutional torts, such as those raised in police misconduct cases. Most judges in the District of Puerto Rico have wholeheartedly embraced these doctrines, finding claims not to be worthy of consideration and leaving the victims of governmental abuse without recourse other than an expensive appeal to the First Circuit.

Plaintiffs raising statutory civil rights claims against private and governmental entities, such as those presented in employment discrimination cases filed pursuant to Title VII of the Civil Rights Act,<sup>5</sup> Age Discrimination in Employment Act,<sup>6</sup> American with Disabilities Act,<sup>7</sup> and similar statutes, also encounter considerable difficulty. *Iqbal* clearly requires more specificity at the pleading stage than previously mandated. Even if the initial dismissal stage is surpassed, Summary Judgment looms as a major peril. Oppositions to summary judgment require an arduous effort and considerable expense, given the stringent procedural requirements in Local Rule 56 and the need to translate key documents.<sup>8</sup> The statutory provisions of Puerto Rico law which prohibit attorneys for employees from charging any fees to their clients, also make it very difficult for such plaintiffs to obtain competent counsel.<sup>9</sup> Unfortunately, far too often, despite such gargantuan efforts, the result is the dismissal of the claim of civil rights violation

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3 See *Iqbal v. Ashcroft*, 129 S. Ct. 1937 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

4 See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In general terms, the qualified immunity defense protects government officials from damage actions and from being exposed to pre-trial discovery if they can demonstrate that the rights alleged to have been violated were not clearly established at the time they acted or failed to act. In its most expansive expression of the doctrine, the First Circuit has stated that "qualified immunity sweeps so broadly that 'all but the plainly incompetent or those who knowingly violate the law' are protected from civil rights suits for money damages." *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir. 1995) (quoting *Hunter v. Bryant*, 502 U.S. 224, 229 (1991); *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

5 Title VII of the Civil Rights Act of 1964 § 701, 42 U.S.C. §§2000e-14 (2009) (covering race, sex, national origin and religious discrimination).

6 Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2009).

7 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2009).

8 See D. P.R. Civ. R. 56.

9 See Law 402 of May 12, 1950, P.R. LAWS ANN. tit. 32, §§ 3114-3119 (2007) (establishing that attorneys for plaintiffs in employment matters, even in federal court cases, can obtain fees only from the employer. If they charge their clients, they can be sued for double damages and may also face ethical charges). See also *In re Franco Rivera*, 169 DPR 237 (2006).

by judges who simply do not take seriously the barriers to equality and equity represented by discriminatory processes and attitudes.<sup>10</sup>

In the United States District Court for the District of Puerto Rico, it is fairly simple to document how the judges' hostility towards or lack of understanding of civil rights claims impacts the development of the law in this field. The district judges, who by large start out from an extremely conservative perspective, tend to yield a heavy axe with respect to civil rights claims, clearly the unwanted child of federal litigation. Although the author cannot point to precise statistics to demonstrate the precise effect of these prejudices and perspectives in the U.S. District Court for the District of Puerto Rico, studies regarding the federal judiciary in general have consistently suggested an anti-plaintiff bias in the courts, particularly in federal employment cases.<sup>11</sup> With respect to the District Court in Puerto Rico, anecdotal evidence (as well as First Circuit reversals) certainly supports the view that federal court judges in Puerto Rico have been too swift to dismiss cases before trial, whether via the motion to dismiss or through the request for summary judgment.

While it is true that the virtual impunity that once reigned with respect to such dismissals is a thing of the past, and the First Circuit in recent years has not hesitated to reverse dismissals it deems the district court granted improvidently, an appeal to Boston is not a simple task. Unfortunately, many plaintiffs simply give up after a Rule 12 dismissal or summary judgment, unable to bear the cost or delay of an appeal to Boston.

In the remainder of this article, the author will focus on decisions of the Court of Appeals for the First Circuit issued during 2010 and the first half of 2011 which reverse judgments of the District Court in Puerto Rico summarily dismiss-

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<sup>10</sup> See Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, 661 (2010) (stating that "[t]o be sure, it is difficult as a general matter for plaintiffs to win discrimination cases. As several scholars have observed, this difficulty may stem in part from judicial bias against these claims. Contrary to available evidence, some judges appear to believe that discrimination claims are 'generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way.'" (quoting Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001))).

<sup>11</sup> See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y. REV. 103 (2009). Clermont and Schwab state that "[b]y far, most appeals in federal employment discrimination cases are appeals by plaintiffs, whether from trial or pretrial adjudications . . . . This fact mainly reflects that plaintiffs suffer most of the losses at the district court level." *Id.* at 109. Furthermore, Clermont and Schwab have documented the fact that "employment discrimination cases constitute one of the least successful categories at the district court level . . . [faring] worse than . . . almost any other category of civil case." *Id.* at 113. They attribute this fact, at least in part, to "attitudinal explanation[s]." *Id.* at 112. Recent years have seen a significant drop in filings of employment discrimination cases, which they suggest may well be due to a *discouragement* factor based on the negative experiences of plaintiffs and the plaintiffs' bar, although they reach no final conclusion on this point. *Id.* at 119-121. They speculate that "there could be a growing awareness . . . that employment discrimination plaintiffs have a tough a row to hoe." *Id.* at 121.

ing civil rights claims, whether on motions to dismiss, on summary judgments or on Rule 50 motions at trial or post-trial.<sup>12</sup> These reversals by the First Circuit can be seen as restraining some of the excesses of the federal judges in Puerto Rico and their free-wheeling dismissals of civil rights claims. An examination of recent case law reveals a striking pattern of reversals related to statutory claims in the employment civil rights field. A similar pattern appears to be emerging with respect to *Iqbal* pleading issues, with the Court of Appeals being more charitable than the district court judges in their assessment of *plausibility*.

In the final analysis, the question that must be asked is whether the judges of the United States District Court for the District of Puerto Rico have properly conceived their roles as judicial officers.<sup>13</sup> Have they too often rejected claims based on misapprehensions of the applicable law, their own ideological leanings, or their refusal to entertain inferences from an evidentiary record if it runs counter to their own preferences and views? It is submitted that the pattern of recent reversals favors the more cynical view—that access to the federal court on civil rights claims has been hampered by an overactive judiciary imposing its own criteria and substituting its own view for that of the trier of fact in the federal system, a jury of one's peers.

## I. THE PLEADING STAGE

### A. *Twombly*, *Iqbal* and the Pleading Standard: An Invitation to Judicial Excess

In May of 2009, the United States Supreme Court issued the watershed *Iqbal* decision, which portended sweeping changes in the practice in federal courts with respect to Rule 12(b) dismissals for failure to state a claim.<sup>14</sup> Coming two years after the Court's decision in the anti-trust case in *Twombly*,<sup>15</sup> *Iqbal* had the potential to slam the door of the courthouse to most civil rights plaintiffs, by constructing an insurmountable high bar for pleadings in civil rights cases and ignoring the reality that civil rights plaintiffs are typically in the dark with respect to specific actions taken by those who violate their rights.<sup>16</sup>

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<sup>12</sup> FED. R. CIV. P. 50(a)-(b).

<sup>13</sup> One way in which such views are questioned is through the reversal rates that judges experience at the appellate level. For example, in 2010, the First Circuit was forced to reverse 54% of decisions appealed from the District Court of Puerto Rico that were adjudged by Judge Besosa. Westlaw, *Judicial Reversal Report for Besosa, Hon. Francisco Augusto Besosa, Hon. Francisco Augusto Besosa Appealed Decisions (January 2006 - September 2011)*. This reversal rate sharply contrasts with statistics at the national level, where only 37.5% of the lower court's decisions were reversed or sent back for some type of reconsideration. Inventive Step, Federal Circuit Caseload – FY2010, available at <http://inventivestep.net/2010/10/>.

<sup>14</sup> *Iqbal v. Ashcroft*, 129 S. Ct. 1937 (2009).

<sup>15</sup> *Bell Atlantic v. Twombly*, 550 U.S. 554 (2007).

<sup>16</sup> Judith Berkan, *Iqbal - Additional Obstacles to Access to the Courts*, in CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 213 (2010).

At issue is the nature of the initial pleadings in federal litigation. For over fifty years, the Supreme Court had endorsed the minimalist approach codified in the Rule 8(a)(2) requirement that a complaint contain “a short, plain statement of the claim showing that the pleader is entitled to relief,”<sup>17</sup> recognizing the function of pleadings in *notifying* the opposing party about the nature of the claims and establishing the role of pretrial evidentiary discovery in preparing for trial.<sup>18</sup> The prior rule, announced in 1957 in *Conley v. Gibson*, prohibited dismissal on a 12(b)(6) motion unless the plaintiff could prove “no set of facts” to sustain the claim.<sup>19</sup>

In the 2009 *Twombly* decision, the Court enunciated a new *plausibility* standard, requiring plaintiffs to demonstrate through precise *factual* allegations, and not through formulaic conclusive assertions, that their claim is *plausible*. Although after this 2007 decision some commentators opined that the rule might be limited to the specific factual context of conspiratorial anti-trust claims, this hope was dispelled two years later by *Iqbal*, a Bivens civil rights action regarding the conditions of confinement of a post-9/11 Muslim detainee in federal detention.<sup>20</sup>

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<sup>17</sup> FED. R. CIV. P. 8(a)(2).

<sup>18</sup> See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (explaining that notice pleading “restrict[s] the pleadings to the task of general notice-giving” and that it is through “the deposition-discovery process” that the “vital role in preparation for trial” is developed). See also, *Access to Justice Denied: Hearing on Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 2–3 (2009) (statement of John Vail, Senior Litigation Counsel and Vice President, Center for Constitutional Litigation), available at <http://judiciary.house.gov/hearings/pdf/Vail091027.pdf>. John Vail clarifies that:

The rules were designed to implement a fundamental American value that everyone is entitled to their day in court. . . . Without the compulsory process that discovery represents, a plaintiff is without means to assert certain facts upon which a lawsuit may turn and must extrapolate or speculate about those facts based on the evidence thus far available. The framers of the 1938 rules understood this and did not want the inability to obtain all the facts pre-suit to bar the courthouse door.

*Id.*

<sup>19</sup> *Conley v. Gibson*, 355 U.S. 41, 45 (1957). In his *Twombly* dissent, Justice Stevens noted that the long-standing relaxed pleading standard “did not come about happenstance, and its language is not inadvertent.” *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting). It was, rather, a reaction to the former “Byzantine special pleading rules” which had limited access to the courts. *Id.* “[T]he appeal of a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought” was “obvious” *Id.* at 574. See also *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (addressing the Ohio National Guard’s killing of four Kent State students in 1970 and establishing that “[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any new evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.”).

