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Survey of First Circuit Opinions

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This survey of First Circuit opinions covers the period from October 1, 2004 to September 30, 2005. The survey describes and analyzes major published civil opinions. Specifically, the survey covers the First Circuit's major opinions in civil rights; constitutional law; federal jurisdiction, practice and procedure; and employment discrimination law.

In the term under review, the First Circuit heard several significant cases in the areas of civil rights, constitutional law, and federal jurisdiction. Two of the court's decisions will make it easier for defendants who are sued for violating civil rights to establish immunities, while a third case, favorable to plaintiffs, endorsed an interesting application of the doctrines of municipal and supervisory immunity.

In *Cox v. Hainey*,¹ a case where a police officer made an unlawful arrest, the court joined several other circuits in ruling that a court could consider the officer's pre-arrest consultation with a prosecutor, and the advice the officer received, in determining qualified immunity.² In *Crete v. City of Lowell*,³ the court reversed a plaintiff's judgment for an excessive force violation, ruling that the allegedly negligent hiring of the assaulting police officer by the

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1. 391 F.3d 25, 35-36 (1st Cir. 2004).

2. *Id.* (holding officer's pre-arrest consult with officer one factor in determining immunity).

3. 418 F.3d 54, 66 (1st Cir. 2005).

municipal defendant was an exercise of discretion and therefore non-actionable under an exception to the Massachusetts Tort Claims Act.⁴ *Young v. City of Providence*⁵ presented a *Monell*⁶ and supervisory liability issue in a suit brought by the estate of a black officer who was off-duty when he was shot and killed by friendly fire from two fellow officers. Reversing, in part, a district court judgment for defendants, the court ruled that the plaintiff should be permitted to establish liability against the City and supervisor defendants for failure to adequately train under the City's "always armed/always on" policy, which jeopardized the safety of off-duty, out of uniform officers.⁷

Also during the term, the First Circuit struck down statutes on constitutional grounds in three cases. In *Planned Parenthood v. Heed*,⁸ the court upheld a district court judgment striking New Hampshire's law requiring parental notification for minors seeking abortion because the statute failed to include a health exception, and its narrowly defined death exception imposed an undue burden on the right to abortion. On review in the Supreme Court, the appeals court decision in *Heed* was vacated and the case remanded to determine whether an alternative, narrower reading could save the statute.⁹ In *Walgreen v. Rullan*,¹⁰ the court ruled that a Puerto Rico law requiring retail pharmacies to obtain a certificate of need before opening a store restrained competition and violated the dormant Commerce Clause. In *El Dia v. Puerto Rico Dept. of Consumer Affairs*,¹¹ the court affirmed a decision striking a regulation requiring non-residents seeking to advertise in Puerto Rican media outlets to post a bond with the Department of Consumer Affairs. The court found the regulation impermissibly restricted commercial speech.¹² In *Igartua de la Rosa v. United States*,¹³ an opinion addressing the right of Puerto Ricans to vote in federal elections, the *en banc* court revisited a divisive issue that has occupied it for a number of years. Chief Judge Boudin ruled that international human rights treaties protecting the right to vote provided no remedy for the exclusion of

4. See *id.* at 64-66 (1st Cir. 2005) (holding city's actions reasonable in hiring process).

5. 404 F.3d 4 (1st Cir. 2005).

6. See generally *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978) (holding city immune from private lawsuits unless municipal policy or custom involved).

7. See *Young*, 404 F.3d 9-11, 28-30 (1st Cir. 2005) (holding city liable because deficient in training officer to comply with "always armed/always dangerous" policy).

8. 390 F.3d 53 (1st Cir. 2004) (voiding New Hampshire abortion law because unconstitutional due to no exception for health of mother), *judgment vacated sub. nom. Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 964-66 (2006) (holding Act only partially unconstitutional).

9. *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967-69 (2006) (discussing reasons why Act not invalid).

10. 405 F.3d 50, 57-8 (1st Cir. 2005) (holding "certificate of need" Act violated Interstate Commerce Clause).

11. 413 F.3d 110, 114-18 (1st Cir. 2005) (holding bond requirement for out-of-state advertisers impermissibly restricted speech).

12. See *El Dia*, 413 F.3d at 114-18 (analyzing speech using *Central Hudson* test).

13. 417 F.3d 145, 147, 151-52 (1st Cir. 2005) (rejecting theory that Puerto Ricans have right to vote for U.S. President and Vice President) *cert. denied* 2006 74 U.S.L.W. 3531 (U.S. March 20, 2006) (No. 05-650).

Puerto Rican residents from federal elections. Specifically, only residents of states and not residents of territories like Puerto Rico are entitled to vote in presidential elections under the Constitution's Electoral College provision.¹⁴ In a vigorous dissent, Judge Torruella canvassed the history of Puerto Rico's colonial status in U.S. history, and asserted that declaratory relief on the treaty question should be available where the right to vote is an enforceable norm of customary international law.¹⁵

There were a number of other significant decisions on constitutional issues. In *Comfort v. Lynn School Commission*,¹⁶ an *en banc* court reversed a panel decision striking a city's race-specific school transfer policy. The court rejected the white plaintiff's claim that the plan violated her Equal Protection rights and, applying a *Grutter*¹⁷ analysis, found the plan narrowly tailored to meet a compelling need to enhance diversity in a school's student body. In *Association de Education Privada de Puerto Rico v. Echevarria-Vargas*,¹⁸ the court reversed and remanded to the lower court a case challenging consumer regulations which were designed to aid consumers of school texts but limited teacher discretion in the choice of school books. The court ruled the plaintiffs should have been afforded a chance to prove the regulation interfered with academic freedom.¹⁹ In *Diva's Inc. v. City of Bangor*,²⁰ the court ruled that an adult entertainment establishment stated a claim for relief on First Amendment grounds against a city agency that denied its application for a permit to have bikini dancing on its premises. In *Ridley v. Massachusetts Bay Transportation Authority*,²¹ the court ruled that the Massachusetts Bay Transportation Authority (MBTA) violated the First Amendment prohibition on viewpoint discrimination in rejecting the interior display in bus, train and trolley of advertisements of a group advocating reform of the state's marijuana laws.²² Dissenting, Judge Torruella disagreed with the majority's conclusion that the MBTA had not created a public forum by opening its vehicles to commercial

14. See *Igartua de la Rosa*, 417 F.3d at 149-150 (noting Electoral College only covers residents of U.S. states).

15. See *Igartua de la Rosa*, 417 F.3d at 158-163 (Torruella, J., dissenting) (arguing Puerto Ricans disenfranchised due to court interpretation of Constitution).

16. 418 F.3d 1 (1st Cir. 2005) (holding plan allowing students to transfer schools based on race constitutional because narrowly-tailored), *cert. denied* 126 S. Ct. 798 (2005).

17. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003).

18. 385 F.3d 81 (1st Cir. 2004) (debating constitutionality of textbook purchasing regulation in schools).

19. See *Ass'n de Educ. Privada de P.R.*, 385 F.3d at 86-88 (listing additional facts necessary for determination of whether First Amendment violated).

20. 411 F.3d 30, 34-37 (1st Cir. 2005) (finding plaintiffs should have chance to prove bikini dancing permissible under Maine's governing statute).

21. 390 F.3d 65 (1st Cir. 2004) (discussing propriety of MBTA rejecting certain advertisements based on content).

22. See *Ridley*, 390 F.3d at 95-96 (holding limits on advertisements acceptable because MBTA constitutes non-public forum).

advertising.²³

The First Circuit also addressed jurisdictional limits on federal courts. In *Ungar v. Palestine Liberation Organization*,²⁴ a case of international significance, the court affirmed a default judgment of over \$116 million against the Palestine Liberation Organization and the Palestinian Authority. After reviewing the history of the Israel/Palestine conflict, Judge Selya rejected the defendants' claim that the case, a damages action brought under the Anti-Terrorism Act and based on the terrorist shooting death of a U.S. national living in Israel, involved a non-justiciable political question: whether the PLO and the PA were covered by state sovereign immunity and thereby exempt from suit under the Anti-Terrorism Act.²⁵

In two cases the court applied the Supreme Court's decision in *Exxon Mobil v. Saudi Basic Industries*²⁶ to clarify the reach of the *Rooker-Feldman*²⁷ doctrine. In one case, *Federacion de Maestros de Puerto Rico v. Junta de Relaciones de Trabajo de Puerto Rico*,²⁸ the First Circuit considered the application of the *Rooker-Feldman* doctrine to interlocutory judgments. The court concluded that where the state court proceedings are "final" with respect to the federal issues in the case, although ongoing on non-federal issues, *Rooker-Feldman* is a jurisdictional bar to federal district court review of the state court decision on the federal issue.²⁹ In another case, *Diva's Inc.*, the First Circuit reversed the district court's holding that *Rooker-Feldman* barred federal district court consideration of *Diva's Inc.* claim that Maine's laws governing nude and bikini dancing were unconstitutional.³⁰ Although the Maine Supreme Judicial Court upheld the statutes before the federal district court addressed the issue, the First Circuit applied *Exxon Mobil* and concluded that *Rooker-Feldman* did not prevent the district court from exercising jurisdiction because the plaintiff filed the federal action before the city of Bangor filed its enforcement action against the plaintiff in state court.³¹

23. See *id.* at 96-97 (arguing MBTA created public forum).

24. 402 F.3d 274, 294 (1st Cir. 2005) (finding defendants failed to demonstrate reason to set aside lower court judgment), *cert. denied*, 126 S. Ct. 715 (2005).

