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FEDERAL CIVIL RIGHTS ACT IN PUERTO RICO, GENERAL PRETRIAL THEORY AND *PRAXIS* IN THE NEW CENTURY

José Enrico Valenzuela-Alvarado[*]

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> If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate . . . We are driven by existing facts to provide for the several states in the South what they have been unable to fully provide for themselves; i.e., the full and complete administration of justice in the

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courts. And the courts with reference to which we legislate must be the United States courts.[1]

I. Introduction

Throughout my career in federal practice, I noticed that civil rights litigation in Puerto Rico is not broadly known by most of our colleagues. Different reasons contribute to such lack of general knowledge of said practice, like for example, the language, and the technicalities of the civil procedure rules that preclude competent attorneys to litigate in said forum.

There are also political differences between attorneys regarding the presence of the Federal District Court in Puerto Rico. Said differences provoked that a considerable number of attorneys opted not to practice in the federal forum. Nevertheless, although both sides can have legitimate reasons, either to practice or not in said forum, the truth of the matter is that the Federal District Court does exist in Puerto Rico, and we should observe critically its deficiencies and its virtues. As to the virtues of the federal system, despite of the particular political views that any attorney has, we should adopt them for the benefit of our system. Likewise, if other jurisdictions within our hemisphere or in another continents have a positive outcome in pursuing justice, we as attorneys should review them, placing apart our prejudices and chauvinism.

The instant law review pretends to contribute in several aspects to interested attorneys in federal practice, specifically in First Amendment litigation. First, I explain in short the history of the Civil Rights Act of 1961 and its consequences in federal litigation. Then, I proceed with a practical view of how to litigate, either from the plaintiff or from the defendant's side of the coin within the federal forum, from the complaint until the pretrial stage. For such, the federal rules of civil procedure are intertwined with the legal theory developed by the First Circuit Court of Appeals and the U.S. Supreme Court decisions, as also interpreted by the Federal District Court for the District of Puerto Rico. Let's begin the ride.

II. The Civil Rights Act of 1961, a little piece of history

Section 1983 was originally Section 1 of the Civil Rights Act of 1871.[2] It was 'modeled' on Section 2 of the Civil Rights Act of 1866,[3] and was enacted for the express purpose of "enforc[ing] the Provisions of the

[1] *Mitchum v. Foster*, 407 U.S. 225, 240-241 (1972) (citing Senator Osborn, Cong. Globe, 42d Cong., 1st Sess., 653 (1871)) [hereinafter *Mitchum*].
[2] *Id*. at 238.
[3] *Civil Rights Act*, 14 Stat. 27 (1866).

Fourteenth Amendment."[4] The predecessor of Section 1983 was thus, an important part of the basic alteration the federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era, and especially of the Fourteenth Amendment, which was its centerpiece, the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.[5]

The Civil Rights Act of 1961 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the U.S. Nation. All of us remember the social and political struggles in the mainland, by which civil rights activists like Dr. Martin Luther King, Jr., brought us his race equality endless desire legacy. The result of that activism, is Section 1983, which provides that:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceedings for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.[6] Thus, since 1961, the federal courts have experienced an explosion of cases surrounding a private cause of action for deprivation of civil rights as a result of state law or misconduct of government officials. The fuse for this explosion was 42 U.S.C. Section 1983.

Commentator William Hawkins[7] explains that in 1961, the case of *Monroe v. Pape*[8] ignited this fuse. Prior to *Monroe*, few cases had been brought under section 1983 because the courts had narrowly interpreted the "under color of'" law requirement.[9] This narrow interpretation usually

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[4] *Mitchum*, 407 U.S. at 240 (citing 17 Stat. 13).
[5] *Id*. at 239. (citing Horace Edgar Flack, *The Adoption of the Fourteenth Amendment* (The Johns Hopkins Press 1908); Jacobus Ten Broek, *The Anti-Slavery Origins of the Fourteenth Amendment* (University of California 1951)).
[6] *Id.* (citing Cong.Globe, 42d Cong., 1st Sess., 374-376 (1871)).
[7] William Hawkins, *Section 1983: A Basic Understanding*, 12 Am. J. Tr. Advoc. 355, 356 (1988).
[8] *Monroe v. Pape*, 365 U.S. 167, (1961) [hereinafter *Monroe*].
[9] Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?,* 26 Ind. L.J. 361 (1951).

required that state law authorize the conduct, which resulted in the deprivation of a civil right. In *Monroe*, the Supreme Court expanded this interpretation to include conduct by officials that violates state law.[10] The Court in *Monroe* held that section 1983 covered acts by all those "who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it."'[11] Simply, Section 1983 legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the U.S. Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.[12]

III. Who are the actors in a civil rights litigation?

As it is known, the Civil Rights Act, specifically Section 1983 of Title 42, "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." "The first step in any such claim is to identify the specific constitutional right allegedly infringed".[13]

Authors Ivan E. Bodensteiner and Rosalie Berger Levinson,[14] explain that while preparing the caption and pleadings in a Section 1983 complaint, plaintiff should take care to designate whether government officials are being sued in their official or individual capacity. When the plaintiff names an official in his individual capacity, she seeks "to impose personal liability upon a government official for actions he takes under the color of state law." When officials are sued in their personal capacity, they may raise qualified and/or absolute immunity as a defense. When a government official is sued in his official capacity, this is the equivalent of naming the government entity itself as a defendant. Where that governmental entity is a state, the plaintiff poses an absolute barrier unless the official capacity suit seeks only prospective relief. Where the governmental entity is a local or county unit, the plaintiff must establish official policy or custom.

Although most circuits today hold "that a plaintiff need not plead expressly the capacity in which he is suing a defendant in order to state a cause of action under Section 1983," much confusion can be avoided by

[10] *Monroe*, 365 U.S. at 187.

[11] *Id.* at 172.
[12] *Mitchum*, U.S. at 242.
[13] *Albright v. Oliver,* 510 U.S. 266, 271 (1994) [hereinafter *Albright*].
[14] Ivan E. Bodensteiner & Rosalie Berger Levinson, 1 *State and Local Government Civil Rights Liability* § 1:8 (2009).

clarifying the substance of one's complaint. In some cases this may involve naming the individual in his official capacity for injunctive relief and in his individual capacity for damages.

In Puerto Rico, if damages were to be awarded pursuant to 42 U.S.C. Section 1983, and/or any state discrimination laws, the funds would ultimately come from the Commonwealth of Puerto Rico[15]. Obviously, every plaintiff knows that a defendant might be covered by the Commonwealth of Puerto Rico Act No.104 of June 29,[16] which grants protection of the Commonwealth of Puerto Rico, permits an official charged in a civil rights action relating to official duties to request legal representation by the Commonwealth, and allows discretionally the Commonwealth to subsequently assume the payment if a judgment is rendered.?

However, Act No. 104 in no way waives the Commonwealth's Eleventh Amendment immunity in such suits; because said statute explicitly states that its provisions "shall not be construed . . . as a waiver of the sovereign immunity of the Commonwealth."[17] In *Ortíz-Feliciano v. Toledo-Dávila***,**[18] the First Circuit held that the indemnification provisions of Puerto Rico law certainly do not comprise such a waiver of the Eleven Amendment Immunity. Puerto Rico's Act. No. 104 provides that the Secretary of Justice shall decide in which cases the Commonwealth shall assume representation and "subsequently, after considering the findings of the court or which arise from the evidence presented," whether it is "in order" to pay the judgment.[19] Only limited standards are provided for granting or refusing indemnification, but they go to the merits of the Secretary of Justice's decision. Nonetheless, the Eleventh Amendment issue is addressed directly by the section 3085 of Act No. 104, which permits the request for indemnification in civil rights actions; it says that its provisions "shall not be construed . . . as a waiver of the sovereign immunity of the Commonwealth." The only remedy provided for reviewing the refusal of the Secretary of Justice to order indemnification is by "petition for review" before "the Superior Court" limited solely to questions of law.[20]

IV. Should a claimant exhaust administrative remedies before filing its civil rights complaint at the federal forum?

[15] *Fernández v. Chardón*, 681 F.2d 42, 60 (1st Cir. 1982).
[16] 1999 Laws P.R. 177 , Act. No. 104 of June 29, 1955, as amended by Act No. 9 of November 26, 1977, and Act No. 12 of July 21, 1977 [hereinafter "*Act No.104*"].
[17] U.S. Const. Amend. XI; 32 Laws. P.R. Ann. §§ 3085, 3087 (West 2009).
[18] *Ortíz-Feliciano v. Toledo-Dávila*, 175 F.3d 37, 40 (1st Cir. 1999).
[19] 32 Laws P.R. Ann. § 3087 (2006).
[20] *Id*.

The Federal Civil Rights Act goes directly to define what constitutes a civil rights violation under the United States Constitution, and provides remedies to a citizen that suffers constitutional violations. As said before, Section 1983 does not provide substantive rights, rather, its substantive source of rights are within the U.S. Constitution itself.[21] Same conclusion was reached by the Puerto Rico Supreme Court in *Leyva v. Aristud*.[22] As a consequence, State Courts can obtain jurisdiction in a federal action, except when federal law disposes the contrary or when there is inconsistency between a federal case and its adjudication in the State courts.[23]

Now, suffice is to say that a federal action does not necessarily excludes automatically actions within the State jurisdiction, which includes administrative State actions. Both jurisdictions are not seen as independent or different, rather, both are seen as courts or entities from a same nucleus. The Uunited States Supreme Court in *Howlett v. Rose*[24] said in sum that the governments and courts are within the "U.S. nation", if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them."[25] And for purposes of Section 1983 actions, Puerto Rico is considered as a "State" of the Union.[26]

In *First Fed. Savg. v. Asoc. de Condómines*,[27] and thereafter in *Mercado Vega v. U.P.R.,*[28] the Puerto Rico Supreme Court addressed this issue. In both cases, the Puerto Rico Supreme Court concluded that any constitutional civil rights violations do not necessarily preclude the administrative state process. In this mission, the court must require a high level of authenticity and clarity in the constitutional violation allegation based upon the Federal Civil Rights Act. Thus, it if a claimant does not points out specific facts, that constitutes constitutional violations of patent gravity and intensity, he or she should exhaust administrative remedies. Otherwise, if said claimant argues a patent severe constitutional violation, federal action is warranted at the federal or state level under Section 1983.