<sup>20</sup> *Iqbal v. Ashcroft*, 129 S. Ct. 1937 (2009). See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

Javid Iqbal, arrested in 2001, alleged that his harsh treatment during his imprisonment stemmed from “the policy of holding post-September 11th detainees in highly restrictive conditions of confinement . . . solely on account of [their] religion, race and/or national origin and for no legitimate penological interest.”<sup>21</sup> Iqbal also asserted that former United States Attorney General, John Ashcroft, was the “principal architect” and that former FBI head, Robert Mueller, was “instrumental in [the] adoption, promulgation, and implementation” of this discriminatory policy.<sup>22</sup> Tracking earlier decisions addressing the liability of high-level government officials with respect to civil rights violations, Iqbal charged that Ashcroft and Mueller “knew of, condoned and willfully and maliciously agreed to subject” him to harsh conditions of confinement in violation of his right to Equal Protection.<sup>23</sup>

These allegations were deemed insufficient by a 5-4 majority of the Court, which considered them to be mere *conclusions* since these were not *factual* allegations that should be entitled to the presumption of truth. The Court found that Iqbal had made no allegations “nudg[ing] his claims’ of purposeful discrimination ‘across the line from conceivable to plausible.”<sup>24</sup> In so doing, the Court pronounced that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”<sup>25</sup> Pleadings must demonstrate “more than a sheer possibility that a defendant has acted unlawfully.”<sup>26</sup> After *Iqbal*, when evaluating pleadings, federal judges are to distinguish between well-pleaded *factual allegations*, which are entitled to credit, as opposed to *legal conclusions*, which “are not entitled to the assumption of truth.”<sup>27</sup>

The *Iqbal* court also instructed judges to apply their own “experience” and “common sense” in measuring the “plausibil[ity]” of a claim.<sup>28</sup> This aspect of

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<sup>21</sup> *Iqbal*, 129 S. Ct. at 1944. Iqbal alleged that he was “kicked . . . in the stomach, punched . . . in the face, and dragged . . . across his cell without justification, [and] subjected to serial strip and body-cavity searches when he posed no safety risk to himself or others.” He also alleged that he and other Muslim detainees were prohibited from praying because there would be “[n]o prayers for terrorists.” *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1951 (quoting *Bell Atlantic v. Twombly*, 550 U.S. 554, 547 (2007)).

<sup>25</sup> *Id.* at 1949.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1950.

<sup>28</sup> *Id.* In arriving at its conclusion that the *Iqbal* pleading was insufficient, the Court applied its own “common sense” mentioning that there were “19 Arab Muslim hijackers” in the 9/11 attacks, and that they were from an “Islamic fundamentalist group [Al Qaeda which] was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples.” *Id.* at 1950-51. Given these facts, the Court found it “more likely” that the detentions resulted from “a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks,” than from discriminatory animus, and that any “disparate, incidental impact on Arab Muslims,” responded to a policy whose purpose “was to target neither Arabs nor Muslims.” *Id.* at 1951.

*Iqbal* is particularly troubling. A district judge's opinion as to how *plausible* a claim appears to be, of course, is intimately tied to his or her ideological leanings, a sobering thought at this time, in light of the current composition of the federal judiciary in general and of the federal court in Puerto Rico in particular.<sup>29</sup> The *Iqbal* decision affords untoward discretion to district judges, who now act as *gatekeepers* at the pleadings stage.

Perhaps the harshest effect of the new pleading is its impact on civil rights litigation. A civil rights plaintiff is usually at a considerable disadvantage at the pleadings stage, since the information key to proving his or her claim lies with the defendants. For example, a victim of police abuse may not know who his or her attackers were or what instructions they were given. The pleader of a *Monell* claim may have some familiarity with system-wide abuses, but will likely lack specifics.<sup>30</sup> A worker who is dismissed from his/her job may suspect that discrimination was a key factor, but he or she certainly was not privy to the decision-making process.<sup>31</sup>

To the degree that the new pleading rules require the victim to plead the very facts which the government or the employer has kept hidden from scrutiny, he or she may be faced with the ultimate irony: The wrongdoer has virtually complete control over the information, but the victim is held to a standard which requires knowledge of that information in order to have his or her case heard by a jury of one's peers.

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In light of this "obvious alternative explanation," the Court, in an unmistakable and improper fact-finding exercise, found that *Iqbal's* claim that his treatment was based on invidious discrimination was "not a plausible conclusion." *Id.*

<sup>29</sup> Most of the district judges in Puerto Rico hail from corporate practices. Only one has experience as a public defender. Several have worked either as prosecutors or as officials in the government of the Commonwealth. Furthermore, a majority of the district judges in Puerto Rico have been nominated by conservative Republican Presidents. President Carter nominated Judge Carmen Cerezo, President Reagan nominated Judge José Fusté, President Clinton nominated Judges Daniel Domínguez and García Gregory, and President George W. Bush nominated Judges Francisco Besosa, Aida Delgado-Colón, and Gustavo Gelpí. Judgepedia, *District Court of the District Court of Puerto Rico*, available at: [http://judgepedia.org/index.php/United\\_States\\_District\\_Court\\_for\\_the\\_District\\_of\\_Puerto\\_Rico](http://judgepedia.org/index.php/United_States_District_Court_for_the_District_of_Puerto_Rico) (last visited September 17, 2011).

<sup>30</sup> See *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

<sup>31</sup> As one commentator recently observed:

Civil rights is one substantive area in which *Iqbal* will empower courts to increase scrutiny over pleadings, a prediction already bearing out in the early days of the new pleading regime. And we can expect a continued willingness among courts in civil rights and constitutional cases to wield their new discretion to dig into the details of complaints, to parse the complaint as a whole and particular allegations within it, to disregard insufficiently detailed allegations, and to decide what allegations and conclusions are most plausible. . . . The predictable result will be a significant decrease in enforcement and vindication of federal constitutional and civil rights, and of the values and principles underlying those rights.

Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 160-61 (2010).

*Twombly* and *Iqbal* radically altered long-standing rules defining the function of pleadings in *notifying* the opposing party about the nature of the claims and establishing the role of discovery in preparing for trial.<sup>32</sup> Traditionally, discovery has been the mechanism for such plaintiffs to obtain the information which is essential to their claims. Expressing his concern about the effect of the new pleading doctrine, Robert Rothman, the former chair of the ABA Litigation Section, characterized the new standard in the following terms:

*Iqbal* has the potential to short-circuit the adversary process by shutting the doors of federal courthouses around the nation to large numbers of legitimate claims based on what amounts to a district court judge's effectively irrefutable, subjective assessment of probable success. This is so notwithstanding a complaint containing well-pled factual allegations that, if allowed to proceed to discovery and proved true at trial, would authorize a jury to return a verdict in plaintiff's favor.<sup>33</sup>

*B. Iqbal and Supervisory Liability: A Key Issue for Civil Rights Plaintiffs*

A second issue raised by *Iqbal* is supervisory liability in civil rights actions. In what many view as a gratuitous expression amounting to nothing more than a *dictum*, the *Iqbal* majority made major pronouncements on this question. The standard for supervisory liability was not before the Court and the issue had not been briefed by the parties. Nonetheless, the majority saw fit to offer its view on the doctrine. Emphasizing that such liability must be posited on a supervisor's "own misconduct," the Court went so far as to characterize "the term 'supervisory liability' itself as a "misnomer."<sup>34</sup> The Court also rejected mere "knowledge and acquiescence" as a basis for liability for supervisors, at least in the context of an Equal Protection claim.<sup>35</sup>

Although it is not clear, at the time of this writing, what the long-term effect of these statements will be in terms of civil rights litigation,<sup>36</sup> the issue of supervisory liability is certainly of critical importance to litigation in Puerto Rico. A case in point is police misconduct litigation. Since most cases alleging police

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<sup>32</sup> See, *supra* note 18.

<sup>33</sup> Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, 35 LITIGATION, Spring 2009, at 1, 2.

<sup>34</sup> *Iqbal*, 129 S. Ct. 1937.

<sup>35</sup> *Id.* For a more extensive discussion on the impact of *Iqbal* on supervisory liability, see Berkan, *supra* note 16.

<sup>36</sup> While the *Iqbal* dissenters predicted dire results with respect to the entire concept of supervisory liability, the ultimate effect may, in fact, be less severe. One recent commentator has pointed out that even the dissenters "hedge[d] their bets a bit" with respect to their dire predictions regarding supervisor liability. Kit Kinports, *Iqbal and Constitutional Torts: Iqbal and Supervisory Immunity*, 114 PENN. ST. L. REV. 1291, 1308 (2010) (observing that elsewhere in the opinion, the dissenters had used such language as "apparently" and "presumably" when referring to the impact of the majority's supervisory liability analysis). *Id.* at 1308 n.83.

misconduct are brought with respect to the island-wide police force, *Monell* claims, such as those brought against large municipalities in the states, are not an option. Moreover, pursuant to Law 9, the indemnification statute in Puerto Rico,<sup>37</sup> such claims often result in a refusal to indemnify the actions of low-level officers. The key to recovery for victims of police misconduct in Puerto Rico who bring § 1983 actions, therefore, depends on the success of claims of supervisory liability.

While it has long been the rule that such supervisory liability claims cannot be based on *respondeat superior*,<sup>38</sup> the broad sweep of the majority opinion—implying the end of supervisory liability in *Bivens* actions and perhaps in all civil rights actions, including those brought pursuant to § 1983—<sup>39</sup> is very troubling. Indeed, this was the concern expressed by the dissenters in *Iqbal*, including Justice Souter, who had authored the *Twombly* decision, but evidently felt that the new pleadings doctrine was being taken too far.<sup>40</sup> While it may be argued that the majority's conclusions on supervisory liability was circumscribed to claims of *purposeful discrimination* such as those present in *Iqbal*, the message sent by the Court may well extend much further.

### C. *Iqbal* in Puerto Rico: The Initial Experience Is Troubling

The district judges in Puerto Rico have in large measure greeted the new *Iqbal* pleading rules with open arms. This is particularly apparent in civil rights cases, in which the doors to the courthouse seem to be shutting at an alarming rate.

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<sup>37</sup> Act No. 9 of November 26, 1975, P.R. LAWS ANN. tit. 32, §§ 3085-3092 (2004).

<sup>38</sup> See, e.g., *Camilo-Robles v. Hoyos*, 151 F.3d 1 (1st Cir. 1998); *Febus-Rodríguez v. Betancourt-Lebrón*, 14 F.3d 87, 91 (1st Cir. 1994); *Bordanaro v. City of Everett*, 871 F.2d 1151 (1st Cir. 1989); *Gutiérrez-Rodríguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989). Supervisors can be held liable for acts or omissions that caused the illegal actions. The First Circuit has long mandated the employment of “common law tort principles” when conducting “inquiries into causation under §1983.” *Gutiérrez-Rodríguez*, 882 F.2d at 561. Liability of supervisors can be founded in their actions of “setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.” *Id.* Pre-*Iqbal* law in the First Circuit provided for the imposition of responsibility even for those police supervisors whose “conduct . . . amounts to condonation or tacit authorization” of the violation,” or with respect to conduct causally connected and affirmatively linked to the unconstitutional conduct of officers on the street. *Camilo-Robles v. Zapata*, 175 F.3d 41, 44 (1st Cir. 1999).

<sup>39</sup> 42 U.S.C. §1983. At least one author has drawn a distinction between claims which, like that of *Javaid Iqbal*, were brought pursuant to the judicially created *Bivens* remedy and those brought under § 1983. See, *Kinports*, *supra* note 36, at 1291. *Kinports* argues that the precise statutory language of § 1983, imposing liability on those who *subject* a plaintiff to a deprivation of rights, or who *causes* a plaintiff to be so subjected, may make a difference in post-*Iqbal* analysis, allowing claims against supervisors who *tolerate* or *condone* the constitutional misconduct of their subordinates. *Id.* at 1298.

<sup>40</sup> The dissent characterized the Court's expressions on supervisory liability as an unjustifiable “foray” into a matter which “has no bearing on its resolution of the case.” *Iqbal v. Ashcroft*, 129 S.Ct. 1937, 1958 (2009).