25. See *id.* at 293-94 (listing reasons why defendants failed to prove sovereign immunity).

26. 125 S. Ct. 1517 (2005) (permitting plaintiff to file protective action in federal court).

27. See *Exxon Mobil*, 125 S. Ct. at 1521-22 (explaining *Rooker-Feldman* doctrine). The doctrine prohibits losing parties in state court actions from bringing a claim in district court challenging the state court ruling. *Id.* at 1521-22.

28. 410 F.3d 17 (1st Cir. 2005) (performing *Rooker-Feldman* analysis after *Exxon Mobil*).

29. See *id.* at 27-29 (denying jurisdiction under *Rooker-Feldman*).

30. See *Diva's Inc. v. City of Bangor*, 411 F.3d 30, 43 (1st Cir. 2005) (finding *Rooker-Feldman* not applicable due to timing of federal suit filing).

31. See *Diva's Inc.*, 411 F.3d at 43-45 (stating error for district court to use *Rooker-Feldman* doctrine to dismiss plaintiff's claim).

I. ATTORNEYS' FEES

In *Boston Children First v. City of Boston*, 395 F.3d 10 (1st Cir. 2005) (Lipez, J.), the court considered whether it was permissible to deny a fee application in a case where the plaintiff was awarded nominal damages. In the district court, the plaintiff challenged the city's former and current school assignment systems.³² The First Circuit affirmed the district court's rulings rejecting the majority of the claims but awarding nominal damages to two children.³³ The district court denied plaintiffs' ensuing application for fees as a "prevailing party" under 42 U.S.C. § 1988.

Reviewing the district court order denying fees under a manifest abuse of discretion standard, the First Circuit affirmed. It applied a two-part analysis: (1) is the plaintiff a prevailing party; and, if so (2) what constitutes a reasonable fee.³⁴ Following the teaching in *Farrar v. Hobby*,³⁵ the court ruled that despite the nominal relief, the plaintiffs were a prevailing party. However, the court stated that the district court did not err in refusing to award a fee where the relief was *de minimus*, and, because the litigation did not resolve the question whether the Boston school assignment approach was unconstitutional, the nominal damages award did not reflect a victory on a significant legal issue. *Boston Children First*, 395 F.3d at 14-15, 17-18.

In *Smith v. Fitchburg*, 401 F.3d 16, 27 (1st Cir. 2005) (Stahl, J.), the court upheld the district court's rejection of a fee application under the Individuals with Disabilities Education Act ("IDEA"). The relevant provision of the Act provides an award of attorneys' fees to parents of students with disabilities who are the "prevailing party" in an action brought under the IDEA. *Smith*, 401 F.3d at 17, 18, n.1. Plaintiffs pursued administrative remedies against Fitchburg public schools for failing to provide necessary home education services. *Id.* at 19. The parties ultimately settled their dispute as to what services must be provided to the child under the IDEA, with Fitchburg conceding it owed Smith home education services. Smith then filed an action for fees under the IDEA. The district court granted summary judgment to Fitchburg, finding that Smith was not a "prevailing party." *Id.* at 19, 27.

The First Circuit affirmed but left undecided the question as to whether the narrow reading of *Buckhannon*, which would limit relief to the two categories there mentioned, or the broader reading, should apply.³⁶ The court held that

32. See *Boston Children First v. Boston Sch. Comm.*, 260 F. Supp. 2d 318, 319 (D. Mass. 2003) (challenging Boston's decision to end racial percentage as element in school admissions process).

33. See *Anderson v. City of Boston*, 375 F.3d 71 (1st Cir. 2004) (affirming district court's order).

34. See *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (setting forth two-part inquiry).

35. 506 U.S. 103 (1992).

36. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001) (establishing basis for fee award). In *Buckhannon*, the Supreme Court rejected the "catalyst theory" that established a basis for a fee award if the party's lawsuit led to a voluntary change in the defendant's conduct. *Id.* at 610. The *Buckhannon* Court held that parties failing to obtain a judgment on the merits or a court-

plaintiff did not have a final judgment on the merits or a consent decree, nor could plaintiff show the functional equivalent of judicial involvement, because the hearing officer yielded to the parties' private settlement and did not "place the weight of judicial authority behind Fitchburg's substantive concession that [plaintiff] was entitled to an [Individualized Education Program]." *Smith*, 401 F.3d at 27.

II. CIVIL RIGHTS SECTION 1983

In *Alsina-Ortiz v. Laboy*, 400 F.3d 77 (1st Cir. 2005) (Boudin, C.J.), the plaintiff, decedent's administratrix, claimed the defendants-prison officers and officials failed to provide medical care to a severely injured prisoner, causing his death. The 42 U.S.C. § 1983 claim asserted a violation of the prisoner's Eighth Amendment rights. The court reversed summary judgment for the prison lieutenant, who received explicit complaints about decedent's serious health condition and did not investigate further. The court affirmed a grant of summary judgment for other prison administrators because there was no evidence they had knowledge of a continuing pattern of failure to report and address the medical needs of prisoners. *Alsina-Ortiz*, 430 F.3d at 81-83.

In *Baron v. Suffolk County Sheriff's Dept.*, 402 F.3d 225 (1st Cir. 2005) (Boudin, C.J.), the court affirmed judgment based on a jury verdict in favor of a 42 U.S.C. § 1983 plaintiff. Plaintiff was constructively discharged from his position as a county correctional officer by defendants, who participated in a campaign of severe harassment in response to plaintiff's report of co-worker wrongdoing. After plaintiff made the report, he was labeled a "rat" and a child molester, received harassing phone calls at his home, and his car tires were slashed. He was also falsely charged with a criminal offense. The department did nothing to protect him from the harassing conduct, and plaintiff ultimately collapsed and was hospitalized due to the stress of work. *Baron*, 402 F.3d at 230.

The First Circuit affirmed the district court's conclusion that plaintiff's evidence was sufficient to establish the plaintiff was harassed in retaliation for speaking out on a matter of inherent public concern. The Department and its officials were liable for an unofficial custom of retaliation against employees who breached the code of silence. The court further found that the jury award of \$500,000 was not excessive in light of the harm suffered by the plaintiff. *Baron*, 402 F.3d at 234, 246.

In *Burke v. Town of Walpole*, 405 F.3d 66 (1st Cir. 2005) (Lipez, J.), the

ordered consent decree were not entitled to fees even if their lawsuit achieved the desired result by voluntary action on the part of the defendant. *Id.* at 622. After *Buckhannon*, some circuits read the opinion broadly to mean that the functional equivalent of a judgment on the merits or a court-ordered consent decree, for example, an order containing an agreement reached by the parties, could satisfy *Buckhannon's* prevailing party definition.

court affirmed in part and reversed in part a grant of summary judgment to police officers and officials involved in the arrest of the plaintiff, Burke, on a charge of murdering his 75-year-old neighbor. The defendant had no involvement with the murder; ultimately the prosecutor filed a *nol prosequi* on the ground that the plaintiff's indictment was premature, and the plaintiff was released from custody after 41 days. The plaintiff filed a suit, claiming his arrest contravened his fourth and fourteenth amendment rights to be free from arrest without probable cause. *Burke*, 405 F.3d at 74.

The court held that one of the defendant police officers, who withheld information about exculpatory DNA results from officers who sought a magistrate's warrant against the plaintiff, was not entitled to qualified immunity. *Burke*, 405 F.3d at 84. The court further held the police chief made conditionally privileged statements when he said during a public meeting that the police "got the right man," and that DNA evidence could have been corrupted. *Id.* at 94-96.

In *Cox v. Hainey*, 391 F.3d 25 (1st Cir. 2004) (Selya, J.), the appellant, charged with a drug offense, sued a police officer for false arrest after it was established that the drugs were prescribed for the appellant. The court sustained the judgment of the district court that the police officer was entitled to qualified immunity. In a case of first impression, the court considered whether the officer's pre-arrest consultation with a prosecutor should have been part of the "totality of the circumstances" in favor of qualified immunity. *Cox*, 391 F.3d at 36. The court agreed with the Fourth, Seventh, Eighth and Ninth Circuits that "a pre-seizure consultation with a prosecutor is a factor to be considered in determining an officer's entitlement to qualified immunity." *Id.* at 34. The court observed that "both the fact of a pre-arrest consultation and the purport of the advice received" from a prosecutor were relevant to the qualified immunity determination. *Id.* at 35.