V. First Amendment litigation, one of the most common doctrines in civil rights litigation applicable in Puerto Rico

[21] *Albright*, 510 U.S. at 271, (1994); *Graham v. Connor,* 490 U.S. 386, 394 (1989).
[22] *Leyva v. Aristud*, 132 D.P.R. 489, 500 (1993) [hereinafter *Leyva*].
[23] *Howlett v. Rose*, 496 U.S. 356, 367 (1990) [hereinafter *Howlett*].
[24] *Id*. at 367-368. See *Tafflin v. Levitt,* 493 U.S. 455, 469 (1990).
[25] *Howlett*, 469 U.S. at. 367-368 (Citing Henry M. Hart, *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489 (1954)).
[26] José Enrico Valenzuela-Alvarado, *Federal Jurisdiction v. Abstention In Puerto Rico, Who Prevails*?, 43 Rev. Jurídica U. Inter. P.R. 279, 280 (2009) (citing, U.S. Const. amend. XI*, Bernier-Aponte v. Izquierdo-Encarnación*, 196 F. Supp. 2d 93, 98 (D.P.R. 2002), citing *Metcalf & Eddy v. P.R. Aqueduct & Sewer Authority,* 991 F.2d 935, 938 (1st Cir. 1993)).
[27] *First Fed. Sav. v. Asoc. de Condómines*, 114 D.P.R. 426, 438-439 (1983).
[28] *Mercado Vega v. U.P.R*., 128 D.P.R. 273, 286 (1991).

A. The "national sport" in Puerto Rico, political discrimination cases

Puerto Rico's political situation has its consequences in civil rights litigation. Specifically, throughout the years several cases involving First Amendment violations have been conducted before the federal district court in Puerto Rico.

Author Guillermo A. Baralt in his book History of the Federal Court in Puerto Rico, 1899-1999,[29] explains that there was an increase in the number of cases came before the federal court during the first half of the seventies. No doubt that the actions filed under the 1964 Civil Rights Act explain part of this increase regarding public employees that have been removed from their jobs by their political affiliation. For example, in March of 1969, seventeen employees terminated by the Municipality of San Juan filed a civil action against the New Progressive Party Mayor, Carlos Romero Barceló in the case named *Vargas v. Romero Barceló*.[30] In said case, the district court dismissed the case and the plaintiffs appealed. The First Circuit vacated and remanded the case for clarification regarding if the mayor was included in the complaint in his personal capacity, specifically stating that any in any Section 1983 action the defendant has to be sued in his individual capacity.[31]

Citing a plethora of federal civil rights cases decisions at the district level, the First Circuit in *Mirla Mireya Rodríguez-Marín v. Víctor Rivera-González*,[32] stated that discrimination based on political-party affiliation has been rampant in government employment in Puerto Rico. If further adds the First Circuit Court that said practice: " . . . has cost Puerto Rican taxpayers dearly in verdicts paid from public funds."[33] Thus, once explained one of the most common doctrines used at our district, which is political discrimination, the Author now proceeds to explain how to initiate such civil action and the available defenses.

In essence, to establish a *prima facie* case, the plaintiff has to show that there is a causal connection linking the allegedly discriminating conduct

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[29] Guillermo A. Baralt, *History of the Federal Court in Puerto Rico, 1899-1999*, 428-430 (Publicaciones. Puertorriqueñas 2004).
[30] *Vargas v. Romero Barceló*, 435 F.2d 843 (1st Cir. 1970).
[31] *Id*. at 844-845.
[32] *Rodríguez-Marín v. Víctor Rivera-González*, 438 F.3d 72, 75-76 (1st Cir. 2006) [hereinafter *Rodíguez-Marín*] (citing, e.g., *Pérez v. Zayas*, 396 F.Supp.2d 90 (D.P.R. 2005); *Román Román v. Delgado Altieri*, 390 F.Supp.2d 94 (D.P.R. 2005); *Padilla Román v. Hernández Pérez*, 381 F.Supp.2d 17 (D.P.R. 2005); *Sueiro Vázquez v. Torregrosa De la Rosa*, 380 F.Supp.2d 63 (D.P.R. 2005); *Rovira Rivera v. P.R. Elec. Power Auth*., 364 F.Supp.2d 154 (D.P.R. 2005); *Irizarry-López v. Torres-González*, 363 F.Supp.2d 7 (D.P.R. 2005)) (the Author clarifies for the record that in the case of *Pérez v. Zayas*, 396 F.Supp.2d 90, there was never a jury verdict against any defendant, and that the case dealt with "whistle blower" allegations based on the First Amendment of the U.S. Constitution. The appearing simply does not understand why the First Circuit Court of Appeals included said case in this discussion, but in order to comply with the citation rules, is quoted for those purposes only with the clarification included herein).
[33] *Rodríguez-Marín*, 438 F.3d at 76.

to his or her political beliefs.[34] Circumstantial evidence may be sufficient to support a finding of political discrimination,[35] but, plaintiff must make a fact-specific showing that a causal connection exists between the adverse treatment and their political affiliation.[36] For political affiliation to be a motivating factor behind an adverse employment action, those responsible for the deprivation of constitutional rights must have had knowledge of plaintiff's political affiliation.[37] If plaintiff successfully establishes his or her *prima facie* case, then the burden shifts to the defendants who must show that they would have taken the same action regardless of plaintiff's political affiliation.[38]

In *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,*[39] the Court established a two-part burden-shifting analysis for evaluating free speech claims, which has also been applied in the political discrimination context.[40] Once the *prima facie* case is established, the plaintiff must show that he engaged in constitutionally protected conduct, and that this conduct was a substantial or motivating factor for the adverse employment decision. If he does so, then the defendant is given the opportunity to establish that it would have taken the same action regardless of the plaintiff's political beliefs, commonly referred to as the *Mt. Healthy* defense.[41]

To meet his burden, plaintiff must point to evidence in the record that would "permit a rational fact finder to conclude that the challenged personnel action occurred and stemmed from a politically based discriminatory animus."[42] In meeting this burden, plaintiff does not need to produce direct evidence of a politically-based discriminatory animus, inasmuch as a discriminatory animus may be established with circumstantial evidence alone.[43]

Plaintiff then must show that there is a causal connection linking defendants' conduct to his political beliefs.[44] Once this burden is met, the defendants must articulate a nondiscriminatory basis for the adverse employment action and must prove by a preponderance of the evidence that

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[34] *LaRou v. Ridlon*, 98 F.3d 659, 662 (1st Cir. 1996) [hereinafter *LaRou*].
[35] *Estrada-Izquierdo v. Aponte Roque*, 850 F.2d 10, 14 (1st Cir. 1988).
[36] *Avilés-Martínez v. Monroig,* 963 F.2d 2, 5 (1st Cir. 1992) [hereinafter *Avilés-Martínez*].
[37] *Goodman v. Pennsylvania Turnpike Com'n***,** 293 F.3d 655, 663-664 (3rd Cir. 2002) [hereinafter *Goodman*]; *see González-De-Blasini v. Family Dept.*, 377 F.3d 81, 85 (1st Cir. 2004).
[38] *Rodríguez-Ríos v. Cordero*, 138 F.3d 22, 24 (1st Cir. 1998); *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) [hereinafter *Mt. Healthy*].
[39] *Mt. Healthy*, 429 U.S. at 287.
[40] *Rodríguez-Ríos v. Cordero*, 138 F.3d 22, 24 (1st Cir. 1998) [hereinafter *Rodíguez-Ríos*]; *Acevedo-Díaz v. Aponte,* 1 F.3d 62, 67 (1st Cir. 1993) [hereinafter *Acevedo-Díaz.*].
[41] *Mt. Healthy*, 429 U.S. at 287.
[42] *Rivera-Cotto v. Rivera*, 38 F.3d 611, 614 (1st Cir. 1994); *see Rodríguez-Ríos*, 138 F.3d at 24; *Vázquez v. López-Rosario*, 134 F.3d 28, 36 (1st Cir. 1998).
[43] *Pagán-Cuebas v. Vera-Monroig*, 91 F. Supp. 2d 464, 474 (D.P.R. 2000); *see Acosta-Orozco v. Rodríguez-de-Rivera*, 132 F.3d 97, 101-102 (1st Cir. 1997) [hereinafter *Acosta-Orozco*]; *Acevedo-Díaz,* 1 F.3d at 69.
[44] *LaRou*, 98 F. 3d at 662; *Avilés-Martínez*, 963 F.2d at 5.

the employment action would have been taken without regard to the plaintiff's politics.[45] "The burden of persuasion is on the [defendants] to establish a *Mount Healthy* defense. 'Summary judgment [is] warranted . . . only if defendants' evidentiary proffer compels the finding that political discrimination did not constitute a 'but for' cause for the [discharge]."[46]

In sum, in a political discrimination case, the plaintiff may discredit the proffered nondiscriminatory reason, either circumstantially or directly, by adducing evidence that discrimination was more likely than not a motivating factor. In this way, the burden-shifting mechanism is significantly different from the device used in other employment discrimination contexts, such as Title VII[47] cases, where a plaintiff is required to come forward with affirmative evidence that the defendant's nondiscriminatory reason is pretextual. In a political discrimination case, the defendant bears the burden of persuading the factfinder that its reason is credible. The evidence by which the plaintiff established his or her *prima facie* case may suffice for a factfinder to infer that the defendant's reason is pretextual and to effectively check summary judgment.[48]

B. The "Whistle Blower Discrimination" under the First and Fourteenth Amendment of the U.S. Constitution.

The line of Supreme Court cases striking this balance has yielded a three-part test, which this court summarized in *O'Connor v. Steeves.*[49] The court must first determine whether the issue about which the employee spoke was a "matter of public concern"; if not, there is no claim for First Amendment protection.[50] Second, the court evaluates the balance between the employee's First Amendment interests and the government's interests as an employer.[51] Finally, if the claim survives both of these tests, the plaintiff employee must show that the protected speech was a substantial or motivating factor behind the adverse employment action; the burden then shifts to the government employer to demonstrate by a preponderance of the evidence that it would have taken the same action absent the protected speech.[52] While the first two tests are typically legal determinations subject to *de novo* review, the third is a question of fact, which normally belongs to the jury.[53]

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[45] *Mt. Healthy*, 429 U.S. at 287; *Rodríguez-Ríos*, 138 F. 3d at 24.
[46] *Acosta-Orozco*, 132 F.3d at 103 (quoting *Jirau-Bernal v. Agrait,* 37 F.3d 1, 4 (1st Cir. 1994)).
[47] 42 U.S.C. §§ 2000(e).
[48] *Padilla-García v. Rodríguez*, 212 F.3d 69, 77-78 (1st Cir. 2000).
[49] *O'Connor v. Steeves*, 994 F.2d 905, 912-13 (1st Cir.1993).
[50] *Connick v. Myers,* 461 U.S. 138, 146 (1983); *see Tang v. Rhode Island,* 163 F.3d 7, 12 (1st Cir. 1998).
[51] *Rankin v. McPherson,* 483 U.S. 378, 388 (1987); *Mullin v. Town of Fairhaven,* 284 F.3d 31, 39-41 (1st Cir. 2002).
[52] *Mt. Healthy*, 429 U.S. at 287; *Wytrwal v. Saco Sch. Bd.*, 170 (1st Cir.1995).
[53] *Nethersole v. Bulger,* 287 F.3d 15, 18-19 (1st Cir. 2002); *O'Connor,* 994 F.2d at 912-13. *See* Rosado v. Roger Sabat, 335 F.3d 1 at 11, (1st Cir. 2003).