A Lexis review demonstrates that as of this writing, *Iqbal* has been cited by the judges of the United States District Court for the District of Puerto Rico on no less than 250 times in the two years and three months since the case was decided by the Supreme Court.<sup>41</sup> After the first two post-*Iqbal* years, the District Court appears to be dismissing such cases for pleading deficiencies very frequently.

That was the trial result in *Rivera-Colón v. Toledo-Dávila*,<sup>42</sup> in which the American Civil Liberties Union (ACLU) called into question what it characterized as a pattern of racially motivated police brutality and harassment of the community of Villa Cañona in Loíza, made up primarily of Afro-Caribbeans.<sup>43</sup> The complaint alleged facts related to a number of incidents of police brutality occurring between 2007 and 2008 that generated administrative complaints in the Puerto Rico Police Department (PRPD), the Bar Association and the Civil Rights Commission.<sup>44</sup> The latter two entities had requested the then Police Superintendent, Pedro Toledo, to investigate police abuse in that community and to take measures to stop the government misconduct.<sup>45</sup>

Applying *Iqbal* to the allegations in the complaint, Judge Casellas found the pleading insufficient against several police supervisors, including Superintendent Toledo and several high-level supervisors of the Carolina area of the PRPD, which supervises operations in Loíza. The judge's words are telling:

The Complaint does not compellingly plead a racial motivation for the alleged use of excessive force, nor does it directly tie these events in to the alleged existence of a larger trend of profiling . . . Furthermore, nothing in the complaint suggests that high ranking officials were aware of the specific incidents involving Plaintiffs.<sup>46</sup>

Addressing *plausibility* and *conclusions*, Judge Casellas made the following observations with respect to public meetings which had been held to address the problem: “[o]f course, the public meetings might in some other circumstances suffice, but the alleged general trend has only been linked to the events at bar

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<sup>41</sup> The experience in Puerto Rico has been repeated in many other federal courts. A Lexis review reveals that between May of 2009, when *Iqbal* was decided, until this writing in mid-August of 2011, *Iqbal* was cited by the federal courts a total of 26,612 times. During the same period, the case was cited in the Courts of Appeals a total of 1,595 times. In the first two and a half years after it was decided, it has been reported that *Twombly* generated close to 23,000 judicial citations. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 at n.4 (2010). They compared this to only some 13,500 citations generated by *Erie Railroad Co. v. Tompkins* in the preceding 72 years. *Id.*

<sup>42</sup> *Rivera-Colón v. Toledo-Dávila*, No. 08-1590, 2010 U.S. Dist. LEXIS 27672 (D. P.R. Mar. 24, 2010).

<sup>43</sup> *Id.* at \*3-4.

<sup>44</sup> *Id.* at \*7 n.3.

<sup>45</sup> *Id.* at \*7-8.

<sup>46</sup> *Id.* at \*14-15.

through conclusory statements, which simply cannot pass the post-*Iqbal* standard.<sup>47</sup>

Luckily for the Rivera-Colón plaintiffs, however, the case had originally been filed in 2008, and the parties had evidently carried out some discovery. Upon a motion for reconsideration, Judge Casellas changed his determination, allowing for the possibility of supervisory liability.<sup>48</sup> The plaintiffs presented testimony from the deposition of Superintendent Toledo and another supervisory officer demonstrating that they did, in fact, have knowledge of the alleged pattern of racially motivated police harassment, noting that “[t]he depositions appear to contradict Defendants’ prior theory that Toledo and Matos were not familiar with the events occurring in Villa Cañona.”<sup>49</sup> Had the case been filed after *Iqbal*, however, it is unlikely that the discovery would have ever taken place.<sup>50</sup>

Dismissal has been ordered in a number of other cases, in which the district judges have understood *Iqbal* to preclude civil rights claims brought against government officials pursuant to § 1983. *Marrero-Rodríguez v. Municipality of San Juan*, for example, involved a horrendous death of a police officer shot by in the back point-blank by a fellow officer in the course of a training exercise in which he played the role of the suspect.<sup>51</sup> The plaintiffs’ theory of supervisory responsibility did not survive *Iqbal* due to its purported lack of sufficient facts to demonstrate the plausibility of the claim. Judge Pieras rejected the allegations of failure to supervise the training exercises adequately and failure to train as mere conclusions.<sup>52</sup> Quoting *Iqbal*, the judge found the averments regarding the death of plaintiffs’ decedent to be nothing more than “labels and conclusions,” “a formulaic recitation of the elements of a cause of action,” devoid of further factual enhancements.<sup>53</sup> Even though the plaintiffs had affirmatively alleged that the Municipality had neglected to promulgate safety protocols or written regulations

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<sup>47</sup> *Id.* at \*15.

<sup>48</sup> *Rivera-Colon v. Toledo-Davila*, No. 08-1590, 2010 U.S. Dist. LEXIS 63669, at \*7 (D. P.R. June 28, 2010).

<sup>49</sup> *Id.* at \*5, \*6.

<sup>50</sup> In *Twombly* and *Iqbal*, the Court clarified that the early dismissal of cases *before* discovery was a desired result. Plausibility had to be clear from the face of the complaint, before any discovery was conducted. The *Twombly* majority, for example, was based, in part, on alarmist concerns expressed by the defense bar, which claimed that the courts had been unable to manage widespread discovery abuse by plaintiffs. *Twombly*, 555 U.S. at 559. This argument is not born out of the facts, since the defense bar claims about the “litigation explosion” and the “liability crisis” are largely unsupported and mythological. See Robert W. Gordon, *The Citizen Lawyer — A Brief Informal History of a Myth with Some Basis In Reality* 50 WM. & MARY L. REV. 1169, 1199 (2009).

<sup>51</sup> *Marrero-Rodríguez v. Municipality of San Juan*, No. 10-1270, 2010 U.S. Dist. LEXIS 138602, at \*6 (D. P.R. Dec. 30, 2010).

<sup>52</sup> *Id.* at \*18-20.

<sup>53</sup> *Id.* at \*19.

concerning such trainings,<sup>54</sup> the court found fatal their failure to “allege sufficient facts that would support such assertions.”<sup>55</sup>

A similar result was reached in the mixed decision issued by Judge Francisco Besosa in the case of *Colón-Andino v. Toledo-Dávila*.<sup>56</sup> At issue was the arrest of a local businessman, who alleged being interrogated for several hours without the required disclosure of his rights, and thereafter detained and arrested on charges that were ultimately dropped.<sup>57</sup> Judge Besosa found most of the allegations against Superintendent Toledo to be lacking in details about the deficient policies promulgated by the Superintendent, “how or why [he] should have or did know about the alleged violations,” and as to how more adequate training or supervision “could have stopped the alleged violations from occurring.”<sup>58</sup> In sum, these allegations were nothing more than a “formulaic recitation of the elements of a supervisory liability claim.”<sup>59</sup>

Dismissal was also ordered in *Medero-García v. Commonwealth*, a case alleging excessive force during an unlawful arrest.<sup>60</sup> With respect to Superintendent Toledo, Judge Casellas found the complaint to be “completely devoid of allegations from which the Court could infer that Toledo was on notice of the officers’ violent and illegal conduct, that this conduct created a grave risk of harm for citizens, and that, even then, Toledo failed to take measures to address the risk.”<sup>61</sup> The complaint’s allegations concerning the failure to train the officers and to monitor their conduct to assure compliance with department policy were deemed to be merely *conclusive*.<sup>62</sup>

The district court also refused on the basis of *Iqbal* to hear the case of Myrta Morales-Cruz, a former professor at the University of Puerto Rico School of Law.<sup>63</sup> Ms. Morales alleged that she was the victim of gender discrimination at the Law School, her claim being brought both under Title VII and pursuant to §

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<sup>54</sup> Furthermore, Judge Pieras also failed to consider important facts of the case, such as the trainings were conducted without a certified instructor and without bulletproof jackets, direct orders were given to conduct the trainings without bulletproof jackets and the trainees were not checked for guns or weapons. *Id.* at \*13-14.

<sup>55</sup> *Id.* at 20.

<sup>56</sup> *Colón-Andino v. Toledo-Dávila*, 634 F. Supp. 2d 220 (D. P.R. 2009).

<sup>57</sup> *Id.* at 227.

<sup>58</sup> *Id.* at 233.

<sup>59</sup> *Id.* at 234 (quoting *Iqbal v. Ashcroft*, 129 S.Ct 1937, 1951 (2009)).

<sup>60</sup> *Medero-García v. Commonwealth*, No. 08-1446, 2009 U.S. Dist. LEXIS 50863, at \*2 (D. P.R. June 16, 2009).

<sup>61</sup> *Id.* at \*14.

<sup>62</sup> *Id.*

<sup>63</sup> *Morales-Cruz v. University of Puerto Rico*, 792 F.Supp. 2d 205, 207 (D. P.R. 2011).

1983 with respect to the individual professors involved in the employment decisions against her and the former Dean of the school.<sup>64</sup>

The plaintiff alleged that the school had treated her in a manner demonstrating gender stereotyping and discriminatory animus, demonstrated by alleged comments about her being “fragile,” “immature” and “unable to handle complex and sensitive issues.”<sup>65</sup> She also claimed that the Dean and a law school professor had referred to her as “that girl” during official meetings.<sup>66</sup> Judge Cerezo found these allegations wanting, constituting nothing more than “conclusory statements and threadbare recitals of the elements of a gender-stereotyping claim,” which must be disregarded under *Iqbal*.<sup>67</sup>

#### *D. The First Circuit Enters the Fray: Restraining the Initial Trend*

As of this writing, several of the above decisions are on appeal to the First Circuit. Accordingly, it is too early to tell what the view of the appellate forum will be with respect to dismissals of this nature and supervisory liability claims in constitutional tort cases, particularly with respect to law enforcement issues.<sup>68</sup> In the area of political discrimination, however, the First Circuit has begun to issue opinions which leave the distinct impression that it will be more generous to civil rights plaintiffs than several of the district judges in Puerto Rico.

The First Circuit recently reversed two *Iqbal* dismissals arising from the District of Puerto Rico in cases alleging political discrimination. Both *Peñalbert-Rosa v. Fortuño-Burset* and *Ocasio-Hernández v. Fortuño-Burset* involve unjust

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<sup>64</sup> *Id.* at 208.

<sup>65</sup> *Id.* at 210.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* The application of *Iqbal* to employment discrimination claims is of particular concern, in light of the *McDonnell Douglas* burden-shifting decisional paradigm, discussed *infra* under the section titled “Summary Dispositions In Discrimination Cases.” See *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802-804 (1973). The burden-shifting model in employment discrimination cases usually plays out in the context of summary judgment. Pursuant to the burden-shifting methodology, a plaintiff’s initial burden of demonstrating that he or she has a sufficient evidentiary basis for establishing a *prima facie* case is supposed to be minimal. *Id.* Ironically, however, the courts appear to be interpreting *Iqbal* to require a greater modicum of proof at the initial *pleading* stage.