In *Crete v. City of Lowell*, 418 F.3d 54 (1st Cir. 2005) (Lynch, J.), the court reversed a district court's judgment for plaintiff on an excessive force claim. The plaintiff, Crete, asserted violations of his constitutional rights under 42 U.S.C. § 1983 and a state claim. The City admitted that the arresting officer used excessive force. The district court granted the City's request for summary judgment on the § 1983 claim and entered judgment for the plaintiff on the state claim on the basis of a jury verdict in plaintiff's favor. *Crete*, 418 F.3d at 57.

The First Circuit reversed the judgment. The court held that the "discretionary function" exception of the Massachusetts Tort Claims Act (MTCA) barred the plaintiff's action. *Crete*, 418 F.3d at 64-65. The facts established that plaintiff was beaten by a police officer who was hired by the City despite its direct knowledge that the officer had been convicted of assault and battery. After interviewing the applicant for a police position and learning of his criminal history, the City conducted an investigation and decided to hire

him notwithstanding the conviction. The court held the City's action constituted a "policy" of the City that was not subject to tort liability under the MTCA, and further, that the decision-maker was exercising his discretion in declining to bypass the applicant. *Id.* at 65. Applying the discretionary function exception of the MTCA to this particular fact pattern appears to be a case of first impression.

In assessing how the case would likely be decided by the Massachusetts Supreme Judicial Court, the court considered federal court decisions under the Federal Tort Claims Act, and that other states, in court decisions, "consider claims of negligent hiring to be barred by the discretionary function exception." *Crete*, 418 F.3d at 65. On the § 1983 claim, the court sustained the district court's grant of summary judgment on the grounds that the City's decision to hire the officer despite his criminal record did not constitute deliberate indifference to the rights of the citizens of the City of Lowell. *Id.* at 66.

In *DiRico v. City of Quincy*, 404 F.3d 464 (1st Cir. 2005) (Stahl, J.), plaintiff DiRico sued the City on a *Monell*³⁷ theory and a police officer for excessive force. The officer stopped the plaintiff in his driveway and, according to the plaintiff, beat him. The officer had been the subject of an unsubstantiated complaint made by a civilian, who claimed he suffered a broken arm and a bruised eye at the hands of the officer, roughly two months prior to the DiRico arrest. The trial court excluded this testimony, and granted summary judgment to the City. After a jury trial against the officer resulted in a hung jury, a second jury returned a verdict for the defendant officer. On appeal, the First Circuit declined to reverse on the evidentiary issue, and held that the trial judge properly granted summary judgment to the City where the evidence was not sufficient to establish that it had failed to properly train, supervise or discipline the officer. *DiRico*, 404 F.3d at 456-67, 468-69.

In *Estades-Negroni v. CPC Hospital San Juan Capistrano*, 412 F.3d 1 (1st Cir. 2005) (Stahl, J.), the court upheld a district court decision dismissing a § 1983 action challenging the involuntary commitment of the plaintiff. The court applied three tests to determine whether the defendant is a state actor: (1) the state compulsion test; (2) the nexus/joint action test; and (3) the public function test.³⁸ Ultimately, the court agreed that the defendant, a private hospital whose actions led to the commitment, was not a state actor. *Estades-Negroni*, 412 F.3d at 5-9.

In *Forgie-Buccioni v. Hannaford Bros., Inc.* 413 F.3d 175 (1st Cir. 2005) (Baldock, J.), the court sustained the judgment of the lower court in a diversity claim for false arrest of a customer against a store in New Hampshire below.

37. See *supra* note 6 and accompanying text (discussing principle of *Monell* liability).

38. See *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992) (setting forth three-part test to determine where a private party is considered state actor under § 1983 (citing *NBC v. Communication Workers of America, AFL-CIO*, 860 F.2d 1022, 1026 (11th Cir. 1988)); see also *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254 (1st Cir. 1994) (including three-part test).

The court held it was not error to deny a remittitur in light of the facts, and that the verdict was not excessive. The First Circuit's opinion left in place a \$100,000 verdict. *Forgie-Buccioni*, 413 F.3d at 181-83.

In *Lopez-Gonzalez v. Municipality of Comerio*, 404 F.3d 548 (1st Cir. 2005) (Campbell, J.), on plaintiff's § 1983 political discrimination in employment claim, the court held that where the initial case was involuntarily dismissed as a sanction for plaintiff's failure to comply with court-ordered discovery, the limitations period did not start to run anew from the date of that dismissal. To allow the plaintiffs to refile the case would grant them an inappropriate reward. *Lopez-Gonzalez*, 404 F.3d at 555-56.

In *Pasdon v. City of Peabody*, 417 F.3d 225 (1st Cir. 2005) (Torruella, J.), the court affirmed a district court judgment dismissing plaintiff's § 1983 claim which was based on the police department's investigation of his ex-wife's allegations against him, resulting in a restraining order. The court agreed with the district court that non-custodial questioning by the police did not require Miranda protections and hence there was no violation in the failure to Mirandize the plaintiff, and that the police questioning did not implicate plaintiff's Sixth Amendment rights. The court further held that disclosure of the incident to the press did not implicate the plaintiff's Fifth or Sixth and Seventh Amendment rights. *Pasdon* 417 F.3d at 228.

In *Rivera v. Rhode Island*, 402 F.3d 27 (1st Cir. 2005) (Lynch, J.), the administratrix, the mother of a fifteen year old girl who was murdered to prevent her from testifying at a murder trial, sued various officials on a substantive due process claim. The girl was shot in the head by a relative of the accused a day before she was scheduled to testify for the prosecution in his trial for murder. Plaintiff sought to establish that the girl's rights were violated by law enforcement officials who promised her that they would protect her from harm in response to many threats on her life. *Rivera*, 402 F.3d at 30.

The First Circuit affirmed the district court's dismissal on the pleadings, finding the state and its officers owed plaintiff no duty under *DeShaney*,³⁹ as plaintiff's liberty was not deprived by any state actors, creating no affirmative constitutional duty on the state to protect the plaintiff. *Rivera*, 402 F.3d at 38-39.

In *Rodriguez-Rodriguez v. Ortiz-Velez*, 391 F.3d 36 (1st Cir. 2004) (Boudin, C.J.) the court sustained the district court's denial of summary judgment in a § 1983 case where the plaintiff's injuries were caused by excessive force. The First Circuit held that the defendants, a mayor and a police officer involved in a brawl related to plaintiff's electioneering activity, were not entitled to qualified immunity because their behavior, if proved, was not reasonable. *Rodriguez-Rodriguez*, 391 F.3d at 41-42.

39. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989) (finding no due process liberty violation where state failed to protect child from his father's physical abuse).

In *Torres-Rivera v. O'Neill-Cancel*, 406 F.3d 43 (1st Cir. 2005) (Lynch, J.), the court affirmed a district court judgment entered in favor of a mother and son after a jury trial on their §1983 claim of excessive force. The jury found defendant to be liable for failure to intervene to prevent another officer's excessive use of force. On the failure to intervene claim, the court found there was no error in instructing the jury under the Fourth Amendment "objectively reasonable" standard rather than the substantive due process "shock the conscience" approach. *Torres-Rivera*, 406 F.3d at 50-52. The court further held the defendant officer was not entitled to qualified immunity where the law was clearly established that the officer had a duty to intervene to prevent the use of excessive force in the course of an investigatory stop. *Id.* at 53-55.

In *SFW Arecibo, Ltd. v. Rodriguez*, 415 F.3d 135 (1st Cir. 2005) (Lipez, J.), the court rejected several constitutional claims by a developer against members of a planning board. The court held that until the developers exhausted their state law remedies to obtain just compensation, there was no "taking" under the Takings Clause. Thus, the procedural and substantive due process claims, as well as the equal protection claim, were without merit. *SFW Arecibo, Ltd.*, 415 F.3d at 141-42.

In *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4 (1st Cir. 2005) (Boudin, C.J.), plaintiff, administratrix of the estate of an off-duty African-American police officer who was shot and killed while responding to a call by two on-duty officers, sued the City on a *Monell* theory, the two officers who shot him for excessive force, and various supervisory officers. The district court bifurcated the trial. On the excessive force claim, a jury returned a verdict in favor of one defendant and against the other. The district court then granted summary judgment to the remaining defendants. *Young*, 404 F.3d at 9-10.

The First Circuit affirmed in part and reversed in part. The court held the plaintiff should have been permitted to proceed on her case based on evidence that the City failed to adequately train its officers regarding its "always armed/always on" policy, thereby exposing the public and the police to the hazard of friendly fire. *Young*, 404 F.3d at 28-29. The court further held that the plaintiff failed to prove a causal link between the alleged negligent hiring of the shooting officer, against whom the jury returned its verdict, and the harm to the decedent. *Id.* at 29.