In *Garcetti v. Ceballos*,[54] a district attorney, working at that moment as a calendar deputy, investigated alleged inaccuracies in several affidavits used to obtain a critical search warrant in a pending criminal case. After investigating, the deputy concluded that the affidavits indeed contained serious misrepresentations, and therefore, prepared a memorandum explaining his findings to his supervisors and recommending dismissal of the case, recommendation that was not followed. Pursuant to these events, the deputy claimed he was subject to retaliatory employment actions in violation to the First and Fourteenth Amendments of the US Constitution and to 42 U.S.C. Section 1983.[55] The Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline".[56] The decision was based in the fact that the memorandum written by the deputy was made pursuant to his official duties as a calendar deputy.[57]

C. Fourteenth Amendment, procedural and substantive due process standards

Commentator *Randy J. Amster*, in its article *Defining a Uniform Culpability Standard In Section 1983*,[58] explains that the Fourteenth Amendment and Section 1983 overlap considerably in both purpose and language. Indeed, Section 1983 was enacted primarily as a means of enforcing and remedying violations of the Fourteenth Amendment. The due process clause of the Fourteenth Amendment incorporates other provisions of the Constitution; Section 1983 then provides remedies for violations of these incorporated provisions. The due process clause itself contains two components, violations of which are also actionable under Section 1983.

For a procedural due process claim to succeed, the plaintiff must identify a protected property or liberty interest.[59] To establish a constitutionally protected property interest, a plaintiff "must have more than an abstract need or desire for [a thing] . . . [and] more than a unilateral expectation of it."[60] A plaintiff instead must "have a legitimate claim of entitlement to it."[61]

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[54] *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1959-1960 (2006).
[55] *Id.*
[56] *Id.* at 1960.
[57] *Id.*
[58] Randy J. Amster, *Defining a Uniform Culpability Standard In Section 1983*, 56 Brook. L. Rev. 183, 185 (1990).
[59] *Behavioral Healthcare Partners, Inc. v. Gonzalez-Rivera*, 392 F. Supp. 2d 191, 201 (D. P.R. 2005) [hereinafter *Behavioral*]. *See Centro Médico v. Feliciano*, 406 F.3d 1, 7 (1st Cir. 2005) (*citing Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972) [hereinafter *Bd. of Regents*]).
[60] *Board of Regents*, 408 U.S. at 577.
[61] *Id*.

In determining whether the State has violated an individual's substantive due process rights, a federal court may elect first to address whether the governmental action at issue is sufficiently conscience shocking.[62] The State action must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[63] "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."[64]

On the other hand, we stress out that the Supreme Court has long held that the Fifth Amendment applies to actions of the federal government, not those of private individuals, nor of state governments.[65] Thus, any claims under the Fifth Amendment against state officials will be dismissed since the Fifth Amendment is inapplicable to state officials.[66]

VI. The practical view of the contemporaneous Civil Rights First Amendment litigation in Puerto Rico, from the Complaint until the Pre Trial.

D. The nemesis of dealing with the complaint and the defenses.

Imagine or remember you at your office at 5:30pm, and when you check at your inbox, you have two federal cases assigned acting as a defendant's attorney, with the deadline running to answer or otherwise plead. From the Plaintiff's perspective, imagine you have several evidence that is uncontested once the complaint is filed, which will facilitate the Court the final resolution of the case. What would you do in both situations? Organize. The best option is to read the Complaint if you are the defendant, and if you are the plaintiff, you should organize all the evidence, together with describing it in simple terms.

As a defendant, when you receive the case, you will notice that plaintiff's attorney will inevitably include statutes that as a matter of strict law, do not apply and should be dismissed. As a plaintiff, you must be careful with the inclusion of federal and local statutes. In simple terms, you must do your research first, because if you include non-applicable statutes, the case will be partially dismissed, which means unnecessary work.

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[62] *Behavioral,* 392 F. Supp. 2d at 202-203. *See County of Sacramento v. Lewis*, 523 U.S. 833, 847 n. 8 (1998); *Rivera v. Rhode Island*, 402 F.3d 27, 36 (1st Cir. 2005).
[63] *Behavioral,* 392 F. Supp. 2d at 202-203.
[64] *Id.*
[65] *Solis v. Prince George's County*, 153 F. Supp. 2d 793, 803 (D. Md. 2001); *Gerena v. P.R. Legal Services, Inc.*, 697 F.2d 447, 449 (1983).
[66] *Daniels v. Williams*, 474 U.S. 327, 330-331 (1986); *Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000).

E. The Pleadings, what to do and how?

Recently, in *Ashcroft v. Iqbal***,**[67] a Muslim Pakistani pretrial detainee brought action against current and former government officials from the Department of Justice and the Federal Bureau of Investigations, alleging that they took series of unconstitutional actions against him in connection with his confinement under harsh conditions after separation from the general prison population.

Defendants moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct and the District Court denied their motion.[68] Accepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners.[69] Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit.[70]

The Second Circuit Court of Appeals concluded that pursuant to the case *Bell Atlantic Corp. v. Twombly,*[71] for evaluating whether a complaint is sufficient to survive a motion to dismiss, called for a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible.*"[72] The court found that the Government's appeal did not present one of "those contexts" requiring amplification. As a consequence, it held Iqbal's pleading adequate to allege Government officials' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law.[73]

The U.S. Supreme Court granted *certiorari* and determined that the Second Circuit has jurisdiction to entertain an interlocutory appeal based on qualified immunity grounds, and that Iqbal failed to state a claim upon a relief can be granted.[74] The Court made an interesting statement:

> We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither

[67] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942 (2009) [hereinafter *Ashcroft*].
[68] *Id.* at 1944.
[69] *Conley v. Gibson,* 355 U.S. 41 (1957) (citations omitted).
[70] *Ashcroft***,** 129 S. Ct. at 1939.
[71] *Ashcroft***,** 129 S. Ct. at 1944 (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007)).
[72] *Id*.
[73] *Id*.
[74] *Id.* at 1953.

> deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.[75]

In essence, the Supreme Court concluded that Iqbal failed to plead sufficient facts to state claim for purposeful and unlawful discrimination; and that complaint challenged neither constitutionality of detainee's arrest nor his initial detention but rather policy of holding post-September 11th detainees once they were categorized as of "high interest".[76] Thus, the complaint had to contain facts plausibly showing that officials purposefully adopted policy of so classifying detainees because of their race, religion, or national origin.[77]

Within our First Circuit, in *LaRou v. Ridlon*,[78] said forum made clear that to establish her *prima facie* case, a plaintiff had to show that there is a causal connection linking the allegedly discriminating conduct to their political beliefs. The First Circuit has said repeatedly that: "[P]laintiffs are obliged to set forth in their complaint 'factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable legal theory.'"[79] In sum, you as plaintiff's counsel should set specific facts together with the true actors that participated in the scene. You should clearly establish, at least, minimal facts as to who did what to whom, when, where, and why-although why, when why means the actor's state of mind, can be averred generally. This in no way means that you should employ a "heightened pleading standard".[80]

C. The Motion to Dismiss Device

Mauet in his book Pre Trial,[81] explains that the motion for judgment on the pleadings is closely related to the motion to dismiss under Fed. R. Civ. P. 12 (b)(6). The standard for evaluating a Rule 12(c) motion for judgment on the pleadings is essentially the same as that for deciding a Rule 12(b)(6) motion: '[T]he trial court must accept all of the nonmovant's well-pleaded factual averments as true, and draw all reasonable inferences in his

[75] *Id.* at 1953-1954.
[76] *Id.* at 1950-1951.
[77] *Id.* at 1952.
[78] 98 F.3d at 662.
[79] *Platten v. HG Berm. Exempted Ltd.* 437 F.3d 118, 127 (1st Cir. 2006) (quoting *Gooley v. Mobil Oil Corp*., 851 F.2d 513, 515 (1st Cir. 1988)); *see Educadores Puertorriqueños en Acción v. Rey Hernández*, 367 F.3d 61, 68 (1st Cir. 2004) [hereinafter *Educadores*] ("in a civil rights action as in any other action subject to notice pleading standards, the complaint should at least set forth minimal facts as to who did what to whom, when, where, and why . . . ."); s*ee also Miranda-Otero v. Industrial Commission*, 441 F.3d 18, 21 (1st Cir. 2006).
[80] *Educadores***,** 367 F.3d at 68.
[81] Thomas A. Mauet*, Pre Trial*, cap. 7, § 7.8, 327 (6th ed., Aspen 2005).

favor.' "[82] Of the seven grounds for a Rule 12(b) motion, the most commonly asserted one is Rule 12(b)(6), which should be made alter the defendant has received plaintiff's complaint and before answering. On or before the motion to dismiss is granted, the plaintiff will usually be given leave to file an amended complaint if requested.

On the other hand, a Fed. R. Civ. P. 12(c) motion, namely as motion to dismiss on the pleadings, could be filed even after the answer to the complaint is filed. This, since at that stage of litigation it has become evident that there is a legal bar, such as an applicable statute of limitations, that will prevent plaintiff from recovering anything. For this reason, Mauet explains, a motion for judgment on the pleadings should not be made unless it is clear from the facts in the pleadings, in light of the applicable substantive law, that plaintiff cannot recover on his or her claim. Such motions are infrequently made.[83]

i. Expeditious dismissal relief if the complaint filed is categorized as "frivolous"

Title 28 of the United States Code, under Section 1915,[84] provides for expeditious dismissal relief if the complaint filed is categorized as unfounded and without merit at all. The most common situations regarding this matter are the *pro se* complaints filed against the Government. It should be noted that, as the courts have pointed out, subsection (d) above contains no definition of the term "frivolous"; the development of standards for its application has been left to the courts. It has been held that the legal sufficiency of a complaint under the Federal Rules of Civil Procedure does not prevent the action from being termed frivolous under Section 1915(d).