<sup>68</sup> In two early post-*Iqbal* cases involving supervisory responsibility, the Court of Appeals dismissed certain supervisory liability claims. See *Maldonado v. Fontánes*, 568 F.3d 263, 275 (1st Cir. 2010); *Sánchez v. Pereira-Castillo*, 590 F.3d 31 (1st Cir. 2009). In both of these cases, the court affirmed the continuing viability of supervisory liability claims after *Iqbal*, but eschewed unnecessary definitions of the precise standards for imposing liability either because, under the facts of the case before it, plaintiffs had “not pled facts sufficient to make at a plausible entitlement to relief under [the court’s] previous formulation of the standards for supervisory liability,” or because the particular complaint did “little more than assert a legal conclusion about the involvement of the [supervisory] defendants in the underlying constitutional violation.” *Maldonado*, 568 F.2d at 275 n.7; *Sánchez v. Pereira-Castillo*, 590 F.3d at 49.

discharge claims brought by employees at La Fortaleza.<sup>69</sup> In both cases, the district court found the complaint lacking, and in both instances, the Court of Appeals for the First Circuit reversed the holding of the lower court.

María Peñalbert-Rosa, a former receptionist in an office building annexed to *La Fortaleza*, charged before the district court that her dismissal from this trust (*confianza*) position in early 2009 was based on unconstitutional political discrimination. She filed her action against Governor Fortuño, his chief of staff, and the administrator of the governor's mansion.<sup>70</sup> In a decision issued in January of 2011, the First Circuit upheld District Judge Cerezo's dismissal of the claim against these three individuals, finding that the complaint lacked specific allegations "beyond speculation" regarding their participation in the decision to dismiss the plaintiff.<sup>71</sup>

In an interesting twist, however, all was not lost for Ms. Peñalbert. The court of appeals, recognizing that "*Twombly* and *Iqbal* are relatively recent," and that "developing a workable distinction between 'fact' and 'speculation' is still a work in progress," took the highly unusual step of remanding the case to the district court in order to provide the plaintiff an opportunity to amend her complaint to substitute particular individuals for the John Doe (fictitiously named) defendants.<sup>72</sup> The court deemed it appropriate to "rescue [the] civil claim" in "the interests of justice,"<sup>73</sup> reasoning that the complaint had adequately alleged that "someone" fired the plaintiff "based on party membership."<sup>74</sup>

The reluctance of the First Circuit to allow the harsh effects of the *Iqbal* doctrine to close the courthouse doors in virtually all such cases was also evident in the recent *Ocasio* decision, another case involving a claim of political discrimination at *La Fortaleza*.<sup>75</sup> *Ocasio* was an action brought by fourteen maintenance and domestic employees at the Governor's mansion who were terminated by the new administration headed by Governor Fortuño. As described by the district court Judge Gustavo Gelpí, the plaintiffs' claims of political discrimination rested on several specific factual averments: they were dismissed within sixty (60) days after the change in administration, there were no reasons given for the discharges, no evaluations preceded the terminations, they were substituted by employees affiliated with the New Progressive Party, there was a politically charged atmosphere in the workplace, characterized by official use of symbols associated

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69 See Peñalbert-Rosa v. Fortuño-Burset, 631 F.3d 592 (1st Cir. 2011); Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1 (1st Cir. 2011).

70 *Id.* at 593-94.

71 *Id.* at 596.

72 *Id.* at 597.

73 *Id.*

74 *Id.* at 596.

75 *Ocasio-Hernández*, 640 F.3d at 4.

with the Governor's party, and the decision-maker was known to have made disparaging remarks about the prior administration of Governor Acevedo-Vilá.<sup>76</sup>

Judge Gelpí found these allegations insufficient to establish that the decision-maker actually knew the political affiliations of each of the fired workers. He was unconvinced that allegations he characterized as "generic, blanket" descriptions of inquiries which were made by government officials regarding the employees' hire dates provided a plausible basis for concluding that the dismissals were discriminatory.<sup>77</sup> The judge reached this conclusion despite the fact that it is common knowledge in Puerto Rico that such inquiries are frequently used to ascertain one's political affiliation. In dismissing the case, he held that the plaintiffs failed to present "fact-specific showing that a causal connection exists between their termination from employment and their political affiliation."<sup>78</sup>

Judge Gelpí himself recognized the pernicious effects of his literal interpretation of *Iqbal*. Characterizing his own ruling as "draconianly harsh to say the least," he opined that *Iqbal* had sounded a "death knell" for civil rights cases before the federal court.<sup>79</sup> The judge went on to lament the fact that after *Iqbal*, "even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without 'smoking gun' evidence."<sup>80</sup> He also took to heart the *Iqbal* language calling for early pre-discovery rulings on adequacy of pleadings. Observing that, in the past, critical evidence for plaintiffs would have been obtainable during pre-dismissal stage discovery, he expressed his view that this was no longer possible under the new doctrine, forcing plaintiffs "to file suit in Commonwealth court, where *Iqbal* does not apply and post-complaint discovery is . . . available."<sup>81</sup>

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<sup>76</sup> *Ocasio-Hernández v. Fortuño-Burset*, 639 F.Supp. 2d 217, 220-21 (D. P.R. 2009). The district judge's description, however, left out major points from the evidentiary record that the First Circuit found to be of significance. Governor Fortuño's campaign slogan, "It's time to change," proved to be a recurring theme for employees at La Fortaleza, and one of the defendant's trusted aides used the jingle as the ringtone on his cellular phone (which also prominently featured the NPP logo). La Fortaleza maintenance employees would be forced to listen to the slogan, along with comments by their supervisor to the effect that things had indeed changed. First Lady Lucé-Vela also told employees that "changes had come," and that she was going to "clean up the kitchen," an apparent reference to changes in the kitchen staff. See *Ocasio-Hernández*, 640 F.3d at 5-6.

<sup>77</sup> *Id.* at 223.

<sup>78</sup> *Id.* at 224.

<sup>79</sup> *Id.* at 226 n.4.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* It is important to note that not all district court judges in Puerto Rico have applied *Iqbal* in such a draconian fashion. See, e.g., *Brenes-Laroche v. Toledo Dávila*, 682 F.Supp.2d 179 (2010) (solving for a damage action arising from police violence against a Paseo Caribe demonstrator). The plaintiff alleged that supervisory responsibility stemmed *inter alia* from the decision of police supervisors to deploy the San Juan Tactical Operations Unit, a unit which is well-known in Puerto Rico for its history of unlawful and excessive force. Brenes-Laroche also alleged that the supervisors were well aware of the fact that Tactical Operations officers, in open violation of department regulations, had

In a decision issued on April 1, 2011, the First Circuit handed a stunning reversal to Judge Gelpí. Finding the allegations in the complaint sufficient pursuant to the *Iqbal* standard, the Court of Appeals laid out its most extensive analysis to date of the current pleading rules and the criteria for the imposition of supervisory liability in civil rights cases. While acknowledging that the “no set of facts” norm set forth in *Conley* no longer applied,<sup>82</sup> the court of appeals rejected the notion that the *Iqbal/Twombly* standard amounts to a “heightened pleading requirement.” . . . [To] insist on the allegation of ‘specific facts’ that would be necessary to prove the claim at trial . . . is incompatible with the notice pleading structure of the Federal Rules.”<sup>83</sup> It further emphasized that disbelief of a particular fact is not a reason to dismiss that fact as alleged by stating that “[n]on-conclusory factual allegations in the complaint in the complaint must be treated as true, even if seemingly incredible.”<sup>84</sup>

The court of appeals also made an effort to distinguish between *conclusions* and *facts*. “Allegations of discrete factual events [in the *Ocasio* case] such as the defendants questioning the plaintiffs and replacing the plaintiffs with new em-

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the “custom, practice and policy of removing their identification when using unlawful force,” and that the supervisors consciously decided not to enforce department policy on the issue. *Id.* at 183. The supervisors had made conscious decisions deploy the Tactical Operations squad, despite their knowledge of the unit’s excessive use of force against protesters, and were in direct communication with the officers on the scene of the protest. *Id.* at 187-87.

Faced with an *Iqbal* challenge, Judge Pérez-Giménez found these averments, in addition to other general allegations on failure to train, supervise and discipline the offending officers, sufficient to survive dismissal on the supervisory liability claim. In contrast to Judge Gelpí, who chose to ignore common knowledge about the rampant political discrimination resulting in the dismissals of public workers as well as the *common sense* understanding that inquiries of employment history are well-recognized techniques to ascertain an employee’s political affiliation, Judge Pérez-Giménez chose to credit that which is obvious to civil rights practitioners in Puerto Rico, if not the general public: that the police force engages in excess force, that specialized units such as Tactical Operations have a particularly ugly history of such violence, and that any self-respecting supervisor in the department is aware of that fact.

Judge Pérez-Giménez also understood the need for discovery in such cases, expressing concern about “the difficulty faced by many civil rights litigants in Plaintiff’s position who are not armed with sufficient facts, more likely to be found in Defendant’s possession, to survive *Iqbal*’s pleadings standard at this pre-discovery stage of litigation.” *Id.* at 187. Nonetheless, his particular interpretation of his obligation to “heed the Supreme Court’s suggestion to ‘draw on [our] judicial experience and common sense’” permitted him to conclude that the supervisory liability claim could survive the 12(b)(6) motion. *Id.* at 188.

Judge Pérez-Giménez’s observations were confirmed in a recent report of the United States Department of Justice, issued on September 8, 2011 (hereinafter DOJ Report). The DOJ Report found widespread civil rights violations by the PRPD, particularly by the tactical operations units and noted that supervisors within the department had known about this problem for many years. United States Department of Justice, Civil Rights Division, *Investigation of the Puerto Rico Police Department* (2011), available at <http://www.justice.gov/crt/about/spl/pr.php>.

<sup>82</sup> See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

<sup>83</sup> *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 10 (1st Cir. 2011).

<sup>84</sup> *Id.* at 12.

ployees are not ‘conclusory’ in the relevant sense.”<sup>85</sup> The First Circuit also held that it was error for the district court to disregard certain factual allegations concerning comments made by government officials, based on the notion that the comments did not “not necessarily refer” to a particular issue that was relevant in that case.<sup>86</sup> The rule is that factual allegations must be viewed in the light most favorable to the plaintiffs. Accordingly, the judge’s use of “the ‘necessarily refer’ standard of the district court is particularly inappropriate for evaluating the sufficiency of the allegations in a complaint.”<sup>87</sup>

Another key issue addressed in *Ocasio* was the looming question of supervisory liability. While the Circuit reaffirmed that § 1983 liability cannot rest solely on the *positions* held by the supervisory official, it also made it clear that supervisory officials can be held liable for injuries beyond those alleging for *direct causation* of constitutional injuries. Government officials may be held liable under § 1983 for injuries from either “direct acts or omissions of that official, or from indirect conduct that amounts to condonation or tacit authorization.”<sup>88</sup> The court also made it clear that the long-standing precedent of cases such as *Gutiérrez-Rodríguez v. Cartagena* and *Bordanaro v. City of Everett* remain good law today,<sup>89</sup> even after *Iqbal* and *Twombly*.<sup>90</sup> Applying these precedents, the court of appeals refused to take *Iqbal’s* *misnomer* language to its harshest consequences. Supervisory liability is still alive and well and can be found when the supervisor engages in conduct which sets “in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.”<sup>91</sup>

Applying these standards to the facts in *Ocasio*, the First Circuit observed that, in defining plausibility, it was proper to examine previous incidents of political discrimination in Puerto Rico, as reflected in reported cases before the courts. Applying “judicial experience and common sense” in order to “make a contextual judgment” about the facts in *Ocasio*, the appellate court found the claims against the Governor, the First Lady and the Fortaleza Chief of Staff to be plausible.<sup>92</sup> Referring to earlier cases, the First Circuit noted that “the plaintiff’s

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85 *Id.* at 14.