The court remanded the case for trial regarding the failure to train claim on the "always armed/always on" policy, and for further proceedings regarding the supervisory claim against the police officers. On remand, the district court denied summary judgment to the three supervisory defendants, holding they were not entitled to qualified immunity on *Young's* failure to train claim, and denied summary judgment on the *Monell* claim against the Chief of Police.⁴⁰

40. See *Young v. City of Providence*, 396 F. Supp. 2d 125, 141-44, 146 (D.R.I. 2005) (articulating

III. CONSTITUTIONAL LAW

A. Commerce Clause

In *Antilles Cement Corp. v. Acevedo Vila*, 408 F.3d 41 (1st Cir. 2005) (Selya, J.), the court vacated a district court judgment declaring two Puerto Rican statutes unconstitutional and remanded the case for further proceedings. The statutes barred the use of non Puerto Rican cement in construction projects funded by Puerto Rico or the U.S. federal government, and called for imported cement to carry warning labels. The district court struck down the statutes under the dormant Foreign Commerce Clause. *Antilles Cement Corp.*, 408 F.3d at 42.

The First Circuit deemed the record on which the lower court acted to be insufficiently developed to reach the constitutional issues. The court reasoned the resolution of two issues of statutory interpretation could render it unnecessary to resolve the Commerce Clause challenge. First, the Buy American Act (BAA), a federal law requiring the use of domestic over foreign materials in all but exceptional situations could preempt Puerto Rico's laws. Second, where the record did not make clear whether the Puerto Rican law applied to the use of cement in private projects funded by the state as well as public works, it was not possible to determine whether the Commonwealth was acting as a market participant or a market regulator, a factor that could bear on the application of the dormant Foreign Commerce Clause. *Antilles Cement Corp.*, 408 F.3d at 50-51. The court remanded the case for further proceedings on these two issues. On remand the district court ordered a temporary restraining order pending a full hearing.⁴¹

In *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005) (Howard, J.), *cert. denied*, 126 S. Ct. 1059 (2006), the court reversed a district court ruling which upheld the constitutionality of a Puerto Rico statute that required retail pharmacies seeking to open or relocate in the Commonwealth to obtain a certificate of necessity and convenience. The First Circuit held that, as administered by the Secretary of Health, the law violated the dormant Commerce Clause because it permitted the Commonwealth to deny access to a particular market in order to control competition, and it allowed local interests to deploy the regulatory scheme to disfavor out-of-state businesses. The court determined that the law was not rationally related to the Commonwealth's stated legitimate interest of encouraging pharmacies to locate in underserved areas because denying access to a particular desired site would not necessarily lead a company to locate a pharmacy in an underserved area. *Walgreen, Co.*

reasons court denied summary judgment).

41. See generally *San Antilles Cement Corp. v. Acevedo Vila*, Civil NO. 02-1643(JP), 2005 U.S. Dist. LEXIS 37754 (D.P.R. 2005) (enjoining enforcement of law in question).

405 F.3d at 59-60.

B. Enclave Clause

In *Torrens v. Lockheed Martin Services Group, Inc.*, 396 F.3d 468 (1st Cir. 2005) (Boudin, C.J.), the appellees sued to recover back wages from their employer, a government contractor. The employees first sued in the Puerto Rico courts, and the case was removed by the employer based on claims later added under the Fair Labor Standards Act. The court applied the Enclave Clause of the U.S. Constitution,⁴² which confers on the federal government exclusive legislative jurisdiction over all lands owned by the U.S. “for the erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings,” to reverse a district court ruling that the property where the employees worked—piers and related property in Puerto Rico acquired by the United States in 1940—was not a federal enclave. *Torrens*, 396 F.3d at 470. The district court denied the employer’s motion to dismiss the claims based on Puerto Rican law. The First Circuit reversed, holding that the Enclave Clause applied, giving the United States exclusive legislative authority over disputes involving the Enclave. *Id.* at 471-73.

C. Right to Vote

In *Igartua-de la Rosa v. U.S.*, 417 F.3d 145 (1st Cir. 2005) (Boudin, C.J.), *cert. denied*, *Igartua-de la Rosa v. U.S.*, No. 05-650, 2006 U.S. LEXIS 2457 (Oct. 29, 2005), the court, sitting *en banc*, reheard an appeal dismissing plaintiff’s lawsuit claiming that denying the right to vote in quadrennial national elections to American citizens residing in Puerto Rico violated the U.S. Constitution. The plaintiff, proceeding *pro se*, brought two previous law suits raising the same issue. In this case, the plaintiff sought a declaratory judgment recognizing that international law protects the right to vote in national elections and that the contrary practice of the United States contravenes international law. *Igartua-de la Rosa*, 417 F.3d at 148.

Chief Judge Boudin, writing for the majority, deemed Article II, § 1, clause 2 of the Constitution, establishing the Electoral College as the mechanism for electing the President, to present an insurmountable barrier to the plaintiff’s claim.⁴³ He concluded that Article II “does not confer the franchise on ‘U.S. citizens’ but on ‘Electors’ who are to be ‘appoint[ed] by each ‘State,’ in ‘such Manner’ as the state legislature may direct, equal to the number of Senators and Representatives to whom the state is entitled.” *Igartua-de la Rosa*, 417 F.3d at 147 (quoting U.S. CONST. Art. II, § 1). Because Puerto Rico is not a state, it

42. See U.S. CONST. Art. 1, § 8, cl. 17 (conferring exclusive legislative jurisdiction for erection of certain water structures).

43. See U.S. CONST. Art. 1, § 1, cl. 2 (establishing electoral college).

cannot appoint “electors” under Article II. As such, an amendment to the Constitution, similar to Amendment XXIII, which extends the Electoral College system to the District of Columbia, would be the only solution. *Id.* at 151.

The majority rejected Igartua’s international law claims, reasoning that no cognizable right to vote in presidential elections exists under customary international law, and that the international instruments on which Igartua relied—the Universal Declaration of Human Rights, the Inter-American Democratic Charter, and the International Covenant on Civil and Political Rights—did not impose any obligations on the United States relevant to Igartua’s claim. *Igartua-de la Rosa*, 417 F.3d at 152.

In a concurring opinion, Judges Lipez and Campbell took the view that the court was without jurisdiction to decide Igartua’s claim. Federal courts may exercise jurisdiction, the court observed, only when it is “likely . . . that the injury will be redressed by a favorable decision.” *Igartua-de la Rosa*, 417 F.3d at 153 (Lipez, J., concurring). The plaintiff’s argument that a declaratory judgment would lead Congress to take corrective action was speculative. Judge Lipez wrote, and therefore, he concluded, the federal courts did not have the power to provide plaintiff with a remedy. *Id.* at 153-54 (Lipez, J., concurring).

Judge Torruella dissented. He canvassed the history of Puerto Rico’s colonial status in American history. He argued that the refusal to extend the franchise to citizens living in United States territories violates both the International Convention on Civil and Political Rights (ICCPR), and customary international law as reflected in numerous international instruments. *Igartua-de la Rosa*, 417 F.3d at 158-84 (Torruella, J., dissenting).

Judge Howard dissented on grounds that the record as to whether the ICCPR is self-executing was insufficient to dismiss the plaintiff’s claim under Federal Rules of Civil Procedure 12(b)(6). He argued that the court ought to have allowed the plaintiff to introduce “evidence regarding the ICCPR’s negotiation and enforcement history,” which would have enabled the court to determine whether the treaty gives rise to a private cause of action. *Igartua-de la Rosa*, 417 F.3d at 186 (Howard, J., dissenting).

D. First Amendment

1. Religion

In *Eulitt v. Maine Dept. of Education*, 386 F.3d 344 (1st Cir. 2005) (Selya, J.), the First Circuit affirmed the district court’s rejection of a challenge to a Maine law excluding private sectarian schools from a program that placed public school students in private settings at public expense. The plaintiffs were parents who paid their children’s tuition at a parochial school. They sued on behalf of themselves, their children, and the parochial school, claiming that the

statute violated the Constitution's Free Exercise and Equal Protection guarantees. Relying on the authority of *Strout v. Albanese*⁴⁴ the district court granted summary judgment for the defendants. *Eulitt*, 386 F.3d at 346-47.

The First Circuit affirmed, but on different grounds. The court found the plaintiffs were without standing to assert the sectarian school's claims. In reaching its decision, the First Circuit considered two Supreme Court cases decided after *Strout*. The court distinguished *Zelman v. Simmons-Harris*⁴⁵ where the Court held Cleveland's voucher system did not violate the Establishment Clause by including private sectarian schools. The court also applied the teaching of *Locke v. Davey*,⁴⁶ where the Supreme Court held a state college scholarship program that excluded theology study did not violate the Free Exercise Clause. *Eulitt*, 386 F.3d at 348-49, 353-54.