The Court in *Ruth v Congress of United States*,[85] held that the term "frivolous" as used in § 1915(d) is essentially equivalent to "ridiculous". The Court added that Rule 12 of the Federal Rules of Civil Procedure had no relation to the question whether an action *in forma pauperis* should be dismissed as frivolous under Section 1915(d). Rule 12, the court said, has to

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[82] *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 23 (1st Cir. 2007) [hereinafter *Flores Galarza*] (citing *Pasdon v. City of Peabody*, 417 F.3d 225, 226 (1st Cir.2005), *Rivera-Gómez v. de Castro*, 843 F.2d 631, 635 (1st Cir.1988)).

[83] Mauet, *supra* n. 81.

[84] 28 U.S.C.A. § 1915, which reads as follows:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefore, by a person who makes affidavit that he is unable to pay such costs or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress. . . . (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

[85] *Ruth v Congress of U.S.,*71 F.R.D. 676, 678 (D.N.J. 1976).

do with the legal insufficiency of claims that present some semblance of rational grounds, and that call for sophisticated professional evaluation worthy of the question. The power to dismiss an *in forma pauperis* action on motion under 28 U.S.C.A. Section 1915(d) on the ground that it is frivolous is not limited or impaired by the provisions of Rule 12(b) of the Federal Rules of Civil Procedure.

In *Fletcher v. Young,*[86] the Court noted that the ground of such motion is not a defense, within the meaning of that rule, but action in accordance with the public policy embodies in the statute, that, while persons who are unable to pay costs or give security therefore should be allowed to prosecute or defend actions for the protection of their rights without being required to pay costs or give security, they should not be allowed under the cover of the statute to abuse the process of the court by prosecuting suits which are frivolous or malicious.

Quite simple, a complaint is "frivolous" if it lacks an arguable basis in law or fact, and a complaint lacks such a basis if it relies on an indisputably merit-less legal theory.[87] In *Jones v. Bales,*[88] it was held that Section 1915(d) confers power to dismiss in situations where dismissal under Rule 12 of the Federal Rules of Civil Procedure might be improper. There are compelling reasons, the court said, for allowing courts broader dismissal powers *in forma pauperis* suits, especially damage suits brought by convicted prisoners, than in other cases. The court pointed out that persons proceeding *in forma pauperis* are immune from imposition of costs if they are unsuccessful, and because of their poverty they are practically immune from later tort actions for malicious prosecution or abuse of process. Thus, the court concluded, indigents, unlike other litigants, approach the courts in a context where they have nothing to lose and everything to gain, and the temptation to file complaints that contain facts, which cannot be proved is obviously stronger in such a situation. The temptation is especially strong in the case of convicted prisoners with much idle time and free paper, ink, law books, and mailing privileges, the court said. The court reasoned that the Federal Rules of Civil Procedure are inadequate to protect the courts and defendants who pay for their defense from frivolous litigation by indigent prisoners. Further, the court pointed out that the rules are liberal, but contemplate litigants who are limited by the realities of time and expense and with a basic respect for accuracy, whereas imprisoned felons are seldom if ever deterred by the penalties of perjury.[89]

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[86] *Fletcher v. Young*, 222 F.2d 222, 224 (4th Cir. 1955).
[87] 28 U.S.C.A. § 1915(e); *Taylor v. Johnson*, 257 F.3d 470, 472 (5th Cir. 2001) (a complaint is frivolous if it lacks an arguable basis in law or fact, and a complaint lacks such a basis if it relies on an indisputably merit-less legal theory); *Harper v. Showers*, 174 F.3d 716, 718 (5th Cir.1999)].
[88] *Jones v. Bales*, 58 F.R.D. 453, 463 (N.D. Ga. 1972), *aff'd* 480 F.2d 805 (5th Cir. 1972).
[89] Milton Roberts, *Standards For Determining Whether Proceedings In Forma Pauperis are Frivolous, and Thus Subject To Dismissal Under 28 U.S.C.A. § 1915(D),* 52 A.L.R. Fed. 679 (1981).

ii. Most common grounds for dismissal

1. *Res judicata*

The doctrine of *res judicata*, also known as claim preclusion, generally "binds parties from litigating or relitigating any issue that was or could have been litigated in a prior adjudication."[90] For *res judicata* to apply, three requirements must be met: "(1) a final judgment on the merits in an earlier action; (2) a sufficient identity between the parties in the two suits; and (3) a sufficient identity of the causes of action in the two suits."[91] "Under the federal law of *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were raised or could have been raised in that action."[92]

2. Collateral Estoppel

Issue preclusion, also know as collateral estoppel, which is quite different to *res judicata*, refers to a party seeking to estop the litigation of an issue by reference to a previous adjudication between the parties. To do so, the proponent has the burden of establishing: "(1) an identity of issues (that is, that the issue sought to be precluded is the same as that which was involved in the prior proceeding), (2) actuality of litigation (that is, that the point was actually litigated in the earlier proceeding), (3) finality of the earlier resolution (that is, that the issue was determined by a valid and binding final judgment or order), and (4) the centrality of the adjudication (that is, that the determination of the issue on the prior proceeding was essential to the final judgment or order)."[93] Collateral estoppel is confined, however, to situations where the matter raised in the second suit is identical in all respects with the one decided in the first suit.[94] The issues are defined by reference to the judicial determination at stake rather than by the "mere presence of a modicum of factual commonality."[95]

3. Statute of limitations

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[90] *Futura Development Corp. v. Centex Corp*., 761 F.2d 33, 42 (1st Cir.1985); *U.S. v. Alky Enterprises, Inc*., 969 F.2d 1309, 1314 (1st Cir. 1992).
[91] *Ortiz-Cameron v. Drug Enforcement Adminstr.*, 139 F.3d 4, 5 (1st Cir. 1998) (citing *Porn v. Nat'l Grange Mut. Ins. Co.*, 93 F.3d 31, 34 (1st Cir. 1996)); *see Boateng v. Inter American U., Inc*., 210 F.3d 56, 61 (1st Cir. 2000).
[92] *Apparel Art Int.,, Inc. v. Amertex Enter. Ltd*., 48 F.3d 576, 583 (1st Cir. 1995).
[93] *A.J. Faigin v. Kelly*, 184 F.3d 67, 78 (1st Cir. 1999) [hereinafter *A.J. Faigin*] (citing *Grella v. Salem Five Cent Savings Bank*, 42 F.3d 26, 30 (1st Cir. 1994)); *see also Boston Scientific Corp. v. Schneider AG*, 983 F. Supp. 245, 255 (D. Mass. 1997).
[94] *A.J. Faigin*, 184 F.3d at 78 (citing *Commr. I.R.S. v. Sunnen*, 333 U.S. 591, 599-600 (1948)).
[95] *Id*.

A complaint brought under Section 1983, borrows the forum state's statute of limitations for personal injury claims.[96] Thus, the Puerto Rico Civil Code's one-year prescriptive period governing tort actions is the statute of limitations applicable to plaintiff claims.[97] Although Puerto Rico law determines the applicable prescriptive period, "federal law determines the date on which the claim accrued."[98] The limitations period "begins to run when the plaintiff 'knows or has reason to know of the injury which is the basis for his claim.' "[99] The "limitations period of actions is a substantive, not a procedural, matter" in Puerto Rico.[100]

Recently the First Circuit in *Santana Castro v. Toledo Dávila*,[101] clarified when a plaintiff tolls the statute of limitations as to tortfeasors via an extrajudicial claim. In this case, plaintiffs specifically alleged that four Puerto Rico Police Department officers illegally arrested, beat, and incarcerated Santana, causing him physical injuries, and causing him and his grandparents' emotional distress. They also claimed that the Puerto Rico Police Department supervisors were liable under a theory of supervisory liability and that Santana was illegally fired from the PRPD in retaliation for bringing legal action against the PRPD. In response, defendants filed a motion to dismiss for failure to state a claim. The district court initially dismissed some of the claims, and upon a subsequent motion for reconsideration, it dismissed all remaining claims by being time-barred. Plaintiffs appealed. The First Circuit Court affirmed the dismissal, concluding *inter alia* that plaintiffs did not toll the statute of limitations by sending an extrajudicial claim against defendant Pedro Toledo only, not to the other defendants in their personal capacities. The First Circuit interpreted the Civil Code of Puerto Rico, as also interpreted by our Supreme Court in *Velilla v. Pueblo Supermarket,*[102] concluding that any generic extra judicial notice does not toll the statute of limitations against the other tortfeasor in their personal capacities, in this case, the police officers.

iii. Can a Defendant request a stay pending a motion to dismiss?

This question could be answered in the case *Medhekar v. United States Dist. Court for N. Dist of Calif.*[103] In said case, the Ninth Circuit in interpreting the Private Securities Litigation Reform Act, concluded that the

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[96] *Rodríguez-García v. Mun. of Caguas,* 354 F.3d 91, 96 (1st Cir.2004) [hereinafter *Rodríguez-García*] (citing *Wilson v. García,* 471 U.S. 261, 277-80 (1985)).
[97] 31 Laws P.R. Ann. § 5298(2).
[98] *Rodríguez-García,* 354 F.3d at 96.
[99] *Id.* at 96-97 (quoting *Rodríguez Narváez v. Nazario,* 895 F.2d 38, 41 n. 5 (1st Cir. 1990)).
[100] *Rodríguez v. Suzuki Motor Corp.,* 570 F.3d 402, 406 (1st Cir. 2009) (citing *García Pérez v. Corporación de Servicios para la Mujer y la Familia, etc.,* 2008 T.S.P.R. 114).
[101] *Santana Castro v. Toledo Dávila*, 579 F.3d 109, 116-117 (1st Cir. 2009) [hereinafter *Santana-Castro*].
[102] *Velilla v. Pueblo Supermarket,* 111 D.P.R. 585, 587-588 (1981).
[103] *Medhekar v. U. S.*, 99 F. 3d 325, 328 (9th Cir. 1995) [hereinafter *Medhekar*].

initial disclosure requirements of Fed. R. Civ. P. 26(a) are contained in a rule entitled "general provisions governing discovery; duty of disclosure," which is found in a section entitled "depositions and discovery." The Ninth Circuit added that "[t]he drafters of Rule 26(a) intended these disclosures to serve as "the functional equivalent" to discovery, and to eliminate the need for formal discovery at the early stages of litigation.[104] Citing Federal Rules of Civil Procedure 26(a)(1)- (5), the Ninth Circuit stated that the federal discovery rules contain numerous examples in which disclosures are treated as a subset of discovery.[105] Thus, the fact that the rules refer to disclosures and discovery as two distinct terms does not alter the usage of disclosures as a form of discovery any more than does the use of the distinct term alter the usage of depositions as a form of discovery. Therefore, the Ninth Circuit Court hold that the initial disclosure requirements of Federal Rules of Civil Procedure 26(a) and related local rules are "discovery" or "other proceedings" for purposes of the Private Securities Litigation Reform Act 's stay provision, and that such disclosures must be stayed pending the disposition of a motion to dismiss in an action covered by said Act.