86 *Id.* at 17.

87 *Id.*

88 *Id.* at 16 (citing *Rodríguez-García v. Miranda-Marín*, 610 F.3d 756, 768 (1st Cir. 2010)).

89 See *Gutiérrez-Rodríguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989); *Bordanaro v. City of Everett*, 871 F.2d 1151 (1st Cir. 1989).

90 *Ocasio-Hernandez*, 640 F.3d at 16.

91 *Id.* (quoting *Sánchez v. Pereira-Castillo*, 590 F.3d 31, 50 (1st Cir. 2009), which in turn cites *Gutiérrez-Rodríguez*, 882 F.2d at 561).

92 *Id.*

complaint unquestionably describes a plausible discriminatory sequence that is all too familiar in this circuit.<sup>93</sup>

Through these expressions in *Ocasio*, the First Circuit echoed the majority view of the Circuit Courts of Appeal with respect to *Iqbal* and supervisory liability. An examination of recent decisions in the circuits reveals a developing consensus consistent with the *Ocasio* case, which adopts pre-*Iqbal* norms to supervisory liability claims.

This overall consensus is discussed in a recent case from the Court of Appeals for the Ninth Circuit. In *Starr v. Baca*,<sup>94</sup> a prisoner alleged supervisory liability against the sheriff of Los Angeles county based on his allowance of prison conditions which led to a violent attack against the plaintiff by fellow inmates at the county jail. Applying pre-*Iqbal* standards of supervisory liability to those facts, the Ninth Circuit rejected the notion that supervisory responsibility had been radically changed by *Iqbal*, affirming that this was the *consensus* of all of the courts of appeal that had addressed the issue, including the First Circuit.<sup>95</sup> The Ninth Circuit interpreted the majority's language on supervisory liability in *Iqbal* to be limited to the precise context in which Mr. Iqbal's claim arose: *deliberate* disparate treatment of a racial/national group. It saw "nothing in *Iqbal* that indicates that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases," such as that brought by Mr. Starr.<sup>96</sup>

In a section entitled "Supervisory Liability for Deliberate Indifference," the Ninth Circuit observed that a:

[D]efendant may be held liable as a supervisor under § 1983 'if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.' [A] plaintiff must show the supervisor breached a duty to plaintiff which was the proximate cause of the injury. The law clearly allows actions against supervisors under section 1983 as long as a sufficient causal connection is present and the plaintiff was deprived under color of law of a federally secured right.<sup>97</sup>

It went on to state that:

The requisite causal connection can be established . . . by setting in motion a series of acts by others, or by "knowingly refus[ing] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury." "A supervisor can be liable in his

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93 *Id.* at 19.

94 *Starr v. Baca*, 633 F.3d 1191, 1193 (9th Cir. 2011).

95 *Id.* at 1196.

96 *Id.*

97 *Id.* at 1196-97 (quotations omitted).

individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others.”<sup>98</sup>

The Court went on to reaffirm the critical pre-*Iqbal* standard that “acquiescence or culpable indifference’ may suffice to show that a supervisor ‘personally played a role in the alleged constitutional violations.’”<sup>99</sup>

In reaching this conclusion, the Ninth Circuit commented on the cases being decided by the other courts of appeal, stating that it “also note[s] that, to the extent that our sister circuits have confronted this question, they have agreed with our interpretation of *Iqbal*.”<sup>100</sup> The *Starr* panel included the First Circuit in

<sup>98</sup> *Id.* at 1197 (quotations omitted).

<sup>99</sup> *Id.* (quoting *Menotti v. City of Seattle*, 409 F.3d 1113, 1149 (9th Cir. 2005)).

<sup>100</sup> *Id.* at 1196. See *Dodds v. Richardson*, 614 F.3d 1185, 1204 (10th Cir. 2010) (concluding:

[T]hat after *Iqbal*, Plaintiff can no longer succeed on a § 1983 claim against Defendant by showing that as a supervisor he behaved ‘knowingly or with deliberate indifference that a constitutional violation would occur’ at the hands of his subordinates, unless that is the same state of mind required for the constitutional deprivation he alleges.

(quoting *Serna v. Colorado Dept. of Corrections*, 455 F.3d 1146, 1151 (10th Cir. 2006) (internal quotations omitted));

*T.E. v. Grindle*, 599 F.3d 583, 591 (7th Cir. 2010) (determining that *Iqbal* does not change the fact that “[w]hen a state actor’s deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity, that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate, and the actor may be held liable for the resulting harm.” This is a case that involved injurious acts against schoolchildren and determined that supervisors can be held liable if they “encourag[ed] a climate to flourish where innocent [children] were victimized,” allowing a “viable” theory of liability by applying pre-*Iqbal* cases supporting a due process theory based on the fact “that the defendants created a risk of harm, or exacerbated an existing one.” *Id.* at 590.); *Whitson v. Stone County Jail*, 602 F.3d 920 (8th Cir. 2010) and *Parrish v. Ball*, 594 F.3d 993 (8th Cir. 2009) (holding that despite the fact that the landscape may have changed, supervisory responsibility still lies, respectively, on an official’s “deliberate indifference to the risk [of] assault[],” *Whitson*, 602 F.3d at 928, and when an official received notice of unconstitutional acts by subordinates, the defendant must “demonstrate[] deliberate indifference to or tacit authorization” of such acts, “fail[ure] to take sufficient remedial action” and caus[ation of] the injury, *Ball* 594 F.3d at 1002; *Santiago v. Warminster*, 629 F.3d 121, 129 n.5 (3rd Cir. 2010) (reaffirming that:

There are two theories of supervisory liability, one under which supervisor can be liable if they established and maintained a policy, practice or custom which directly caused the constitutional harm, and another under which they participated in violating plaintiff’s rights, directed others to violate them, or, as the persons in charge, had knowledge of and acquiesced in their subordinates violations.)

*Id.*

*Floyd v. City of Kenner*, 351 F. Appx. 890 (5th Cir. 2009) (rejecting the particular claims against two supervisors in that case as “speculations” and “bare assertions without detail or content,” lacking “specific facts that constitute a deprivation of [Constitutional] rights,” but noting that supervisors may still be held liable if there is “a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.” *Floyd*, 351 F. Appx. at 898-899.

this consensus, referencing the court's 2009 decision of *Sánchez v. Pereira-Castillo*.<sup>101</sup> The panel cited with approval the First Circuit's discussion of the standard for supervisory liability, which in turn had cited *Iqbal*:

Although 'Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*,' supervisory officials may be liable on the basis of their own acts or omissions, . . . [including supervising] 'with deliberate indifference toward the possibility that deficient performance of the task may contribute to a civil rights deprivation.'<sup>102</sup>

What all of this means for the future of civil rights litigation is still an open question. No doubt, the Supreme Court will ultimately have to weigh-in again on questions such as the degree of specificity required in pleadings pursuant to the new standard. The Court will also eventually have to resolve a case squarely raising the question of supervisory liability and the survival of the pre-*Iqbal* standards for imposing such responsibility, particularly in §1983, as opposed to *Bivens* actions.

In the meantime, however, several judges of the District Court for the District of Puerto Rico appear to be determined to read *Iqbal* in the harshest manner, clearing their docket of cases alleging government misconduct by cutting off litigants at the pass, prohibiting them from even commencing discovery, and essentially precluding such claims before the federal court in Puerto Rico. The First Circuit, on the other hand, may continue to put a brake on the most outrageous decisions, instructing the district judges that their role in drawing upon their "judicial experience and common sense," does not allow them to "disregard properly pled factual allegations, 'even if it strikes a savvy judge that actual proof of those facts is improbable.'"<sup>103</sup>

## II. SUMMARY DISPOSITIONS IN DISCRIMINATION CASES

### A. Overcoming the Pretrial Burdens and Analysis

While it is certainly true that the *Twombly/Iqbal* pleading rules promise high obstacles for civil rights litigants at the pleading stage, these are not the only impediments to successfully litigating such claims. Even before *Iqbal*, plaintiffs in employment discrimination cases faced major procedural impediments in their path to achieving a jury trial and sustaining a verdict. The methodology for proving civil rights claims is fraught with danger for plaintiffs, since judges, despite authority to the contrary, apply arcane burden paradigms in a mechanical

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<sup>101</sup> *Sánchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009).

<sup>102</sup> *Id.* (quoting *Iqbal v. Ashcroft*, 129 S.Ct. 1937, 1948 (2009); *Camilo-Robles v. Zapata*, 175 F.3d 41, 44 (1st Cir. 1999)).

<sup>103</sup> *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 25 (1st Cir. 2011) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Iqbal*, 129 S.Ct. at 1950).

manner. Even if the pleading stage is successfully passed, the next major hurdle is summary judgment, a process in which a district judge often applies his or her own prejudices to find inferences of discrimination to be unreasonable.

Due to the nature of employment discrimination claims, reasonable inferences from an evidentiary record must be based on an examination of motive and intent, which is clearly best assessed at a trial where subtleties of demeanor and attitude can be observed. An employment discrimination plaintiff, however, must first convince the judge to not dispose of the case through the summary judgment mechanism. While this is not an easy task for any civil rights plaintiff, it is especially arduous in the context of employment discrimination cases.

The standards applicable to employment discrimination cases are based on an unwieldy methodology, built upon shifting burdens and stages of presentation. A plaintiff alleging a violation of federal anti-discrimination law must first make a *prima facie* showing that he or she has marshalled sufficient evidence to satisfy four criteria — (1) belonging to a protected category; (2) qualified for the position; (3) suffering an adverse action; and (4) that the position remained open or was filled with someone who is typically from outside of the protected category.<sup>104</sup> Once the *prima facie* standard is satisfied,<sup>105</sup> then the employer has a burden of *production* to articulate a non-discriminatory legitimate business reason for the employment decision.<sup>106</sup> If this burden is met, then the inquiry shifts back to the plaintiff to demonstrate that the employer's proffered justification is pretextual and that the real reason was discrimination, focusing on the "ultimate factual issue,"<sup>107</sup> whether there are sufficient facts in the record from which a reasonable jury could conclude that the challenged action was discriminatory.<sup>108</sup>

This cumbersome artifice masks what could be considered the "bottom line" in discrimination cases at the summary judgment stage: Does the plaintiff's proof, taken as a whole, allow the inference that the employer's action was based on impermissible discrimination? It is not a question of whether each single item is satisfied to a "T," but rather whether the record, as a whole, demonstrates that

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**104** McDonnell Douglas Corp v. Green, 411 U.S. 792, 802 (1973).

**105** It is worthy of note that plaintiff's burden at this stage is "*de minimis*" and certainly "not onerous." *Fernandes v. Costa Brothers Masonry*, 199 F.3d 572, 584 n.4, 580 (1st Cir. 1999). The *prima facie* method was "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

**106** The employer need only present a sufficient explanation "to enable a rational factfinder to conclude that there existed a nondiscriminatory reason for the . . . employment action." *Ruiz v. Posadas de San Juan Associates*, 124 F.3d 243, 248 (1st Cir. 1997).

**107** *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

**108** These basic standards are altered in specific factual and legal contexts, such as sexual or religious harassment, in which the plaintiff's burden includes the requirement that the harassment be sufficiently severe to affect the "terms or conditions" of employment. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993). In the context of retaliation, additional criteria apply, such as the temporal relationship between the employer's adverse action and the allegedly protected conduct which provoked the retaliation. See *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 16 (1st Cir. 1997).

a plaintiff is entitled to have a jury infer that he/she was subject to illegal discrimination.