In *Eulitt*, the First Circuit held that the statute did not infringe on the individual plaintiffs' Free Exercise rights because it did not inhibit them from choosing religious education. *Eulitt*, 386 F.3d at 356. Rejecting the plaintiff's Equal Protection challenge, the court reasoned that the State's interest "in concentrating limited state funds on . . . secular education, avoiding entanglement, and allaying concerns about accountability that . . . would accompany state oversight of parochial schools' curricula and policies" are rationally related to its education plan's limited funding scheme. *Id.*

In *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005) (Torruella, J.), *cert. denied*, *Wirzburger v. Galvin*, 2006 U.S. LEXIS 946 (Jan 23, 2006), the court affirmed a district court decision rejecting a constitutional challenge to provisions of the Massachusetts Constitution that insulate from amendment by the initiative procedure two state constitution provisions forbidding public support for sectarian schools. Plaintiffs claimed the state constitutional provisions violated their federal constitutional rights to Free Exercise, Free Speech, and Equal Protection. Plaintiffs sought to amend by popular initiative Article 18 of the Massachusetts Constitution, which prohibits public aid for private schools. The Attorney General rejected their petition on the grounds that Article 48, which authorizes amendment by popular initiative, contains two provisions—the Anti-Aid Exclusion and the Religious Exclusion—that effectively insulate Article 18 from amendment by the initiative process. *Wirzburger*, 412 F.3d at 274-75.

Applying the intermediate scrutiny test established in *United States v. O'Brien*,⁴⁷ the First Circuit ruled that because Massachusetts has a substantial interest in protecting the fundamental rights aimed at by Article 18, namely, free exercise and freedom from state religion, the state constitution's exclusion

44. 178 F.3d 57 (1st Cir. 1999) (allowing state grants to non-sectarian private schools).

45. 536 U.S. 639 (2000) (finding state tuition payment program not violating Establishment Clause).

46. 540 U.S. 712 (2004) (allowing state to provide scholarship for college students pursuing theology).

47. 391 U.S. 367 (1968) (finding statute prohibiting destruction of Selective Service registration certificates does not violate free speech).

provisions did not infringe on the plaintiffs' speech rights. In applying intermediate scrutiny, the First Circuit explicitly rejected the D.C. Circuit's approach in *Marijuana Policy Project v. United States*.⁴⁸

On the plaintiffs' Free Exercise claim, the court ruled that the state constitutional exclusions neither discriminated against plaintiffs on the basis of their religious beliefs or status, nor precluded them from any form of religious exercise. *Wirzburger*, 412 F.3d at 280-81. Finally, the court rejected the plaintiffs' argument that the constitutional exclusions harmed a suspect class, i.e., religious individuals, and applied rational basis review. The court held the State's aim to prevent the establishment of a religion is legitimate, and the means rationally related to the goal. *Wirzburger*, 412 F.3d at 283-85.

2. Speech and Expression

a. Academic Freedom

In *Association de Educacion Privada de Puerto Rico v. Echevarria-Vargas*, 385 F.3d 81 (1st Cir. 2004) (Lynch, J.), an organization representing a group of private schools challenged regulations issued and enforced by the Puerto Rican Department of Consumer Affairs designed to protect the interests of school textbook consumers. The regulations required all schools, including private schools, to post the textbooks they intended to use at least three months before the commencement of classes; to disclose the final sales price of the books and the school's agreement with the bookseller; and to permit parents to purchase older editions of texts unless there were "significant" changes in the most recent edition. The district court dismissed the complaint. *Echevarria-Vargas*, 385 F.3d at 84-85.

The First Circuit reversed and remanded. The court ruled the plaintiffs should have been afforded the opportunity to prove that the regulations violated academic freedom because they interfere with teachers' ability to determine what to teach. *Echevarria-Vargas*, 385 F.3d at 87. Plaintiffs argued that by depriving schools of the ability to demand use of the same edition of texts by all students in the classroom, the regulations effectively created a "Tower of Babel," and thereby interfered with teachers' academic freedom. *Id.* at 86, 87.

Judge Torruella dissented. In his view the plaintiffs were entitled to relief on the pleadings because the regulations manifestly interfered with academic freedom. *Echevarria-Vargas*, 385 F.3d at 88-90 (Torruella, J., dissenting).

48. 304 F.3d 82 (D.C. Cir. 2002) (granting subject matter jurisdiction to foreign plaintiffs). In *Marijuana Policy Project*, the D.C. Circuit applied the rational basis test and upheld the subject matter exclusion in the District of Columbia's initiative process, reasoning that such exclusions "restrict[] no speech." *Id.* at 85.

b. Access to Clinic Entrances

In *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2005) (Lynch, J.), *cert. denied*, *McGuire v. Reilly*, 1255 S. Ct. 1827 (2005), the court considered a challenge to the Massachusetts statute regulating demonstrations near reproductive health clinics. The statute in question was the Reproductive Health Care Facilities Act (RHCFA), MASS. GEN. LAWS ch. 266, § 120E1/2 (2004). The Act restricts speech near the entrance to abortion clinics by creating a fixed buffer zone in front of the clinic and a floating buffer zone around individuals who enter the fixed buffer zone. The Massachusetts Act followed the formula approved by the Supreme Court in *Hill v. Colorado*.⁴⁹

The first challenge to RHCFA, *McGuire v. Reilly*,⁵⁰ (hereinafter *McGuire I*) the First Circuit held the Act was not unconstitutionally speech restrictive on its face, but rather it provided a legitimate and content neutral regulation on time, place and manner. *McGuire* 386 F.3d at 49. The *McGuire I* court “recognized that plaintiffs, should they adduce sufficient facts, might be able to make out a claim that the statute, as applied, was unconstitutional.” *Id.* at 49. In *McGuire I*, the court reversed summary judgment for the plaintiffs, and observed that “[i]f, as plaintiffs predict, experience shows that clinic staffers in fact are utilizing the exemption as a means either of proselytizing or of engaging in preferential pro-choice advocacy, the plaintiffs remain free to challenge the Act, as applied, in a concrete factual setting.” *Id.* at 47.

In the second challenge to the Act, the plaintiffs sought to defeat summary judgment by making the showing suggested in *McGuire I*. They sought to establish that the escorts for the clinics, who were allowed within the floating buffer zone, but not for purposes of First Amendment advocacy, were favored by law enforcement responsible for implementing the Act. Plaintiffs’ challenge ultimately failed for want of evidence. The court held the new facts still did not support a facial challenge because there was no evidence of invidious intent. The court applied the invidious intent standard to the as applied claim as well. To prove the unconstitutionality of the statute, the plaintiffs had to demonstrate that state actors were engaging in viewpoint discrimination with the invidious intent to harm the disfavored point of view. *McGuire*, 386 F.3d at 49, 50. The court held that plaintiffs’ evidence failed to establish “a pattern of unlawful favoritism.” *Id.* at 55 (citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316, at 325 (2002)).

c. Commercial Speech

In *El Dia, Inc. v. Puerto Rico Dept. of Consumer Affairs*, 413 F.3d 110 (1st

49. 530 U.S. 703 (2000) (upholding law authorizing free speech restrictions in “bubble zone” around health care facilities).

50. 260 F.3d 36 (1st Cir. 2001) (upholding Reproductive Health Care Facilities Act).

Cir. 2005) (Torruella, J.), the court upheld a First Amendment challenge to a regulation requiring non-resident advertisers to post a bond to advertise in Puerto Rican publications. The regulation, promulgated by the Department of Consumer Affairs, required the publisher verify that the bond, which was intended to cover potential fines for violations of the department's regulations, was posted. *El Dia., Inc.*, 413 F.3d at 113-14.

The First Circuit affirmed the decision of the district court granting summary judgment to the publisher. The question was whether the regulation met the test for restricting commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁵¹ Characterizing this as a case of first impression, the First Circuit held that the regulation failed to meet the second prong of the *Central Hudson* test because there was no showing that nonresident advertisers were more prone to violate the department's regulations than local advertisers, who were not subject to the bond requirement. *El Dia., Inc.*, 413 F.3d at 114. The court held that the state could not meet its burden under *Central Hudson* by offering no evidence or only anecdotes in support of its restriction. *Id.* at 117-18.

In *Wine and Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36 (1st Cir. 2005) (Selya, J.), a franchise liquor plaintiff challenged Rhode Island's restrictions on granting liquor sales licenses to franchisors on First Amendment grounds, claiming a violation of the right to commercial speech and associational rights. *Wine & Spirits Retailers, Inc.*, 418 F.3d at 43-44.

The First Circuit held that plaintiff had standing to sue because its injury was traceable to the statutory prohibition. *Wine & Spirits Retailers, Inc.*, 418 F.3d at 44-46. It further held that there was no speech violation because there was no interference with the right to give business advice to license holders, and no association violation because association did not involve expressive conduct. *Id.* at 47-51. The court also held there was no equal protection violation under the rational basis standard adopted for economic legislation in *Hodel v. Indiana*.⁵² *Id.* at 53-54.

4. Public Forum

In *Ridley v. Mass. Bay Transp. Authority*, 390 F.3d 65 (1st Cir. 2004) (Lynch, J.), the court affirmed in part and reversed in part a district court decision directing the defendant transit authority to revise its regulations for accepting advertisements. Plaintiffs' "car card" advertisements were rejected by the Massachusetts Bay Transit Authority (MBTA). Ridley sought to place

51. 447 U.S. 557 (1980) (holding commercial speech entitled to First Amendment protection if it concerns lawful activity and is not misleading). Such speech can be restricted if the restriction is in support of a substantial government interest, "directly advances the governmental interest asserted," and "is not more extensive than is necessary to serve that interest." *Id.* at 566.