Even though the cases explained above were interpreted in the scope of the Private Securities Litigation Reform Act by concluding that a stay is permissible, the Author strongly suggest to use this as a good beginning for continuing the research to justify a stay when there is a motion to dismiss pending. The Author concludes that the grounds are the same as the ones explained by the Ninth Circuit in *Medhekar,* and a stay should be granted if there are strong grounds for dismissal, in order to avoid extra costs in documentary evidence and in litigation.[106] Of course, this does not mean that any generic motion to dismiss justifies a stay while pending its final resolution.

D. The Initial Scheduling Order or the Case Management Memorandum

Commentator Natallie J. Santana Suárez, in her law review article Managing Docket Pressure,[107] points out that state courts handle many more cases than the federal court, for example, annually, state courts receive thirty million cases, while one million cases are filed in federal court. In handling

[104] *Id.* (citing 1993 Advisory Committee Notes to Fed.R.Civ.P. 26(a)(1).
[105] *Id*. (citing Fed. R. Civ. P. 26(a)(1)-(5) (identifying different forms of disclosures and methods to discover additional matters); Fed. R. Civ. P. 26(c) (availability of protective orders relating to discovery or disclosures); Fed. R. Civ. P. 26(f) (including disclosures in the discovery plan)).
[106] 6 Moore's Federal Practice, § 26.22 [5][b] (Matthew Bender 3 ed.); *See* Griffin B. Bell, et al., Automatic Disclosure in Discovery--The Rush to Reform, 27 Ga. L. Rev. 1, 41-42, 46-47 (1992); Virginia E. Hench, Mandatory Disclosure and Equal Access to Justice, 67 Temp. L. Rev. 179, 204-07 (1994).
[107] Natallie J. Santana Suárez, *Managing Docket Pressure,* 48 Rev. de D.P. 113, 114 (citing the web site information contained in Federal Judicial Center at: http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu2e&page=/federal/courts.nsf/page/5DD5E0A65BA87BCA8525682400517BA5?opendocument_ (last updated May 19, 2010)).

these caseloads, the author adds, there are almost thirty thousand state court judgeships, compared to over one thousand and seven hundred federal judgeships. Federal courts may hear fewer cases than state courts; however, these cases tend to be more of national importance and more complex.

Definitively, although federal court is from limited jurisdiction, there are a lot of civil cases pending in said forum. Thus, in order to expedite the coordination of federal civil cases, most of the federal Judges opted to issue an initial scheduling order or a case management memorandum. Both are essentially the same, but differ in form of how is drafted. For example, some federal Judges prefer that the parties file together the Initial Scheduling Memorandum, rather than others that allow to file such separately.

Honorable Judge Jaime Pieras, Jr. in his law review article Judicial Economy and Efficiency Through the Initial Scheduling Conference: The Method,[108] defines the Initial Scheduling Conference as the determination of the timeframe of the litigation. All important dates will be set during the Initial Scheduling Conference, including but not limited to, dates for the taking of depositions and deadlines for filing dispositive motions. Thus, is of the utmost importance that all attorneys who attend the Initial Scheduling Conference bring their calendars with them. Failure to bring calendars to the ISC wastes the time of both the court and all attorneys involved, and will be looked upon most unfavorably. One of the objectives of the Conference is to simplify the issues and to reach agreements as to uncontroverted facts and accepted principles of law applicable to the case. Further, counsel attending the Conference are expected to be conversant with the facts and the law so that they are able to enter into such agreements. Lastly, but not least, every attorney must be willing to reach a settlement agreement at the Initial Scheduling Conference, with a settlement demand and a settlement offer. Failure to do so will result in strict economic sanctions.

In essence, since the Initial Scheduling Conference requirements are so detailed, the Author recommends to each attorney to review the same way ahead before the filing of the memorandum and the hearing. Same conclusion with the Case Management Memorandum drafting and hearing process. Otherwise, counsel will be strictly penalized by its failure to follow such orders, which have the only intention of facilitating your clients and the Court with an expeditious and feasible way to litigate at the federal forum.

[108] Jaime Pieras, *Judicial Economy and Efficiency Through the Initial Scheduling Conference: The Method*, 35 Cath. U. L. Rev. 943, 947 (1986).

E. The strategic plan for discovery in order to include the relevant evidence in the summary judgment motion, or in the eventual jury trial

The best "test" for the discovery plan is made once you request to your client or to the adverse party, for example, the administrative investigation, or personnel file. Once you have this information, you are ready to conduct discovery, thinking in the motion for summary judgment, or in the jury trial, if the request for dismissal is denied or partially granted. Then, you as an attorney must review the evidence to be provided by the initial disclosures,[109] depositions,[110] interrogatories,[111] requests for admissions,[112] or request for production of documents.[113]

Preferably, after you have all these documentary evidence, it is highly recommended to proceed with depositions. For that end, you will find here examples from defendant's perspective in order to eventually file a summary judgment motion, attacking Plaintiff's allegations during his deposition.

> **PLAINTIFF'S DEPOSITION**
>
> **Plaintiff's political affiliation.**
> On or about October 31, 2009, Plaintiff filed Complaint in the above-captioned case. In sum, Plaintiff alleges in the Complaint that "Defendants intentionally, or with deliberate indifference and callous disregard of Plaintiff's rights, deprived Plaintiff of her rights to free speech, freedom association, due process of law, and equal protection under the law thru a hostile work environment, and a pattern and practice of discrimination." Further, Plaintiff alleges that she is an active member of the Republican Party.
>
> **Question: Please describe in detail the "inferior work environment" that you suffered by being part of the Republican Party?**
>
> **Source:** As stated in *Agosto-de-Feliciano v. Aponte-Roque,*[114] and *Ortiz García v. Toledo Fernández*,[115] to succeed on her "inferior" work environment claim, a plaintiff has to show, by clear and convincing evidence, that she was subjected to an unreasonably inferior environment. If that burden is met, plaintiff has to show that her political affiliation was a substantial factor in the establishment of the unreasonably inferior work environment. If she makes this *prima facie* showing, the burden shifts to the defendants to show that

[109] P.R. R. Civ. P. 26.
[110] Fed. R. Civ. P. 32
[111] *Id.* at 33.
[112] *Id*. at 36.
[113] *Id*. at 34.
[114] *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209 at 1217-20 (1st Cir. 1989).
[115] *Ortiz García v. Toledo Fernández*, 405 F.3d 21, 23-24 (1st Cir. 2005).

they would have acted in the same way regardless of plaintiff's political affiliation.[116]

Question: Please describe in detail the alleged specific facts regarding your freedom of speech violations?

Source: A cause of action for the violation of an employee's right to free association exists when a government employer's action is severe enough to cause a reasonably hardy individual to compromise his [her] political associations in favor of the prevailing party or when the employer's action places plaintiff in a situation "unreasonably inferior" to the norm of his [her] position.[117] In other words, harassment of a public employee for his/her political beliefs violates the First Amendment unless the action is so trivial that a person of ordinary firmness would not be deterred from holding or expressing those beliefs.[118]

Now, we proceed with the same allegation included in plaintiff's complaint, but from the plaintiff's perspective, in order to prove the necessary elements of political discrimination in defendant's deposition.

DEFENDANT'S DEPOSITION

Plaintiff's political affiliation.

As said before, on or about October 31, 2009, plaintiff filed Complaint in the above-captioned case. In sum, plaintiff alleges in the Complaint that "defendants intentionally, or with deliberate indifference and callous disregard of plaintiff's rights, deprived plaintiff of her rights to free speech, freedom association, due process of law, and equal protection under the law thru a hostile work environment, and a pattern and practice of discrimination." Further, plaintiff alleges that she is an active member of the Republican Party.

Question: Please describe in detail if you know Defendant's political affiliation, and if so, when and how you acknowledged the same?

[116] In *Rosario-Urdaz v. Velazco,* 433 F.3d 174, 179-180 (1st Cir. 2006) [hereinafter *Rosario-Urdaz*] (the First Circuit Court of Appeals determined that a public employee had no § 1983 cause of action based on alleged harassment by coworkers, including former subordinate who had allegedly thrown food at her, been reprimanded and transferred out, then transferred back and criticized employee in letter to superior who ultimately discharged her; unless coworkers carried on a substantial campaign of harassment, instigated or knowingly tolerated by superiors, their acts would not constitute mis-exercise of government power at which § 1983 was aimed); *See also*, *Guzmán v. City of Cranston,* 812 F.2d 24, 26 (1st Cir. 1987); *Woodward v. City of Worland,* 977 F.2d 1392, 1400 (10th Cir. 1992) (A single insult by coworker with no supervisory power is not political discrimination by one exercising official authority); *Webber v. Int'l Paper Co.,* 417 F.3d 229, 236-37 (1st Cir.2005).

[117] *Cabrero v. Ruiz*, 826 F. Supp. 591, 597 (D.P.R. 1993), *aff'd* 23 F.3d 607, 611 (1st Cir. 1994); *Zayas Rodríguez v. Hernández*, 748 F. Supp. 47, 53 (D.P.R. 1990).

[118] *Pieczynski v. Duffy*, 875 F.2d 1331, 133 (7th Cir. 1989); *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982).

> **Source:** In *Miranda-Otero v. Commonwealth of P.R.*,[119] citing the Third Circuit in *Goodman*,[120] it was held that to establish that public employee's political affiliation was a substantial or motivating factor in adverse employment decision, as required to show discrimination based on political association, a plaintiff must produce sufficient evidence to show the defendant knew of plaintiff's political persuasion, and proof of knowledge can come from direct or circumstantial evidence.
>
> **Question: Please describe the specific events in which Defendant allegedly told you that he is "tired of dealing with the elephants of the Republican Party" at work?**
>
> **Source:** In *González-De-Blasini v. Department of the Family*,[121] it was held that any plaintiff who alleges political discrimination has to show that political affiliation was a substantial factor in the challenged employment action. Further, as stated by the First Circuit in *LaRou*, "[P]laintiff's are obliged to set forth in their complaint factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable legal theory."[122]

These are suggested common questions for a political discrimination case. In no way you should interpret that these questions substitute your discern or decisions of what to ask in your case. These are simply ideas for conducting a deposition according to the current case law in order to proceed either with a motion for summary judgment or for the jury trial, if applicable.