Any doubt as to the rule prohibiting a mechanical application of the three-stage *McDonnell Douglas* analysis was dissipated by the 2000 decision of the United States Supreme Court in *Reeves v. Sanderson Plumbing Products*, which mandated that the strength of a plaintiff's case must be judged on the *record as a whole*.<sup>109</sup> During this summary judgment analysis, moreover, the judge should not give credence to uncorroborated evidence of a decision-maker's alleged *non-discriminatory* reasons, if the plaintiff presented evidence contradicting the decision-maker or impeaching his or her statement as to motive. The impeachment can take many forms, including the proffering of a false reason and the failure to follow businesslike procedures.<sup>110</sup> Evidence that the decision-maker has changed stories regarding the motivation for the employment decision, in and of itself, can be evidence that the official story is pretextual.<sup>111</sup>

Of course, a fact-finder's disbelief of an employer's proffered reason for its action may be highly probative of the ultimate issue—whether the employment decision was based on illegal discrimination. Such was the case in *Reeves*, in which the Court indicated that “the [Fifth Circuit] Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence.”<sup>112</sup> The Court explained that “[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.”<sup>113</sup> Indeed, the discrimination explanation “may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.”<sup>114</sup>

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**109** *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150 (2000). Although *Reeves* addressed the evidentiary burdens and standards in discrimination cases in the context of for post-trial Rule 50 determinations, the Court clarified that the Rule 50 standard “mirrors” that which applies in the Rule 56 summary judgment context and that the “inquiry under each is the same.” *Reeves*, 530 U.S. at 150.

**110** *Id.* at 150-51.

**111** *Id.* at 146-49. See also *Santiago-Ramos v. Centennial*, 217 F.3d 46 (1st Cir. 2000) (establishing that “[a]nother method of establishing pretext is to show that [the company's] nondiscriminatory reasons were after-the-fact justifications, provided subsequent to the beginning of legal action” and that direct contradiction of the official reasons for the employment action is, of course, one of the many means of showing intentional discrimination). *Santiago-Ramos*, 217 F.3d at 56.

**112** *Reeves*, 530 U.S. at 146. The evidence in *Reeves* consisted of comments remarkably similar to those in the case at bar. A decision-maker stated that Reeves “was so old [he] must have come over on the Mayflower” and “was too damn old to do [his] job.” *Id.* at 151. In finding sufficient evidence of age-bias, the Supreme Court referenced these remarks, as well as a co-worker's observation that the decision-maker treated Reeves in a manner that was decidedly different from the way he treated younger employees. *Id.*

**113** *Id.* at 134.

**114** *Id.*

In employment discrimination cases, where issues of intent and motivation are critical to understanding what occurred—and different inferences could be drawn from the evidence—one would think that summary judgments would be rare. Unfortunately, this is not the case. Many judges enter into the fray, issuing dispositive rulings in favor of employers based on their own interpretations of the evidence.<sup>115</sup> In point of fact, many commentators believe that this has contributed to a remarkable decline in the number of employment discrimination cases filed in federal courts in recent years. Once accounting for nearly ten percent of the docket of the federal courts, by 2009 such cases were down to just over six percent of the docket, falling behind such categories as *habeas* petitions and product liability cases.<sup>116</sup> Given the make-up of the federal judiciary, it is very difficult for a plaintiff in a civil rights case to achieve the jury trial promised by the federal judiciary and the Seventh Amendment to the United States Constitution.<sup>117</sup>

### *B. The Experience in Puerto Rico and the First Circuit: A Changing Pattern*

For many years, the judges of the District Court for the District of Puerto Rico dismissed employment discrimination cases with virtual impunity, confident that the First Circuit would leave such decisions to their discretion.<sup>118</sup> In so doing, the judges freely applied their own prejudices and interpretation of the facts to the disadvantage of plaintiffs, holding employees to a rigorous standard of proof in a *prima facie* case. The judges often find decision-maker's discriminatory comments to be nothing more than *stray remarks*. Evidence of a hostile environment was deemed not to comply with the pervasiveness requirement and the employer's explanation of a legitimate business reason for their actions were

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<sup>115</sup> The frequency of the summary judgment mechanism to dispose of employment discrimination claims has been criticized by several commentators. See, e.g., Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993).

<sup>116</sup> See Clermont & Schwab, *supra* note 11, at 2.

<sup>117</sup> See *id.* at 5 (“[F]ederal courts disfavor employment discrimination plaintiffs, who are now forswearing use of those courts.”). In Puerto Rico, this also means forswearing one’s right to a jury trial, as there are no juries in civil cases in the courts of Puerto Rico.

<sup>118</sup> The active use of the summary judgment mechanism in the federal court in Puerto Rico was reflective of an overall trend in the federal judiciary. See Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141 (2000). The number of civil and criminal trials in the federal courts declined from a total of 16,255 in 1973 to 10,424 in 1999, at the same time that the number of active and senior judges nearly doubled and a great number of magistrate judges were added to the judiciary. On the civil side, it is clear that the leap is attributable in large part to the use of summary judgment to dispose of cases. *Id.* at 142.

accepted at face value.<sup>119</sup> With rare exceptions,<sup>120</sup> the Court of Appeals approved of such docket-clearing decisions.

As the new century began, however, a different pattern emerged, with fairly frequent reversals by the First Circuit of employment discrimination cases dismissed on summary judgment by federal judges in Puerto Rico. For example, in *Meléndez-Arroyo v. Cutler-Hammer* the First Circuit found several highly offensive ageist comments sufficient to allow the plaintiff her right to a jury trial on her ADEA claim.<sup>121</sup> In *Santiago-Ramos v. Centennial*,<sup>122</sup> the First Circuit reminded the district court that the “aggregate package of proof” must be considered, with all inferences in favor of the plaintiff, to determine if there is a genuine issue of fact on improper motive; emphasizing the particular caution which should be exercised before granting summary judgment for employers on such issues as pretext, motive and intent.<sup>123</sup> In *Domínguez-Cruz v. Suttle Caribe*,<sup>124</sup> the Court explained that the “totality of the evidence” need be examined to decide whether “there was evidence presented on summary judgment from which a jury could (although need not) infer that the employer’s claimed reasons for terminating [the plaintiff] were pretextual and that the decision was the result of discriminatory animus.”<sup>125</sup>

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**119** See, e.g., *Rodríguez Cuervos v. Wal-Mart Stores*, No. 96-2014, 1998 U.S. Dist. LEXIS 22445 (D. P.R. 1998), *aff’d*, 181 F.3d 15 (1st Cir. 1999) (granting summary judgment, upon finding plaintiff had failed to demonstrate that he had been replaced by an employee outside of the protected class and that the employer had established a legitimate, non-discriminatory reason for its action); *Alegre v. Schering Plough del Caribe*, 975 F.Supp. 153 (D. P.R. 1997), *aff’d* *Alegre v. Schering Plough Del Caribe, Inc.*, 201 F.3d 426 (1st Cir. 1998) (seeing age discriminatory comments as *stray remarks* unrelated to the employment decision).

**120** One of the few exceptions was the case of *Lipsett v. Univ of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988) (reversing summary judgment in a celebrated cases of sex discrimination and harassment in the UPR Residency Program in General Surgery). The Court of Appeals noted that summary judgment would be *inappropriate* if a jury could infer that the proffered reasons were pretextual and resulted in improper retaliation or discrimination. Although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. *Id.* at 895. Another exception to the general rule was *Mulero-Rodríguez v. Ponte, Inc.*, which reversed a grant of summary judgment in a national origin and age discrimination case, finding that the anti-Puerto Rican comments of a person in a position to influence decision-making was not a “stray comment,” and emphasizing that “determinations of motive and intent, particularly in discrimination cases, are questions better suited for the jury.” *Mulero-Rodríguez v. Ponte, Inc.*, 98 F.3d 670, 677 (1st Cir. 1996) (quoting *Pettiti v. New England Tel. & Tel. Co.*, 909 F.2d 28, 34 (1st Cir. 1990)).

**121** *Meléndez-Arroyo v. Cutler-Hammer*, 273 F.3d 30 (1st Cir. 2001) (holding that court must consider whether the plaintiff presented sufficient “admissible evidence to create a factual issue for trial on the issue of motivation—that is to permit a reasonable jury to conclude that the decision . . . was taken or prompted by someone based on [the discriminatory factor]”). *Meléndez-Arroyo*, 273 F.3d at 33.

**122** *Santiago-Ramos v. Centennial*, 217 F.3d 46 (1st Cir. 2000).

**123** *Santiago-Ramos*, 217 F.3d 46.

**124** *Domínguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424 (1st Cir. 2000).

**125** *Id.* at 430-31.

The realities of the workplace hardly ever result in irrefutable evidence of discriminatory animus.<sup>126</sup> In this day and age, it is an unusual case when a supervisor openly expresses his/her discriminatory views. As the First Circuit has noted, a plaintiff in a discrimination case “will rarely, if ever be able to produce a ‘smoking gun’ that provides direct, subjective evidence of an employer’s [animus]. Rather, the plaintiff must convince the fact-finder to draw an inference from a broad array of circumstantial and often conflicting evidence’.”<sup>127</sup> However, several of the judges of the district court in Puerto Rico have failed to take these lessons to heart, often requiring evidence which is virtually impossible for a plaintiff to obtain before allowing a discrimination case to go to a jury.

Plaintiffs whose case is dismissed on summary judgment by judges who are unwilling to credit their perceptions regarding the discriminatory basis for employment decisions are often left without recourse. Plaintiffs’ counsel, often having spent hundreds of hours and thousands of dollars on the litigation—and faced with Law 402 of 1950, the statutory prohibition against charging their clients—often give up at that stage, unable or unwilling to undertake an appeal which is expensive and time-consuming. Dockets are cleared, favorable statistics are maintained, but justice is not done.

In recent years, the First Circuit has proven to be a more receptive forum for plaintiffs willing and able to appeal such cases, putting the brakes on those judges who are too quick on the trigger. A review of cases decided by the Court of Appeals in recent months reveals a distinct pattern of reversals of decisions by the judges in Puerto Rico who summarily dismissed employment discrimination claims, whether on the pleadings, on summary judgment, or in the Rule 50 context.<sup>128</sup>

For example, in a period of just thirteen months between mid-2010 and mid-2011, the First Circuit reversed Judge Francisco Besosa no less than four times on

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<sup>126</sup> It is worth noting that the First Circuit long ago acknowledged that “‘smoking gun’ evidence is ‘rarely found in today’s sophisticated employment world’.” *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 n. 12 (1st Cir. 1999) (quoting *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 171 n. 8 (1st Cir.1998)). It has been suggested that the difficulty in identifying such evidence may be due to the fact that “[e]mployers have become increasingly adept at protecting themselves from discrimination lawsuits. It is rare for an employer to make a direct statement to an employee such as, ‘I can’t hire a woman for this job.’” Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C.L. REV. 203, 215 n. 45 (1993). For this reason, when “determining how much proof and what quality of proof is needed to rebut the defendant’s articulated reason for its employment decision, courts should consider the sophistication of today’s defendants. Many companies are known to keep bad comments in all employee files in order to defend against potential suits. Consequently, negative comments in an employee’s earlier performance reviews are not necessarily reliable. Performance review and notes placed in an employee’s file after the conflict between the employee and employer arises should have little or no probative value because they are after-the-fact justifications for the employer’s actions.” *Id.* at 255.