52. 452 U.S. 314 (1981) (requiring only rational basis scrutiny for legislation neither involving suspect classes nor infringing fundamental rights).

advertisements with a religious message. The MBTA rejected the ads under their guidelines prohibiting ads which demean or disparage an individual or group of individuals on the basis of religion. A second plaintiff, Change the Climate, Inc., sought to place ads generating discussion about laws criminalizing marijuana. The MBTA rejected those ads for the stated reason that they promoted use of marijuana, an illegal substance, among children. *Ridley*, 390 F.3d at 73-74, 96.

Writing for the majority, Judge Lynch concluded that the MBTA regulations were not subject to strict scrutiny because the MBTA was not operating a public forum. As for the plaintiffs' claims that the rejection of their ads was unreasonable and/or constituted unlawful viewpoint discrimination, the majority affirmed the district court's denial of relief to *Ridley*, but ruled that the district court erred in denying relief to Change the Climate, Inc. for the reason that the MBTA improperly exercised viewpoint discrimination in rejecting Change the Climate, Inc.'s advertisements. *Ridley*, 390 F.3d at 90-93, 94-95, 96.

Judge Torruella dissented, reasoning that because rejection of *Ridley*'s advertisement was unreasonable and constituted impermissible viewpoint discrimination, it was unnecessary "and ill-advised" to address the public forum issue. Judge Torruella cited opinions in the Second and Third Circuits to find that the MBTA's advertising program converted it into a public forum. *Ridley*, 390 F.3d at 97, 101 (Torruella, J., dissenting).

e. Political Speech and Activity

In *McClure v. Galvin*, 386 F.3d 36 (1st Cir. 2004) (Lynch, J.), the court considered a constitutional challenge to a Massachusetts statute requiring a candidate seeking to register as an independent to have been independent for not less than ninety days. Plaintiff McClure voted in the Democratic presidential primary and thereafter sought to run for state senate as an independent. The town clerk rejected his certification request because fewer than ninety days had elapsed between the Democratic presidential primary and the filing deadline for running for in-state political office. McClure sued, claiming the statute infringed upon his right to vote and his right under the First and Fourteenth Amendments to run for political office. The district court denied his motion for a preliminary injunction and dismissed his claims. The court affirmed the district court's dismissal, relying on *Storer v. Brown*,⁵³ in which the Supreme Court upheld a California law preventing candidates from placing their names as independents on the general election ballot if they had registered with a political party at any time within one year prior to the date of the primary election preceding the general. The court reasoned that where the

53. 415 U.S. 724 (1974).

burden imposed on McClure was not severe, the most exacting standard of review—strict scrutiny—does not apply. Under less exacting review, the court noted, a state’s important regulatory interests are usually sufficient to justify reasonable, nondiscriminatory restrictions. In this case, the court held that the state’s important regulatory interests justified the cutoff rule. *McClure*, 386 F.3d at 37-38, 40-41.

f. Generally

In *Osegiacz v. City of Cranston*, 414 F.3d 136 (1st Cir. 2005) (Selya, J.), the First Circuit reversed in part and affirmed in part the lower court’s judgment on a First Amendment challenge to Cranston’s policies pertaining to private holiday displays on the City Hall lawn. Cranston required individuals sponsoring such displays to obtain prior approval from the mayor. In 2003, individuals displayed a crèche, a Menorah, and other more secular holiday scenes at City Hall. The plaintiff claimed that the displays violated the Establishment Clause and her free speech rights. The district court granted the defendant summary judgment on the Establishment Clause claim, and the plaintiff and did not appeal. Conversely, the district court granted the plaintiff summary judgment on her free speech claim on the grounds that the policy gave the mayor unfettered discretion to grant or deny display requests. The First Circuit reversed this judgment, holding that the plaintiff lacked standing to complain that the regulation violated the First Amendment by vesting excessive discretion in the mayor. The plaintiff could not show an injury in fact, one of the three Article III standing requirements, because she had no interest in applying to put up a display. *Osegiacz*, 414 F.3d at 137-39, 142. Additionally, the court reasoned that the rules allowing First Amendment facial challenges to regulations chilling speech did not apply because “virtually by definition the threat of self-censorship cannot exist if a party has no intention either of speaking or otherwise exposing herself to the vagaries of a standardless licensing policy.” *Id.* at 141.

In *Wagner v. City of Holyoke*, 404 F.3d 504 (1st Cir. 2005) (per curiam) (Boudin, J., Selya, J., and Lynch, J.), *cert. denied*, 126 S. Ct. 552 (2005), the court considered a former Holyoke police chief’s claim that the city infringed his freedom of speech by subjecting him to disciplinary action, harassment, and public humiliation because of his disclosures of alleged police improprieties to the press and various government agencies. The district court ruled that qualified immunity protected the individual city officials. During the jury trial, the district court denied plaintiff’s motion for a directed verdict on speech claims related to certain incidents. *Wagner*, 404 F.3d at 506-07. The jury eventually returned a verdict for plaintiff and awarded nominal damages of \$1 on a finding that plaintiff had endured “severe harassment” in violation of his speech rights. *Id.* at 507. The district court awarded fees in the amount of

\$72,840. On appeal, the First Circuit upheld the fee award as well as the district court's rulings on qualified immunity and the directed verdict motion. Plaintiff argued he was entitled to a directed verdict on evidence establishing that he was disciplined for complaining about police corruption to the state attorney general, the press, and the Massachusetts Commission Against Discrimination. The court held, however, the plaintiff was not entitled to a directed verdict because the city defended by arguing that the disclosures breached departmental regulations and the chain of command. The evidence, therefore, could support a defendant's verdict under *Pickering v. Board of Education*,⁵⁴ and *Mount Healthy City School District Board of Education v. Doyle*.⁵⁵ *Id.* at 507-09.

3. Association

In *Cepero-Rivera v. Fagundo*, 414 F.3d 124 (1st Cir. 2005) (Torruella, J.), plaintiff claimed his termination from his position as Director of Labor Affairs of the Human Resources Department of the Puerto Rico Highway Authority constituted discrimination based on party affiliation. The First Circuit held that the district court erred in *Educadores Poretorriquenos en Accion v. Hernandez*⁵⁶ when it dismissed plaintiff's action for failure to prove a prima facie case. Following the Supreme Court's decision in *Swierkiewicz v. Sorema N. A.*,⁵⁷ the *Educadores* court held that the heightened pleading standard under Rule 12(b)(6) was permissible for civil rights cases. However, in this case the First Circuit held that where it was clear the defendants were entitled to summary judgment, the error in applying the *prima facie* case standard on the defendants' motion to dismiss was harmless. *Cepero-Rivera*, 414 F.3d 128-29.

In *Galloza v. Foy*, 389 F.3d 26 (1st Cir. 2004) (Selya, J.), the court considered the claim of ousted government employees of the Municipal Revenues Collection Center ("CRIM"), a tax agency in Puerto Rico. Upon winning the 2000 general election, the popular Democratic party, along with a reconstituted board of directors and a new executive director assumed control of CRIM and asked the plaintiffs, who were regional administrators, to resign. The plaintiffs claimed the terminations violated their right to political association. *Galloza*, 389 F.3d at 27.

The First Circuit held that the regional administrative positions in CRIM were policymaking jobs and therefore exempt from the First Amendment's

54. 391 U.S. 563 (1968) (holding protected speech must constitute substantial or motivating factor behind adverse employment action).

55. 429 U.S. 274 (1977) (holding defendant can prevail by showing plaintiff would have received discipline absent protected speech).

56. 367 F.3d 61, 62 (1st Cir. 2004) (dismissing part of case after plaintiff exhausted all administrative remedies).

57. 534 U.S. 506 (2002) (establishing facts standard for prima facie employment discrimination cases). Civil rights claimants need only follow the notice pleading requirement of Rule 8(a) (2). *Id.* at 508.

protection for associational rights and the general rule that “a government employer cannot discharge public employees merely because they are not sponsored by or affiliated with a particular political party.” *Galloza*, 389 F.3d at 28 (citing *Elrod v. Burns*, 427 U.S. 347, 350 (1976)).

In *Gonzalez-Pina v. Rodriguez*, 407 F.3d 425 (1st Cir. 2005) (Torruella, J.), the court considered a claim that post-settlement retaliation violated the plaintiff employee’s rights. In 1997 the plaintiff and the municipality of Mayaguez settled plaintiff’s political discrimination case. The agreement included the requirement that the municipality rehire the plaintiff. After being rehired, the plaintiff claimed he was not given any real work, he was subjected to harassment, and he was not appointed to a position commensurate with his qualifications. The district court granted summary judgment, finding the plaintiff collaterally estopped from bringing some of his claims based on the settlement agreement, and that the evidence was insufficient to support a claim of political discrimination. *Gonzalez-Pina*, 407 F.3d at 428-29.