F. The Summary Judgment device[123]

In *Celotex Corp,. v. Catrett*,[124] the Court agreed that summary judgment for the defendant was proper when the plaintiff had obtained no evidentiary support for an essential element of the claim. *Celotex* was an asbestosis case in which the defendant obtained summary judgment by pointing out that the plaintiff had presented no evidence that he had ever been exposed to the defendant's product. The Court agreed that the defendant was not required to prove that the plaintiff had not been exposed. Because the plaintiff would bear the burden of proof at trial, he was obligated to show that he had obtained sufficient factual support for the

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[119] *Miranda-Otero v. Commonwealth of P.R.*, No. 04-1199 (PG), slip op. at page 5 (D.P.R. 2005).
[120] *Goodman*, 293 F.3d at 663-664 (3rd Cir. 2002).
[121] *González-De-Blasini v. Department of the Family*, 377 F. 3d 81, 85-86 (1st Cir. 2004).
[122] *LaRou*, 98 F.3d at 662.
[123] *See generally*, José Enrico Valenzuela-Alvarado, Speech, *The Summary Judgment at the Federal Forum, the best intent to dismiss a case,* (February 28 and 29, 2008), Seminar at the Institute for the Training and Development of Juridical Thought. (Presentation available in the Commonwealth of Puerto Rico Department of Justice's Institute for the Training and Development of Juridical Thought, http://www.plaxo.com/profile/show/197569189288?pk=7b3a271acd4d0c0cf0818eef2597f0d8af7bd01f (Last Updated May 19, 2010).
[124] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986) [hereinafter *Celotex*].

claims to justify that trial. Because the plaintiff had not done so, summary judgment was appropriate.

Similarly, in *Anderson v. Liberty Lobby, Inc.*,[125] the Court held that the special libel standards which would apply at trial also apply to motions for summary judgment, and plaintiffs cannot defeat such motions without presenting evidence of actual malice sufficient to raise a material question on that issue. Although ultimately the proof of malice is an issue for the jury, and although plaintiffs may present evidence that defendants' sources were unreliable, it is proper for a court to grant summary judgment where no reasonable jury could rule for plaintiff on an essential element of the case. This is true even where the issue concerns defendants' state of mind, since the relevant evidentiary standard requires "clear and convincing" proof. Where no evidence of malice was shown, and defendants' affidavit showed that the article in question was researched in good faith, summary judgment was properly granted.

In Puerto Rico, the case of *Morales-Concepción v. Lluch*,[126] provides a local interpretation of a summary disposal of a case when there is no evidence that can link a defendant with the discrimination allegations included in the complaint. In said case, an employee failed to show that non-renewal of her contract by Puerto Rico Highways Authority officials' stemmed from politically based discriminatory animus, and she thus failed to establish political discrimination, where she failed to proffer even indirect evidence that her duties were essential and still needed by Puerto Rico Highways Authority and thus were substituted for by others whose political affiliation was consonant with officials.

Now, in practical terms, we must discuss how to draft the statement of uncontroverted material facts for the summary judgment motion. Mauet in his book Pre Trial,[127] mentions that a good place to start is to get the pattern jury instructions used in your jurisdiction for the claims, or defenses, involved in the motion. The elements of the instructions will tell you what specific proof is necessary for each of those claims or defenses, on which you are seeking summary judgment and is a useful blueprint for the specific contents of the memorandum of law.

In simple terms, you should incorporate the legal research done prior to the discovery, together with the discovery you obtain pursuant to the initial disclosures (Loc. R. Civ. P. 26), depositions (Fed. R. Civ. P. 32), interrogatories (Fed. R. Civ. P. 33), requests for admissions (Fed. R. Civ. P.

[125] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986) [hereinafter *Anderson*].
[126] *Morales-Concepción v. Lluch*, 312 F. Supp. 2d 125, 131 (D.P.R. 2004).
[127] Mauet, *supra* n.81, at 330.

36), or request for production of documents (Fed. R. Civ. P. 34). Is like connecting your DSL or "one link" cable connection with your laptop, to obtain internet. So simple like that.

In addition, we must point out that every piece of evidence included in the motion for summary judgment must be accompanied of a certified translation, if it is not in the English language. The law incontrovertibly demands that federal litigation in Puerto Rico be conducted in English.[128] Further, the local Rules of Civil Procedure provide that the costs incurred in the translation of all documents received or filed in the Court shall be taken as costs and requires that all documents shall be translated into English Language.[129] In *Estades-Negroni v. The Associates Corp. of North America*,[130] the First Circuit Court sustained that: "Our opinion states that we cannot consider materials that have not been translated."

Ten days after the moving party filed its motion for summary judgment, the opposing party must submit its opposition pursuant to the local Rules of Civil Procedure.[131] If you are the moving party, you must review in detail said opposition to your motion for summary judgment, in order to find its virtues and deficiencies.

As a movant for summary judgment, you need to get focused in the deficiencies. The most frequent deficiencies are the following:

i. The opposing party submitted a sworn statement that contradicts his or her own admissions during a deposition, contrary to Federal Rules of Evidence. Rule 801.

Pursuant to Federal Rules of Evidence, a party's own statement is the classic example of an admission.[132] Any contradictory allegation made, for example in a sworn statement while compared with an admission made prior during a deposition is totally unacceptable. The First Circuit has established repeatedly that; "[A] party's assertion of fact in a pleading is a judicial admission by which it normally is bound throughout the course of the proceeding."[133] In simple terms, an admission waives any other evidence. The Author point out this situation, since during his practice noticed that once a motion for summary judgment is filed, the opposing party pretends to

[128] 48 U.S.C. § 864 (2003).
[129] P.R. R. Civ. P. 10, 43.
[130] *Estades-Negroni v. The Assoc. Corp. of N. Am.*, 359 F.3d 1, 3, 31 (1st Cir. 2004). *See Estades-Negroni v. Assocs. Corp. of N. Am*., 345 F.3d 25, 31 (1st Cir. 2003).
[131] P.R. R. Civ. P. 7(b).
[132] Fed. R. Civ. P. 801(2)(a).
[133] *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528 (2nd Cir. 1985); *see*, *e.g., Davis v. A.G. Edwards & Sons*, 823 F.2d 105, 108 (5th Cir. 1987); *Ferguson v. Neighborhood Housing Serv.*, 780 F.2d 549, 550-51 (6th Cir. 1986).

re-articulate his or her own assertions with by manufacturing a blue print design of so-called "facts".

ii. The opposing party submitted evidence that is not translated into the English language, contrary to local Rule of Civil. Procedure 10 and 43

As discussed above, in collecting a record for summary judgment a district court must sift out non-English materials, and parties should submit only English-language materials.[134] This mandate is so strict, that the First Circuit recently excluded an opinion made by the Puerto Rico Supreme Court by not being translated into the English language, in the case of *Otero-Várcarcel v. PRIDCO*.[135] Although this case was not for publication, certainly affected negatively its outcome, since the party did not submit said certified translation.

iii. The opposing party in his or her opposition, filed a "ferret motion", not organized, and contrary to Federal Rule of Civil Procedure 56.

Regarding this "ferret motion situation", it must be noted what local Rule of Civil Procedure 56(c) provides. The said rule requires a party opposing a motion for summary judgment to submit with its opposition "a separate, short, and concise statement of material facts".[136] "The opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule."[137] The Court is not required to ferret through the record lurking for facts that may favor plaintiff when those facts were not proffered under a counter designation of facts as required by local Rule of Civil Procedure 56(c), the successor of local Rule 311.12.[138] "When a party opposing a motion for summary judgment fails to comply with the "anti-ferret rule" the statement of material facts filed by the party seeking summary judgment shall be deemed admitted."[139]

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[134] *U. S. v. Rivera-Rosario,* 300 F.3d 1, 6 (1st Cir. 2002).
[135] *Otero-Várcarcel v. PRIDCO,* 192 Fed. Appx. 2, 5 (1st Cir.2006).
[136] P.R. R. Civ. P. 56(c).
[137] *Id*.
[138] *Morales v. Orssleff's EFTF,* 246 F.3d. 32, 33 (1st Cir. 2001); *Rivas v. Federación de Asociaciones Pecuarias*, 929 F.2d. 814, 816 (1st Cir. 1991).
[139] *Lugo Rodríguez, v. Puerto Rico Institute of Culture,* 221 F. Supp. 2d. 229 (D.P.R. 2002) (citing *Méndez Marrero v. Toledo*, 968 F. Supp. 27, 34 (D.P.R. 1997); *Tavárez v. Champion Prods., Inc.*, 903 F. Supp. 268, 270 (D.P.R. 1995)).

iv. The opposing party never opposed to our Summary Judgment within the fourteenth days provided by local Rule of Civil Procedure 7(b).

In *Chamorro v. Puerto Rican Cars, Inc*, the First Circuit Court expressed itself in the following manner: "Batiz's other justification for noncompliance is that his counsel was busy with a complicated jury trial. We consistently have refused to accept such excuses, and we see no basis for applying a different standard here. The fact that an attorney has other fish to fry is not an acceptable reason for disregarding a court order." [140]

Regarding this failure to oppose issue, the author comments a personal experience while acting as defendants' counsel. In the case of *Alexander Monge v. Cortes,*[141] Plaintiff filed Complaint against my former clients, Agent José Luis Torres, from the P.R. Police Department (hereinafter "PRPD") and Juan Matos, from the Administration of Medical and Emergency Services ("ASEM", by its Spanish acronym). The other co-defendants were not covered by the so-called "Act. No. 104 protection", which in sum provides legal representation and further discretionary payment of judgment to public officials sued in their personal capacities. It is important to point out that a private attorney represented the other co-defendants, not the Department of Justice. On January 23, 2006, the Court issued an Opinion & Order, granting in part and denying in part Defendants' Motion for Summary Judgment. Tersely, the Court granted our Motion to Adjudicate the Motion for Summary Judgment as unopposed, accepting as true all Defendants' properly supported statements of uncontested facts.[142] In addition, the Court denied the Motion for Summary Judgment as to co-defendants Angel Cortés, Gilberto Díaz, Miguel Marín, and Carlos Aquino, all security guards from ASEM. However, as to my clients, José L. Torres and Juan Matos, the Court granted our Motion for Summary Judgment, explaining, *inter alia*, that they were not personally involved in the facts of the case.