<sup>127</sup> *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 895 (quoting *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 929 (1st Cir.1983)).

<sup>128</sup> See FED. R. CIV. P. 50(a)-(b).

decisions granting summary disposition to defendants in employment cases. Three of the cases had been disposed of on summary judgment.<sup>129</sup> One more had been dismissed by this judicial officer at the close of the plaintiff's evidence at trial.<sup>130</sup> In all, the court of appeals found that the judge had improperly drawn specific inferences from the evidence while ignoring reasonable interpretations that the jury was entitled to make as the ultimate trier of fact.

*Rosario v. Department of the Army*, decided on June 2, 2010, involved a claim by a civilian Fort Buchanan employee that claimed she was subjected to a hostile work environment in violation of Title VII.<sup>131</sup> Judge Besosa dismissed the case on summary judgment, concluding that the offending conduct alleged by the plaintiff (including frequent remarks about her underwear) amounted "only to a lack of courtesy and professionalism rather than gender-based harassment sufficiently severe or pervasive to create a hostile work environment."<sup>132</sup> In reversing summary judgment, the court of appeals noted that, while the alleged behaviors *could* be interpreted as "offhand comments or isolated episodes, some of which were motivated by legitimate workplace concerns, that view is certainly not the only one that could reasonably be drawn from the record."<sup>133</sup>

Two months later, on August 5, 2010, the Court of Appeals for the First Circuit again reversed a grant of summary judgment in an employment discrimination case ruled upon by Judge Besosa. The plaintiff in *Collazo v. Bristol-Myers Squibb* alleged that he was terminated in retaliation for his protected activity, in encouraging the company to take seriously the complaint of sexual harassment brought by one of his supervisees.<sup>134</sup> In contrast to the district judge, who had granted Bristol-Myers' summary judgment motion "for the reasons stated by defendant Bristol-Myers" in its brief,<sup>135</sup> the First Circuit undertook an extensive analysis of the nature of Title VII's prohibition of retaliation for *opposing* illegal practices. It found that the lower court had erred in rejecting the plaintiff's "opposition" claim, based on its erroneous understanding that such a claim requires that it be Mr. Collazo, himself, who had actually "initiated" a complaint.<sup>136</sup> The court had also given insufficient importance to several actions by the plaintiff constituting support for the other employee's complaints. The totality of the record demonstrated that "[a] jury could reasonably view Collazo's persistent

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<sup>129</sup> *Vega-Colón v. Wyeth Pharmaceuticals*, 625 F.3d 22 (1st Cir. 2010); *Collazo v. Bristol-Myers Squibb Manufacturing, Inc.*, 617 F.3d 39 (1st Cir. 2010); *Rosario v. Department of the Army*, 607 F.3d 241 (1st Cir. 2010).

<sup>130</sup> *Valle-Arce v. Puerto Rico Ports Authority*, 651 F.3d 190 (1st Cir. 2011).

<sup>131</sup> *Rosario*, 607 F.3d 241.

<sup>132</sup> *Id.* at 242.

<sup>133</sup> *Id.* at 247.

<sup>134</sup> *Collazo*, 617 F.3d at 42.

<sup>135</sup> *Id.* at 44.

<sup>136</sup> *Id.* at 46.

efforts to help [his underling] initiate her sexual harassment complaint and urge Human Resources to act upon that complaint as resistant or antagonistic to the complained-of conduct.<sup>137</sup> On yet another critical point, the court of appeals also rejected the lower court's notion that the plaintiff had any burden to demonstrate the actual validity of the underlying sexual harassment complaint in order to prevail on his related retaliation claim.<sup>138</sup>

Another reversal came a few months later, in *Vega-Colón v. Wyeth Pharmaceuticals*,<sup>139</sup> decided on October 28, 2010. The employee's claim was based on the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), the law protecting active military personnel from discrimination in employment based on their military service.<sup>140</sup> USERRA has a burden-shifting paradigm similar to the Title VII method discussed above, with the employee bearing an initial burden of presenting evidence establishing that his military status "was at least a motivating or substantial factor" in the adverse employment action.<sup>141</sup> The employer then has to show that it would have taken the employment action in the absence of the plaintiff's military status.<sup>142</sup>

Although the court of appeals affirmed the district judge's dismissal of several of Vega's claims, it vacated summary judgment on one crucial issue: the extension of a Performance Improvement Plan which was explicitly based on the employee's absence for military service.<sup>143</sup> There was sufficient record evidence to allow the claim to proceed, including specific non-hearsay party admissions made by company supervisors with respect to this issue. Rejecting the district court's analysis, the appeals panel found that Wyeth had failed to meet its burden and that "the evidence [was] sufficiently strong that a reasonable jury could find in Vega's favor."<sup>144</sup>

The string of reversals of summary disposition by this particular judicial officer continued with *Valle-Arce v. Puerto Rico Ports Authority*,<sup>145</sup> a decision issued on July 15, 2011. The court of appeals reversed a Rule 50 ruling which Judge

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 48 ("To establish participation in a protected activity under the opposition clause . . . the plaintiff need not show that the conditions he or she opposed 'actually amounted to a violation of Title VII' . . . [but rather] that he or she had 'a good faith, reasonable belief that the underlying challenged actions' were unlawful" (quoting *Fantini v. Salem State College*, 557 F.3d 22, 32 (1st Cir. 2009)).

<sup>139</sup> *Vega-Colón v. Wyeth Pharmaceuticals*, 625 F.3d 22 (1st Cir. 2010).

<sup>140</sup> See Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4335 (2002 & Supp. 2011).

<sup>141</sup> 38 U.S.C. § 4311.

<sup>142</sup> *Vega-Colón*, 625 F.3d at 29.

<sup>143</sup> A Magistrate Judge had recommended that summary judgment be denied as to that issue, but Judge Besosa disagreed and ordered summary disposition on that claim, as well as all of the others raised by the employee. *Id.* at 30 n. 9.

<sup>144</sup> *Id.* at 31.

<sup>145</sup> *Valle-Arce v. Puerto Rico Ports Authority*, 651 F.3d 190 (1st Cir. 2011).

Besosa had issued against the plaintiff, who claimed that she was terminated due to the refusal of the employer to grant her request for reasonable accommodation pursuant to the Americans with Disabilities Act (hereinafter ADA) and in retaliation for her exercise of her statutory rights.<sup>146</sup> The judge dismissed the case after the plaintiff presented her evidence, finding that she had not met her burden under the ADA of demonstrating that she was a *qualified* individual able to perform the essential functions of her job despite her disability. In making this determination, Judge Besosa viewed as a critical element Valle's frequent absences from the workplace, observing that "[a]n employee who does not come to work cannot perform any function [,] not just the essential functions of her job."<sup>147</sup>

In a somewhat harsh decision, the court of appeals criticized the district judge's oral "bare-bones ruling," noting that it was "not the role of the district court 'to consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence'."<sup>148</sup> The First Circuit also faulted the district court for its determination that Valle did not qualify under the ADA due to her excessive absences, questioning its refusal to credit the record evidence establishing that she would have been able to work had the employer granted her request for accommodation.<sup>149</sup> It also reversed the district court's dismissal of plaintiff's retaliation and failure to accommodate claims.<sup>150</sup>

The court of appeals did not mince words in the context of another reversal, this time with respect to Judge Jaime Pieras. The plaintiff in *Sepúlveda-Villarini v. Department of Education of Puerto Rico* brought his claim pursuant to both ADA and § 504 of the Rehabilitation Act.<sup>151</sup> The case went up on appeal from a dismiss-

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<sup>146</sup> *Id.* at 193. See FED. R. CIV. P. 50(a).

<sup>147</sup> *Id.* at 200.

<sup>148</sup> *Id.* at 199 (quoting *Andradre v. Jamestown Housing Authority*, 82 F.3d 1179, 1186 (1996)). The court of appeals also noted that it would have been better for the trial judge to reserve decision on the Rule 50 motion, as a "wise and time-saving precaution," minimizing "the risk that the trial will have to be replayed [while retaining] the power to pass on the sufficiency of the evidence in a timely manner." *Id.* at 199 n. 8 (quoting *Gibson v. City of Cranston*, 37 F.3d 731, 735 n. 4 (1st Cir.1994)). Had the jury found in favor of Valle and the judge had nonetheless entered a judgment notwithstanding the verdict, the court of appeals would have had the option of reinstating the initial verdict, rather than remanding for a possible retrial.

<sup>149</sup> *Id.* at 200.

<sup>150</sup> With respect to the retaliation claim, the court noted that the district judge had dismissed the claim on the basis of oral argument during trial, with no written briefs, and that it had issued a two-page ruling which failed to "explain . . . the grounds" on which the defendant was entitled to judgment. *Id.* at 201. The court of appeals, on the other hand, found more than sufficient evidence on the basis of which a jury could conclude that Ms. Vera's termination was based on impermissible retaliation. This included the timing of the dismissal, as well as substantial evidence demonstrating that she had been singled out for engaging in conduct which had been tolerated when done by employees who had not requested accommodation. *Id.*

<sup>151</sup> *Sepúlveda-Villarini v. Department of Education of Puerto Rico*, 628 F.3d 25 (1st Cir. 2010). See Rehabilitation Act, 29 U.S.C. § 794 (applying to entities receiving federal funds).

sal at the pleadings stage, and was reversed in an opinion authored by former United States Supreme Court Justice David Souter, the very Judge who had authored *Twombly* and had dissented in *Iqbal*.<sup>152</sup> Justice Souter found that the district judge had erred in “demand[ing] more than plausibility.”<sup>153</sup> Misapplying the standard, the lower court required precise specifics as to *how* the requested accommodation would have been medically significant. The court of appeals observed that the judge’s reasoning could “even be read as an expression of skepticism that medical evidence would support the causal claim.”<sup>154</sup>

A few months earlier, Judge Pieras had been reversed in another case involving the Department of Education. The plaintiff in *Agusty-Reyes v. Department of Education* was a primary school teacher who alleged that she was repeatedly sexually harassed by her supervisor and that her tenure was ultimately blocked by a retaliatory poor evaluation given by the supervisor upon her rejection of his advances.<sup>155</sup> The court of appeals rejected the district court’s overall view of the evidence, as well as its conclusion that the plaintiff had not suffered a tangible employment action. The court noted that a failure to grant tenure was the functional equivalent of a failure to promote, “a well-recognized tangible employment action.”<sup>156</sup> It also could “lead to a meaningful change in an employee’s benefits in an up-or-out situation at a time when budgetary constraints loomed.”<sup>157</sup> The court of appeals also rejected the lower court’s grant of summary judgment to the defendants based on the *Faragher-Ellerth* affirmative defense available to defendants in sexual harassment cases.<sup>158</sup> Finally, it concluded that the plaintiff was more than enough record evidence from which a jury could have concluded that plaintiff was subject to illegal retaliation.<sup>159</sup>

The string of recent reversal of summary dispositions in employment discrimination matters also was felt by Judge Carmen Cerezo. In early March of this year, the court of appeals reversed Judge Cerezo’s grant of summary judg-

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152 See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). After retiring from the Court, Justice Souter has frequently sat on First Circuit appellate panels.

153 *Sepúlveda-Villarini*, 628 F.3d at 29. Justice Souter described the new pleading standard as follows: “The make-or-break standard . . . is that the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief.” *Id.*

154 *Id.* at 30.