The First Circuit agreed that the claims hinging on the Municipality’s alleged failures to comply with the settlement agreement were barred. The only viable claim was that of post-settlement political discrimination. However, the First Circuit found the evidence insufficient to establish that claim. To establish political discrimination, the court observed, a claimant had to show that his party affiliation was a substantial or motivating factor behind an adverse employment action.⁵⁸ The court referred to *Agosto-de-Feliciano v. Aponte-Roque*,⁵⁹ holding that to show that an employment action was adverse, the claimant must show, by clear and convincing evidence, that his work situation is “unreasonably inferior” to the norm, and secondly, by a preponderance, that his political affiliation motivated the adverse employment action. The employer can then show, by a preponderance of the evidence, that it would have taken the contested action regardless of the employee’s political affiliation. *Gonzalez-Pina*, 407 F.3d at 429-33.

In a footnote, the court noted that *Agosto-de-Feliciano* may not still be good law because the Supreme Court has held minor adverse actions may infringe First Amendment rights. *Gonzalez-Pina*, 407 F.3d at 432, n.2. In *Rutan v. Republican Party of Illinois*,⁶⁰ the Supreme Court held that “promotions, transfers, and recalls after layoffs based on political affiliation or support” infringe First Amendment rights.⁶¹ However, in *Gonzalez-Pina*, the First Circuit agreed with the district court that the plaintiff failed to establish a link between his treatment and political animus, and therefore he did not meet the

58. See *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (discussing “substantial factor” standard).

59. 889 F.2d 1209, 1217-20 (1st Cir. 1989) (en banc).

60. 497 U.S. 62 (1990).

61. *Id.* at 76 (protecting government employees freedom to believe or associate with different political affiliations).

second prong of *Agosto-de-Feliciano*. The court left for another day whether the “unreasonably inferior” standard of *Agosto-de-Feliciano* was consistent with the Supreme Court’s teaching in *Rutan*. *Gonzalez-Pina*, 407 F.3d at 432.

In *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31 (1st Cir. 2005) (Coffin, J.), the court agreed with the district court that the record did not establish that plaintiff was the victim of political discrimination, and therefore affirmed the lower court judgment granting summary judgment for defendant. *Guzman-Ruiz*, 406 F.3d 36-37.

In *Hadfield v. McDonough*, 407 F.3d 11 (1st Cir. 2005) (Howard, J.), *cert. denied*, 126 S. Ct. 480 (2005), the plaintiff complained that a new sheriff terminated him from his position as Assistant Deputy Superintendent in Field Services for Training in violation of his First Amendment association rights and his right to procedural due process. The First Circuit affirmed the lower court summary judgment for the defendants. The court ruled the plaintiff’s previous position was one for which political affiliation was an appropriate qualification. The court further held that there was no procedural due process violation because the plaintiff was afforded a post-deprivation hearing. *Hadfield*, 407 F.3d at 14-25.

In *Ortiz Garcia v. Toledo Fernandez*, 405 F.3d 21 (1st Cir. 2005) (per curiam) (Lynch, J., Stahl, J., and Howard, J.), the court agreed with the district court that the plaintiff, an agronomist in the Department of Agriculture and a supporter of the losing party in the Puerto Rico Commonwealth-wide election, failed to demonstrate she was subjected to an unreasonably inferior work environment. Therefore, the plaintiff could not make out a claim of political discrimination. The court affirmed the grant of summary judgment in favor of the defendant. *Ortiz Garcia*, 405 F.3d at 23-25.

In *Ruiz-Casillas v. Camacho-Morales*, 415 F.3d 127 (1st Cir. 2004) (Torruella, J.), the court held that the plaintiff’s political discrimination claim failed because she was a trust employee who worked closely with policymakers, and therefore her party affiliation was an appropriate qualifier for the position. The court further held that the plaintiff’s First Amendment claim did not state a valid claim independent from the freedom of association claim. *Ruiz-Casillas*, 415 F.3d at 133-34.

In *Torres-Rivera v. Calderon-Serra*, 412 F.3d 205 (1st Cir. 2005) (per curiam) (Lynch, J., Stahl, J., and Howard, J.), the court affirmed the district court’s dismissal of claims of political discrimination. The plaintiffs challenged a Puerto Rico statute, Law 94, which reorganized the Industrial Commission in the wake of a newly elected government. The reorganization eliminated all existing Commissioner positions, including the plaintiffs. The law returned the Industrial Commission to a five member agency from the twenty-five member commission established in 1996. All twenty-five members of the Commission were forced to resign, and the Governor appointed five new members. Plaintiffs claimed the statute unconstitutionally infringed their First

Amendment and Due Process rights. The First Circuit also considered whether the district court erred in granting immunity to various executive officials for actions in connection with Law 94. *Torres-Rivera*, 412 F.3d at 207-10.

The First Circuit ruled Law 94 constitutional. The First Circuit found no First Amendment violation because the statute was neutral and made no reference to the political affiliation of the persons to be appointed, and it deemed without merit the Due Process claim based on the alleged vagueness of the statute. As to the immunity issues, the court found that the Governor, although an executive officer, was entitled to legislative immunity for his act of signing Law 94. The court relied on the holding in *Bogan v. Scott-Harris*⁶² that non-legislative officials are entitled to legislative immunity where they are performing legislative functions. The court further found the Governor and other executive officials were qualifiedly immune because there was no violation of the plaintiffs' First Amendment rights. The court observed that if political criteria were employed to replace some but not others, the plaintiffs may have had a First Amendment claim, but where all twenty-five of the commissioners were terminated, regardless of their political affiliation, there was no basis for a First Amendment claim. *Torres-Rivera*, 412 F.3d at 210-14.

4. Right to Petition

In *Powell v. Alexander*, 391 F.3d 1 (1st Cir. 2005) (Lipez, J.), the court sustained a \$10,000 punitive damages award against defendant Alexander, the Pittsfield solicitor general. The district court ordered the damage award against the public official in her individual capacity after a long trial on plaintiff Powell's claim that Alexander retaliated against him for suing the city, and thereby violated his First Amendment right to petition the courts for redress of grievances. Powell originally sued local officials in state and federal court in 1991. He claimed race discrimination motivated his termination from the Pittsfield police department. Alexander represented the city officials in the settlement of that case. The terms of settlement required the city to pay Powell back wages and to reinstate him on the condition he undergo retraining and a complete physical examination. The parties reached that settlement in 1993. Although ultimately it became clear that Powell was eligible for reinstatement under the terms of the settlement agreement, Alexander waged an aggressive campaign to keep secret a medical report that cleared Powell for duty written by a doctor employed by the city. *Powell*, 391 F.3d at 5-6, 8-12.

In 1997, Powell filed a retaliation suit against Alexander. In the retaliation case, the district court wrote an eighty-seven page opinion, finding that the solicitor general engaged in conduct that was "particularly egregious" and "outrageous and worthy of condemnation." *Id.* at 14 (citing *Powell v. City of*

62. 523 U.S. 44, 55 (1998).

Pittsfield, 221 F. Supp. 2d 119, 122, 152 (D. Mass. 2002), *aff'd and remanded sub nom.* *Powell v. Alexander*, 391 F.3d 1 (1st Cir. 2005)). The First Circuit held that the district court findings contained sufficient evidence to support the conclusion that Alexander was recklessly indifferent toward Powell's federally protected rights. This showing permitted the district court to impose punitive damages under 42 U.S.C. § 1983. *Id.* at 21.

On appeal, Alexander argued that the court could not subject her to punitive damages because Powell failed to give proper notice he was suing her in her individual capacity. *Id.* In ruling on a matter of first impression, the First Circuit rejected Alexander's argument that the court should use a "*per se*" approach to determine whether she knew she was being sued in her individual capacity. *Id.* The First Circuit rejected the Eighth Circuit's *per se*, or bright-line, approach which states, "only an express statement that [governmental officials] are being sued in their individual capacity will suffice to give proper notice to the defendants."⁶³ *Id.* (citing *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999)). Instead, the court followed the "course of proceedings" approach applied in several other circuits. *Id.* Under the course of proceedings test, a court may examine the substance of pleadings and the course of proceedings, rather than the language of the complaint alone, to determine whether the defendant is being sued in an official or individual capacity. *Id.* The *Powell* court reasoned that the course of proceedings approach "appropriately balances a defendant's need for fair notice of potential personal liability against a plaintiff's need for the flexibility to develop his or her case as the unfolding events of litigation warrant." *Id.* at 22. Applying the course of proceedings approach, the court concluded that Alexander had sufficient notice Powell was suing her in her individual capacity. Consequently, the court upheld the punitive damages award and remanded to the district court to establish the amount of costs and fees due Powell. *Id.* at 23-25. Finally, *Powell* makes clear that "claims of retaliation for the exercise of First Amendment rights are cognizable under § 1983." *Id.* at 16.