Then, the private attorney representing the remaining co-defendants went to jury trial. The Court, at the third day of trial, issued another Opinion & Order, in which reiterated its prior ruling, by saying that any evidence that intends to contradict the Uncontroverted Material Facts already admitted by the Court, would be stricken from the record. Specifically, the Court quoted case law from the First Circuit, which for my surprise has recognized the use of facts ascertained at the summary judgment stage at the time of trial in

[140] *Chamorro v. Puerto Rican Cars, Inc.,* 304 F.3d 1, 3 (1st Cir. 2002).
[141] *Alexander Monge v. Cortes*, 413 F. Supp. 2d 54 (D.P.R. 2006); 413 F. Supp. 2d 42 (D.P.R. 2006). [hereinafter *Alexander Monge*].
[142] *Id.*

order to accordingly narrow the scope of the litigation.[143] The Court noted that as the drafters of Rule 56(d) point out, that provision "serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact.

The Court concluded the following:

> After thoroughly evaluating the parties' stipulations in the record and the Defendants' statement of proposed uncontested facts and supporting evidence, the Court determines that the following material facts are not in genuine issue or dispute. Docket No. 62 at 3. The Court then listed the facts that it had found to be uncontroverted after an examination of the pleadings. The Court informed the parties at the pre-trial conference of its practice of providing the jury with a copy of the listing of uncontroverted facts in the case, and the parties were each sent a copy of the list (termed the "Chart of Uncontroverted Facts") via email prior to the beginning of the trial. The list includes only the facts identified as uncontroverted in the Court's "Opinion and Order" at Docket No. 62.
>
> The Court adjudicated the motion for summary judgment in accordance with the Rules of Civil Procedure, the Local Rules of this District, and the jurisprudence of the First Circuit. The Court exercised its authority under Rule 56(d) and made available to the jury the facts which the Initial Scheduling Conference and the evidence presented in support of the motion for summary judgment show are beyond dispute[144].

Then, for our surprise, the Jury issued their verdict, dismissing the case with prejudice as to the remaining defendants. Plaintiff appealed to this verdict and to the prior summary judgment decision regarding the chart of uncontested facts provided to the jury. The First Circuit affirmed the District Court's decision, and pinpointed plaintiff's failure to oppose to defendants' motion for summary judgment by declaring that:

> In all events, we have examined the plaintiff's late-filed opposition. Even had that opposition been considered-but setting to one side, however, bald assertions, unsupported conclusions, and vituperative epithets-summary judgment still would have been warranted for Matos and Torres. With that

[143] Advisory Committee Notes to Fed.R.Civ.P. 56(d). *See Alexander Monge*, 413 F. Supp. 2d. at 6 (citing *Alberty-Vélez v. Corp. de P.R. Para la Difusión Pública*, 242 F.3d 418, 422 (1st Cir. 2001) ("facts specified [as uncontroverted at the summary judgment stage] 'shall be deemed established, and the trial shall be conducted accordingly."), citing Fed. R. Civ. P. 56(d)).

[144] *Id.*

> in mind, we are confident that the district court did not abuse its discretion in denying the plaintiff's two motions for reconsideration . . . .[145]

Now, if the other party did file its opposition on time, and after reviewing the opposing counsel opposition, we should ask ourselves if we should we file a reply to the said opposition to our motion for summary judgment? How, and when? For a Reply to the other party's Opposition to any Motion for Summary Judgment, you must obtain first leave from the Court, pursuant to Loc. Civ. R. P. 7 (c). It is with the prior leave of Court and within seven (7) days of the service of any objection to a motion, that the moving party may file a reply memorandum, which shall not exceed ten (10) pages in length and which shall be strictly confined to replying to new matter raised in the objection or opposing memorandum.

As to the disposition of the case either if the motion for summary judgment is denied or granted, one of the most frequent questions of attorneys is, what if the court can go to trial even if a summary judgment final resolution still pending?. It may be noted that under Rule 56 of the Federal Rules of Civil Procedure, a summary judgment may be entered on motion where there are no disputed issues of fact. Where a pretrial conference results in a determination that there are no disputed questions of fact the case is ripe for the entry of a summary judgment in accord with the undisputed facts.[146] This means that, inherent in the pretrial process is the right of the court to dispose of questions of law, and where there are no issues of fact, so that only questions of law remain to be solved, and these are disposed of at a pretrial conference, judgment must necessarily follow for one party or the other. For example, in *United States v. Chiaravalle*,[147] a proceeding to cancel a certificate of naturalization, wherein the defendant admitted at a pretrial conference that the facts alleged in the petition were true, whereupon the court ordered judgment for the plaintiff. Where, at pretrial, admissions and pleadings show that no issue of fact remains to be determined, court has power to decide questions of law and enter summary judgment. [148]

G. The Pre Trial

[145] *Alexander Monge v. Cortés*, 233 Fed. Appx. 8, 9-10 (1st Cir. 2007).
[146] *Berger v. Brannan*, 172 F2d 241, 242-243 (10th Cir. 1949) *See Schram v. Marion*, 44 F. Supp. 760, 761 (S.D. Mich. 1942) (wherein, as a result of admissions and agreements at the pretrial conference, there were no issues of fact in dispute, and the facts revealed that plaintiff had no cause of action, and so the court entered a judgment of no cause of action).
[147] *U. S. v. Chiaravalle*, 45 F. Supp. 509, 510 (S.D. Mich. 1942).
[148] *Holcomb v. Aetna Life Ins. Co.,* 255 F2d 577, 580 (10th Cir. 1958), *See McDonald v. Bowles*, 152 F.2d 741, 742-743 (9th Cir. 1945).

Rule 16 of the Federal Rules of Civil Procedure provides in simple terms that in any action, the court may in its discretion, direct the attorneys for the parties to appear before it for a conference to consider: (1) The simplification of the issues; (2) The necessity or desirability of amendments to the pleadings; (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; (4) The limitation of the number of expert witnesses; (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury; (6) Such other matters as may aid in the disposition of the action.

Further, Rule 16 of the Federal Rules of Civil Procedure adds that the court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

The pretrial order that follows the pre trial conference is intended to be tailored to the particular case and to reflect agreements made by the parties.[149] Said pretrial, which is based on Rule 16 of the Federal Rules of Civil Procedure, should state the issues with clarity and certainty. Conversely, a pretrial order in which the issues are not clearly stated may result in the setting aside of the order or in a new trial.[150]

The statement of issues, however, need not accept the language of either party, even though both parties object to the form of the order. A pretrial order is valid even though the parties object to the wording of the issues, cannot agree on the language to be used to state them, and will not approve the language used by the court in stating their positions, where it appears that they really agree on the fundamentals of the case.[151] Where certain portions of the order reflect the view of only one party, the court may compel the abandonment of those issues.[152]

Commentator M. L. Cross, interprets Rule 16 of the Federal Rules of Civil Procedure by stating that because of the express provisions of the typical rule or statute on pretrial practice, the pretrial order, unless modified at the trial to prevent manifest injustice, controls the subsequent course of

[149] 62A Am. Jur. 2d *Pretrial Conference* § 54 (2010).
[150] *See Plastino v. Mills,* 236 F.2d 32 (9th Cir. 1956) (the Ninth Circuit remanded a case for a new order and trial, on the ground that it was impossible to determine the issues in the case from the pretrial order, which as agreed to by the parties was 32 pages in length, since the order never became sufficiently definitive for a trial).
[151] Life Music, Inc. v. Edelstein, 309 F.2d 242 (2nd Cir. 1962); Life Music, Inc. v. Broad. Music, Inc., 31 F.R.D. 3 (S.D.N.Y. 1962).
[152] *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 245 F. Supp. 889 (E.D.Ill. 1965) (courts are not only authorized to limit the issues but also it is their duty to do so, acting reasonably and with discretion).

the action. [153] Nevertheless, the Author point out the rule of thumb of what is written in the pretrial proposed order is written on stone. As such, the outcome of pretrial conference s are central to the litigation, for as Rule 16 of the Federal Rules of Civil Procedure itself expressly states, pretrial orders "shall control the subsequent course of the action unless modified by a subsequent order." "Trial judges enjoy great latitude in carrying out case-management functions."[154]

Furthermore, Rule 16 of the Federal Rules of Civil Procedure also allows sanctions for noncompliance. The district court, for example, may refuse to hear testimony or give instructions on issues not originally encompassed by the pretrial order. That is, in simple terms, that the district court usually does not allow the parties to amend the proposed pretrial order, and less to amend to pretrial order once is issued.[155] Therefore, the Author strongly recommends to any litigant to be very careful and diligent with the pretrial drafting and filing, so you can avoid any unnecessary litigation regarding this strict rule.

VIII. The Qualified Immunity in theory and practice reality check

In *Martínez-Rodríguez v. Guevara,*[156] the First Circuit Court reiterates the U.S. Supreme Court interpretation of the "qualified immunity doctrine", which protects federal and state officials from civil liability in the performance of discretionary functions, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

The question to be asked in the first prong of the qualified immunity analysis is whether the facts, "[t]aken in the light most favorable to the party asserting the injury . . . show the officer's conduct violated a constitutional right[.]"[157] In particular, "[t]he first prong inquiry at th[e] 12(b)(6) [motion to dismiss] stage is unlikely to be very specific, given that federal civil practice is based on notice pleading, where great specificity is not required, and that there is no heightened pleading requirement for civil rights cases."[158]

As stated in *Asociación de Subscripción Conjunta v. Flores Galarza*,[159] "[t]he second question [of the qualified immunity analysis] deals

[153] M. L. Cross, *Binding effect of court's order entered after pretrial conference*, 22 A.L.R.2d 599 § 2 (1959).
[154] *Senra v. Cunningham*, 9 F.3d. 168, 170-171 (1st Cir. 1993), *Jones v. Winnepesaukee Realty,* 990 F.2d 1, 5 (1st Cir. 1993) (citing *In re San Juan Dupont Plaza Hotel Fire Litig.,* 859 F.2d 1007, 1019 (1st Cir. 1988)).
[155] *Id.* at 171. *See* Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1527 (1990).
[156] *Martínez-Rodríguez v. Guevara*, 597 F.3d 414 (1st Cir. 2010).
[157] *Flores Galarza*, 484 F.3d at 23 (citing *Saucier v. Katz,* 533 U.S. 194, 201(2001)) [hereinafter *Saucier*], overruled in part by *Pearson v. Callahan*, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) [hereinafter *Pearson*].
[158] *Id.* at 27 (citing *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55, 61 (1st Cir. 2004)).
[159] *Id.* at 33.

with fair warning; it asks whether the law was clearly established at the time of the constitutional violation."[160] This requirement ensures that "officers are on notice that their conduct is unlawful" before subjecting them to suit.[161] One way of determining whether a constitutional right was clearly established at the time of the alleged violation "is to ask whether existing case law gave the defendants fair warning that their conduct violated the plaintiff's constitutional rights."[162] In conducting this inquiry, "[t]he court must canvass controlling authority in its own jurisdiction and, if none exists, attempt to fathom whether there is a consensus of persuasive authority elsewhere."[163] Significantly, "[t]his inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' "[164] As the First Circuit has noted, "[c]ourts must be careful not to permit an artful pleader to convert the doctrine of qualified immunity into a hollow safeguard simply by alleging a violation of an exceedingly nebulous right."[165]

Then, "the final prong of the qualified immunity analysis, often the most difficult one for the plaintiff to prevail upon, is 'whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right."[166] The qualified immunity inquiry recognizes that "[i]t is not always evident at the time an official takes an action that a clearly established right is involved. For example, the factual situation might be ambiguous or the application of the legal standard to the precise facts at issue might be difficult."[167] So long as an "officer's mistake as to what the law requires is reasonable, the officer will be entitled to qualified immunity.