155 *Agusty-Reyes v. Department of Education*, 601 F.3d 45, 46 (1st Cir. 2010).

156 *Id.* at 54.

157 *Id.*

158 See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). The doctrine provides for an affirmative defense in those cases in which sexual harassment does not result in a tangible adverse employment action. The employer can escape responsibility if it demonstrates (1) that its own actions to prevent and correct the harassment were reasonable, and (2) that the employee’s action in failing to seek corrective action were unreasonable. *Faragher*, 524 U.S. at 807.

159 *Agusty-Reyes*, 601 F.3d at 56.

ment in *Baltodano v. Merck, Sharp & Dohme (I.A. Corp.)*, in which the plaintiff, a non-Puerto Rican, claimed national origin discrimination and unjust discharge, particularly by one supervisor he alleged to be xenophobic.<sup>160</sup> The employer, when requested, repeatedly failed to respond to proper requests made in discovery, refusing to provide information concerning discipline taken against similarly situated employees. Rather than complying with its discovery obligations, the company proceeded to file a motion for summary judgment.<sup>161</sup> In response, the plaintiff presented a properly supported Rule 56(f) motion requesting that the court delay its ruling on summary judgment and allow the plaintiff to later supplement his brief upon receipt of the requested information. Although the plaintiff thereafter moved to compel Merck to provide the information, his motion was denied by the court.<sup>162</sup>

The First Circuit reversed in an opinion focused primarily on the fact that the summary judgment ruling was premature, since it had been made without allowing the plaintiff the opportunity to secure the information about comparitors. “Any other rule would encourage defendants to ‘stonewall during discovery—withholding or covering up key information that is otherwise available to them through the exercise of reasonable diligence.’”<sup>163</sup>

Within less than a month’s time, Judge Cerezo suffered a second reversal when the court of appeals vacated a judgment she issued in *Ríos-Colón v. Toledo-Dávila*, in which she granted dismissal at the pleadings stage.<sup>164</sup> The police officer plaintiff in *Ríos-Colón* claimed that he had been the victim of racial discrimination on the job, bringing his claim against the employer pursuant to Title VII and against individual supervisors under § 1983 and the Equal Protection clause.<sup>165</sup> The First Circuit reversed, finding error in the judge’s decision to even consider the constitutional claim of an Equal Protection violation with respect to the plaintiff’s adverse treatment at the PRPD.<sup>166</sup>

Chief Judge José A. Fusté did not escape the growing wave of reversals of summary dispositions in employment discrimination cases. In *Vera v. McHugh*, decided in October of 2010, the Court of Appeals reversed Judge Fusté on the dismissal of one of two sexual harassment claims brought by a Fort Buchanan employee.<sup>167</sup> The First Circuit disagreed with the lower court’s appreciation that

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<sup>160</sup> *Baltodano v. Merck, Sharp & Dohme (I.A.) Corp.*, 637 F.3d 38, 39 (1st Cir. 2011).

<sup>161</sup> *Id.* at 40-1.

<sup>162</sup> *Id.* at 41.

<sup>163</sup> *Id.* (quoting *Carmona v. Toledo*, 215 F.3d 124, 133 (1st Cir. 2000)).

<sup>164</sup> *Ríos-Colón v. Toledo-Dávila*, 641 F.3d 1 (1st Cir. 2011).

<sup>165</sup> *Id.* at 2.

<sup>166</sup> *Id.* at 4-5.

<sup>167</sup> *Vera v. McHugh*, 622 F.3d 17, 19 (1st Cir. 2011).

the events alleged by the plaintiff, factually and legally, did not constitute actionable sexual harassment.<sup>168</sup>

Ms. Vera alleged that her supervisor, on a daily basis, “stared at her in a sexual way, came so close to her that she could feel his breath, pulled his chair next to her so that their legs touched, laughed at her discomfort, blocked her escape from the cramped office with a closed door, and on one occasion called her ‘Babe’.”<sup>169</sup> Characterizing the plaintiff’s reactions to the supervisor’s mocking of her discomfort and his constant provocations in coming close to her “understandable,” the Court of Appeals expressed its view that “the facts and attendant circumstances suggest that [the supervisor] went out of his way to violate Vera’s privacy and the integrity of her personal space.”<sup>170</sup> Once again, the First Circuit restrained the excess of a district judge in Puerto Rico who had been too eager to substitute his own view of the facts and the inferences to be drawn therefrom, for that of the ultimate trier of fact.

As this article goes to print, yet another grant of summary judgment in an employment case in Puerto Rico has been reversed. On August 26, 2011, the court of appeals ruled in the case of *Pérez-Cordero v. Wal-Mart Puerto Rico, Inc.*, that Judge Juan M. Pérez-Giménez erred in granting summary judgment for Wal-Mart on the plaintiff’s claims of sexual harassment and retaliation.<sup>171</sup>

On the hostile environment claim, the court below had held that the plaintiff failed to demonstrate that his female supervisor’s actions in grabbing him, hugging him and sucking on his neck in front of an associate, or her sexually related remarks were “unwelcome.”<sup>172</sup> The judge also concluded that there was “no indication that the kissing incident was out of the ordinary or customary,” or that the alleged conduct was “anti-male or at least slightly sexual.”<sup>173</sup> The judge also believed that the reported incidents were not frequent or sufficiently severe to constitute an interference with the plaintiff’s performance or the terms and conditions of his employment.<sup>174</sup> Judge Pérez-Giménez also dismissed plaintiff’s retaliation claim despite the record evidence that after complaining of the sexual harassment, the employee was subjected to a public scolding and other forms of humiliation in front of co-workers, excluded from critical meetings, threatened with respect to his employment evaluation, and a disciplinary meeting was initiated by his supervisors in order to impose discipline upon him.<sup>175</sup>

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168 *Id.* at 20.

169 *Id.* at 27.

170 *Id.* at 28.

171 *Pérez-Cordero v. Wal-Mart Puerto Rico, Inc.*, 656 F.3d 19, 20 (1st Cir. 2011).

172 *Id.* at 27.

173 *Id.*

174 *Id.*

175 *Id.* at 29.

In a lengthy decision, the First Circuit reversed the district court in all respects. It found the evidence of “unwelcomeness” to be clearly sufficient.<sup>176</sup> Noting that sexual harassment need not be “sexual” in nature, but rather must be gender-specific, the court of appeals also rejected the district court’s analysis requiring the harassment to be “motivated by sexual desire.”<sup>177</sup> The appeals court also took the district judge to task for failing to recognize that the “severeness” of a hostile environment is not limited to the specific acts of sexual harassment, but also include the retaliatory acts — including public humiliation — suffered by the plaintiff upon his rejection of his supervisor’s advances. It found more than sufficient evidence of retaliation.<sup>178</sup> Throughout the opinion, the court of appeals observed that while the court below had correctly stated the applicable criteria, it had “applied [the relevant] factors far too rigidly” to the evidence in the record.<sup>179</sup>

The question remains—what to make of this large body of appellate jurisprudence over a short period of time, reversing summary dispositions in employment discrimination matters arising from the District of Puerto Rico? It is not difficult to conclude that several federal judges in Puerto Rico are simply too eager to clear their dockets of these cases. Whether this is based on their ideological bents, prior experience in the profession, institutional pressures, or some other explanation is a question left for another day.

It also appears, however, that these decisions, if appealed, will not escape the watchful eye of the appellate judges, who have, on several occasions and in different words, expressed their views that such “decision(s) belong to the jury, not the judge.”<sup>180</sup>

This demonstrates the importance of taking such cases to the appellate forum to question the practice of trial judges in this district of substituting their own views of the evidence for that of the jury to which litigants are entitled. If the decisions are left unquestioned, this practice will continue. If they are questioned on the basis of an adequately developed record, then justice may eventually be within reach, and the district judges may limit their impulse to take on the fact-finding role at procedural stages in which it is not appropriate for them to do so, based on the understanding that such dismissals will ultimately come back to bite them.

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<sup>176</sup> *Id.* at 28. In dismissing Pérez-Cordero’s case, the district judge made much of the customary practice among Wal-Mart employees of greeting each other with a kiss on the cheek. In strong language, the Court of Appeals noted that this practice was not “in any way probative of [the plaintiff’s] receptiveness to [his supervisor] forcefully sucking on his neck.” *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 31-2.

<sup>179</sup> *Id.* at 29.

<sup>180</sup> Valle-Arce v. Puerto Rico Ports Authority, 651 F. 3d 190, 199 (1st Cir. 2011).

## CONCLUSION

A review of the First Circuit decisions from early 2010 to the present has revealed an interesting pattern of reversals of summary dispositions with respect to civil rights cases appealed from the U.S. District Court for the District of Puerto Rico. While the *Iqbal* experience is still too recent to allow one to proclaim a true trend, the cases of *Peñalbert* and *Ocasio* portend a more narrow view of the pleadings limits than the expansive view the judges of the district court appear to be applying. On the other hand, with respect to summary dispositions in employment discrimination cases, the trend is bright and clear: the days of free-wheeling grants of summary disposition are gone. When improvidently granted, summary dispositions will be reversed. The Court of Appeals for the First Circuit is watching, and it will not hesitate to act to restrain the judicial excesses that are all too commonplace in this field in Puerto Rico.

This pattern, remarkably, bucks the overall trend in the federal judiciary, in which plaintiffs rarely achieve success in appeals from adverse decisions in employment discrimination actions.<sup>181</sup> The recent wave of First Circuit reversals of summary dispositions issued by the judges of the district court is astounding when compared with other jurisdictions. Data from the Administrative Office of the United States Courts, as reported by Clermont & Schwab, established that, in the entire federal judiciary in the seventeen-year period between 1988 and 2004, a total of 1,133 plaintiffs in employment discrimination cases won reversals on appeal from pretrial summary dispositions in the entire federal judiciary, winning less than eleven percent of the appeals filed.<sup>182</sup> The significance of the trend identified in this article, as evidenced by the *twelve* reversals in cases appealed from just one district court (the two *Iqbal* reversals on political discrimination, the Equal Protection claim reversal, and the nine reversals involving statutory employment discrimination claims), all in a period of a little more than a year, cannot be overstated.<sup>183</sup>

This is truly a breathtaking development which begs for an explanation that is beyond the purview of this article, except for the subjective view of the author that several of the district court judges in Puerto Rico have relied principally on their own ideological views and prior experience, in some cases as management-side litigators, in their rush to dismiss such claims. Apparently, the First Circuit

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<sup>181</sup> See Clermont & Schwab, *supra* note 11, at 110.

<sup>182</sup> *Id.*

<sup>183</sup> Taking the Clermont & Schwab figure of 1,133 reversals as a base line, one could extrapolate to the twelve Courts of Appeals and the ninety-four District Courts. Assuming, for the purpose of this analysis, that the volume of business is the same for all of the courts (even though the First Circuit is the smallest of the Courts of Appeals) one would expect there to be some 94 successful reversals in each Circuit for employment discrimination plaintiffs *over a seventeen-year period*, or 5.5 reversals per year. For each of the District Courts, the number would be twelve reversals in those same seventeen years or less than one case per year.

has finally undertaken a close examination of the underlying records in such cases. When one scratches the surface, the disconnect between the actual evidence and the trial judge's characterization of the same cannot be discounted. A plaintiff with a civil rights claim in Puerto Rico has a tough road ahead, facing obstacles at the pleadings stage, on summary judgment and at trial. If he or she has the staying power, however, there may be some light at the end of the tunnel.