In practical terms, the Author can conclude that qualified immunity is not often applied at the motion to dismiss level. The First Circuit recently in *Maldonado v. Fontanes*,[168] stated that courts have discretion, in analyzing a qualified immunity claim, to decide whether (on the facts of a particular case), it is worthwhile to address first whether the facts alleged make out a violation of a constitutional right, which is the first part of the qualified immunity analysis. This, since there may be instances where "a discussion of why the relevant facts do not violate clearly established law ... make[s] it apparent that in fact the relevant facts do not make out a constitutional

[160] *Savard v. Rhode Island*, 338 F.3d 23, 27 (1st Cir. 2003).
[161] *Flores Galarza*, 484 F.3d at 33; citing *Saucier*, 533 U.S. at 206.
[162] *Id.* (citing *Suboh v. Dist. Attorney's Office of Suffolk*, 298 F.3d 81, 93 (1st Cir. 2002)).
[163] *Id.* (citing *Savard*, 338 F.3d at 28).
[164] *Id.* (citing *Wilson v. City of Boston*, 421 F.3d 45, 56 (1st Cir. 2005) (quoting *Saucier*, 533 U.S. at 201, 121 S. Ct. 2151)).
[165] *Id.* (citing *Limone v. Condon*, 372 F.3d 39, 46 (1st Cir. 2004)).
[166] *Id*. at 36 (citing *Wilson*, 421 F.3d at 57-58); s*ee Starlight Sugar, Inc. v. Soto,* 253 F.3d 137, 141 (1st Cir. 2001).
[167] *Id.* (quoting *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55, 61 and *Saucier,* 533 U.S. at 205).
[168] *Maldonado v. Fontanes*, 568 F.3d 263, 271 (1st Cir. 2009) (citing *Saucier v. Katz,* 533 U.S. 194 (2001), overruled in part by *Pearson v. Callahan,* 129 S. Ct. 808 (2009).

violation at all,"[169] making it worthwhile to address the first prong of the qualified immunity analysis.

Nevertheless, *Maldonado v. Fontanes*[170] adds that the utility of bypassing the first prong -violation of a constitutional right- is particularly apparent "[w]hen qualified immunity is asserted at the pleading stage [because] the precise factual basis for the plaintiff's claim or claims may be hard to identify." Following *Pearson*,[171] the First Circuit concluded that where the answer to the first prong of the immunity question may depend on the further development of the facts, it may be wise to avoid said first step.

On the other hand, if the defendant argues qualified immunity at the summary judgment level, he or she would certainly be in a better position to prove said defense. The pleadings situation at the motion to dismiss level is supposed to not affect the outcome of a qualified immunity motion for summary judgment if the evidence exists for that end. At the summary judgment level, as stated clearly in *Anderson v. Liberty Lobby, Inc.*,[172] where no evidence of malice was shown and defendants' evidence showed that the decision in question was researched in good faith, summary judgment was properly granted. Nevertheless, as said before, this qualified immunity issue has to be determined in a case by case basis, since there is no mathematical equation for a defendant to use while litigating this issue.

IX. Is the interlocutory appeal of a qualified immunity denial an available real option?

Generally speaking, appeals are permitted only from final judgments of the district court.[173] There are, however, several exceptions. "Chief among these is the so-called collateral order doctrine," by which "an order may be appealed immediately if it 'finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[174]

As discussed by the U.S. Supreme Court in *Will v. Hallock*,[175], the interlocutory order to be appealed should: (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from

[169] *Id.* (citing *Pearson,* 129 S. Ct. at 818-819).
[170] *Id*. at 270.
[171] 129 S. Ct. at 818-819 (citing *Buchanan v. Maine,* 469 F.3d 158, 168 (1st Cir. 2006)).
[172] *Anderson*, 477 U.S. at 250.
[173] 28 U.S.C. § 1291.
[174] *Lee-Barnes v. Puerto Ven Quarry Corp*., 513 F.3d 20, 25 (1st Cir. 2008); *Flores Galarza*, 484 F.3d at 13 (quoting 28 U.S.C. § 1291); *Espinal-Domínguez v. P. R.*, 352 F.3d 490, 495 (1st Cir. 2003) (quoting *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541, 546 (1949).
[175] *Will v. Hallock*, 546 U.S. 345, 349 (2006).

the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment."[176]

In *U.S. v. Carpenter*,[177], the First Circuit said that in order to qualify for review under the collateral order doctrine, the collateral issue must: (i) [be] so conceptually distinct from other issues being litigated in the underlying action that an immediate appeal would neither disrupt the main action, nor threaten to deprive the appellate court of useful context which might be derived from subsequent developments in the litigation; (ii) completely and conclusively resolve the collateral issue; (iii) infringe rights which appellant could not effectively vindicate in an appeal after final judgment in the case; and (iv) involve an important or unsettled legal issue, rather than merely challenge discretionary trial court rulings.[178]

Conversely, and as a matter of exception, orders denying claims of Eleventh Amendment immunity and qualified immunity, to the extent they turn on issues of law, are immediately appealable. Eleven Amendment and qualified immunity issues fall within the ambit of this exception, and are thus immediately appealable to the First Circuit Court of Appeals.[179]

In *Flores Galarza*,[180] the defendant Flores-Galarza filed an interlocutory appeal after a motion for judgment on the pleadings was denied, arguing, among other issues, that he was entitled to qualified immunity. The First Circuit in an extensive opinion concluded that, consistent with the Eleventh Amendment, Flores Galarza is amenable to be sued in his official capacity for injunctive and declaratory relief, but is protected from damages in his personal capacity by the doctrine of qualified immunity.

This qualified immunity interlocutory appeal is not often the rule in the First Circuit, is rather the exception. Any litigant must be very careful while deciding to appeal interlocutorily an order from the district court denying qualified immunity. What can be perceived from the *Flores Galarza* case is that qualified immunity provides us the option to proceed with the interlocutory appeal if the suit is "against an officer for money damages when the relief would come from the officer's own pocket, there is no Eleventh Amendment bar even though the conduct was part of the officer's official duties. In such a suit, the officer could claim

[176] *U. S. v. Quintana-Arroyo*, 235 F.3d 682, 684 (1st Cir. 2000).
[177] *U.S. v. Carpenter*, 449 F.3d 13 (1st Cir. 2007) (quoting *U. S. v. Kouri-Pérez*, 187 F.3d 1, 5 (1st Cir. 1999)).
[178] *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 278 (1988).
[179] *Flores Galarza*, 484 F.3d at 13 (citing *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy*, *Inc.*, 506 U.S. 139, 143 (1993) ("orders denying individual officials' claims of . . . qualified immunity are among those that fall within the ambit of [the collateral order doctrine] . . . [W]e agree . . . that the same rationale ought to apply to claims of Eleventh Amendment immunity made by States and state entities possessing a claim to share in that immunity.") (citation omitted); *Flores Galarza*, 484 F.3d at 13 (citing *Pagán v. Calderón*, 448 F.3d 16, 26 (1st Cir. 2006) (stating that denial of qualified immunity is an appealable final decision).
[180] *Id.* at 6; *See Maldonado v. Fontanes*, 568 F.3d 263, 271-271 (1st Cir. 2009) [hereinafter *Maldonado*].

absolute or qualified immunity as a defense."[181] Specifically, if such a judgment might induce the Commonwealth to indemnify a government official from the Commonwealth of Puerto Rico to spare him from ruin, that likelihood is irrelevant to the personal-capacity determination.[182]

X. Conclusion and Recommendations

As has been explained in the instant law review article, you have the most basic tools to conduct a civil rights case under Section 1983. The Author picked the most common substantive law doctrines, the devices used throughout the proceedings until pretrial, and the interlocutory appeal for that end.

Pursuant to the above discussion, we can conclude that each explanation can be seen from both perspectives, either from the plaintiff or from the defendant's side of the coin. The benefits provided by the Federal Civil Rights Act show us that despite of the good allegations that any plaintiff can have, if the attorney and the client are not diligent, his case could be dismissed. Likewise, if the defendant has a good defense, but he shows no interest during litigation, the case inevitably will go all the way to jury trial.

The Author simply drew a map to follow in general terms in this work. Remember always to combine theory with *praxis* and to be diligent with your case. Use with conscious the federal procedure, no matter if you are on the plaintiff or on the defendants' side of the coin. Think that in these cases you have a jury, and a lot of resources are used during the civil proceedings for the benefit of all the parties, which mean that you should not misuse the system for sterile struggles or personal beliefs. This is one of the main reasons the Author litigates at the federal forum, not by political beliefs, but because you can pursue justice in a foreign system that lives within our Puerto Rico, that certainly has more virtues than deficiencies. Thus, let's adopt the virtues to our jurisdiction and to our State system, and I certainly hope this article helps to that end.

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[181] *Id.* at 13 (citing Erwin Chemerinsky, *Federal Jurisdiction* § 7.5, 429 (4th ed. 2003)).

[182] *Id.* at 26 (citing Chemerinsky*, Federal Jurisdiction* § 7.5.2, 430 (4th ed. 2003)) ("[T]he fact that a government officer is acting in the scope of official duties is not enough to bar a suit as being in 'official capacity'."); *See Berman Enters., Inc. v. Jorling*, 3 F.3d 602, 606 (2d Cir. 1993) ("Whether or not a state would choose to reimburse an official for damages for constitutional harm he caused in his individual capacity is a matter of no concern to a federal court.") ("State indemnification policies are irrelevant for Eleventh Amendment analysis and do not prevent federal court relief against individual officers.").