In *Centro Médico del Turabo, Inc. v. De Melecio*, 406 F.3d 1 (1st Cir. 2005) (Selya, J.), the court considered Puerto Rican medical service providers' Section 1983 claims that the Secretary of Health's failure to grant them certifications necessary to develop private facilities and denial of other applications and requests regarding their facilities infringed on their rights to procedural and substantive due process, equal protection, and freedom of speech. The district court dismissed the complaint for failure to state a claim. On appeal, the First Circuit agreed with the district court's holding that only claims based on one incident were timely and that plaintiffs could not make out a continuing violation based on serial violations. The court observed that the

63. See also *Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 620 (8th Cir. 1995) ("Plaintiff's complaint [must] contain a clear statement of her wish to sue defendants in their personal capacities.").

continuing violation rule is not applicable where the anchoring, non-time barred incident is not itself unlawful. Regarding the timely incident, the First Circuit held that there was no procedural or substantive due process violation because there was no property or liberty interest at stake when the Secretary assigned the regional hospital contract to a medical school rather than the plaintiffs. The plaintiffs also argued that by rejecting their application to run the regional hospital, the Secretary was retaliating against them in violation of the First Amendment because they had pursued state court remedies to redress to the Secretary's denial of their permit applications. *Centro Médico*, 406 F.3d at 4-9. The First Circuit observed that "as a general matter . . . [c]laims of retaliation for the exercise of First Amendment rights are cognizable under § 1983." *Id.* at 9 (quoting *Powell v. Alexander*, 391 F.3d 1, 16 (1st Cir. 2004) (omission in original)). The plaintiffs, however, could not make out a cognizable claim because the Secretary took no retaliatory action against them in awarding the contract to a medical school. The Secretary, in accordance with her statutory authority, never opened the contract for bidding. *Id.* at 10. Therefore, the "plaintiffs had no constitutionally protected interest in participating in a [bidding] process." *Id.*

E. Eleventh Amendment

In *Horizon Bank & Trust Co. v. Massachusetts*, 391 F.3d 48 (1st Cir. 2004) (Lynch, J.), a mortgagee brought an interpleader action in state court to determine who owned surplus funds resulting from a property foreclosure. The plaintiff named a private party, the Commonwealth of Massachusetts, and the United States as defendants. The United States removed the case to federal court. The federal district court dismissed the Commonwealth on Eleventh Amendment grounds. The Commonwealth also moved to dismiss the entire action because it claimed to be an indispensable party. Without an indispensable party, the Commonwealth argued, the case could not proceed. The district court denied the Commonwealth's motion to dismiss, and the Commonwealth appealed. The First Circuit dismissed the appeal as moot because the Commonwealth admitted that its claim to the funds held by the mortgagee was inferior to that of other parties, and therefore it had no stake in the outcome of the lawsuit. *Horizon Bank*, F.3d at 51-55.

F. Fourteenth Amendment

1. Due Process

In *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53 (1st Cir. 2004) (Torruella, J.), *vacated sub nom. Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006), the court considered a facial challenge to a New Hampshire law requiring parental notification for minors

seeking abortions. Clinics providing abortion services argued New Hampshire's statute was constitutionally flawed in three respects: (1) it failed to provide an exception to the notification requirement where the medical provider deemed the abortion necessary to protect the health of the patient; (2) the exception to the notice requirement where abortion was necessary to prevent the death of the patient was too narrowly drawn; and (3) the judicial bypass mechanism did not adequately protect the confidentiality of the patient. The First Circuit upheld the judgment of the district court enjoining enforcement of the statute. *Heed*, 390 F.3d at 59.

The court held that the appropriate inquiry to determine the statute's facial constitutionality was whether it imposed an undue burden on the woman's exercise of her right to abortion. In adopting this standard, the court rejected the test applied in *United States v. Salerno*,⁶⁴ which requires the challenger to establish that "no set of circumstances exists under which the Act would be valid." *Heed*, 390 F.3d at 59. The First Circuit followed the lead of six circuits⁶⁵ and departed from the contrary view of two circuits⁶⁶ that *Casey*'s undue burden test did not overrule the *Salerno* "no set of circumstances" test. *Id.* at 57-58. Applying the undue burden standard, the court declared that the failure to include a health exception rendered the New Hampshire law unconstitutional. The court further held the statute's narrow definition of the death exception placed providers in a quandary whether to risk violating the statute or to act in their best judgment to protect the patient's life; hence the statute imposed an unconstitutional burden on the right to abortion. The court did not address the adequacy of the confidentiality provisions because it had determined the statute wanting on the two other grounds. *Id.* at 59-65. In *Ayotte v. Planned Parenthood of Northern New England*,⁶⁷ the Supreme Court remanded the case to the First Circuit to reconsider the choice of remedy. On remand, the First Circuit must determine whether the statute can be saved by applying it in a manner that avoids the constitutional problem and is consistent with legislative intent.⁶⁸

In *Whalen v. Massachusetts Trial Court*, 397 F.3d 19 (1st Cir. 2005) (Coffin, J.), *cert. denied*, 126 S. Ct. 379 (2005), the court considered a state

64. 481 U.S. 738 (1987).

65. See *A Woman's Choice—E. Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002), *cert. denied*, 538 U.S. 1192 (2003); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 142-42 (3d Cir. 2000); *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1025-26 (9th Cir. 1999), *amended on denial of reh'g*, 193 F.3d 1041 (9th Cir. 1999); *Women's Med. Prof. Corp. v. Voinovich*, 130 F.3d 187, 193-96 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996), *cert. denied sub nom. Leavitt v. Jane L.*, 520 U.S. 1274 (1997); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452 (8th Cir. 1995).

66. See *Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1997); *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992).

67. 126 S. Ct. 961, 967-69 (2006).

68. *Id.* at 967-69.

court clerk's claim that the Massachusetts Trial Court deprived him of procedural due process when it chose him for layoff. Whalen, who was eventually reinstated, was laid off as part of an overall downsizing. The Trial Court did not conduct an entirely random layoff; the decision-maker considered layoff candidates' performance records, among other factors. The decision-maker did not provide Whalen the opportunity to defend his performance record in a pre-termination proceeding. *Whalen*, 397 F.3d at 22. The court held that, because he could only be terminated "for cause," the employee had a vested interest in his position, and therefore Whalen was entitled to a pre-termination hearing. *Id.* at 24-26. The court determined, however, the defendants were entitled to qualified immunity because the law establishing the employee's right to a pre-termination hearing was not clearly established at the time of Whalen's termination. The court further held Whalen was not entitled to injunctive relief to restore retirement and pension credit for the time he was out of work. The Eleventh Amendment bars federal suits against unconsenting states except those for prospective injunctive relief permissible under *Ex Parte Young*. Whalen, the court determined, sought recovery of past loss and not prospective relief, even though he would not actually be entitled to the lost benefits until he retired. *Id.* at 27-30. In Judge Stahl's dissenting view, Whalen's procedural due process right to a pre-termination hearing was "clearly established" at the time the Trial Court acted. *Id.* at 30 (Stahl, J, dissenting).

2. Equal Protection

In *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005) (Lipez, J.), *cert. denied*, 126 S. Ct. 789 (2005), an *en banc* court reversed a panel decision reversing a district court judgment. The district court judgment approved the City of Lynn's plan which used race as a criterion in making school transfer decisions. The Lynn Plan survived an Equal Protection challenge in the district court, where the judge found the city's interest compelling and the means—race specific transfer decisions—narrowly tailored to meet the legitimate objective.⁶⁹ A panel reversed in part and remanded,⁷⁰ but the *en banc* court reversed the panel and affirmed the district court. The court concluded that Lynn's race based school transfer policy was designed to further school desegregation in order to enhance diversity within the student body. Following the Supreme Court's decision in *Grutter*,⁷¹ the court deemed this goal compelling and the means narrowly tailored. It determined that Lynn did not

69. See *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328 (D. Mass. 2003), *aff'd sub nom. Comfort v. Lynn Sch. Comm.* 418 F.3d 1 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 789 (2005).

70. See *Comfort v. Lynn Sch. Comm.*, No. 03-2415, 2004 U.S. App. LEXIS 21791 (1st Cir. Oct. 20, 2004), *rev'd*, 418 F.3d 1 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 789 (2005).

71. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding school's interest in diverse student body compelling enough to justify narrowly tailored use of race in law school admissions).

have to rule out every possible means to meet *Grutter*'s narrow tailoring test. The court further held that the Lynn Plan did not violate Article 111 of the Massachusetts Constitution, which forbids school assignment on the basis of race, for two reasons. First, assignment within the meaning of Article 111 means original assignment, not transfer. Second, even if transfer is included in the concept of assignment, Article 111 does not ban the use of race outright. Rather, use of race requires the court to apply strict scrutiny when considering, under the *McDuffy* rule,⁷² whether Article 111 prohibits the Lynn Plan. The court also affirmed the lower court's denial of plaintiffs' motion arguing the district court judge should recuse herself based on her past membership in the Lawyers Committee for Civil Rights (LCCR). The court noted that the judge severed her connection with the LCCR when she ascended to the bench. Thus, her prior association with the organization could not support a reasonable challenge to her impartiality. *Comfort*, 418 F.3d at 6, 16-23, 26-27.

Chief Judge Boudin wrote a concurring opinion in which he suggested that the case was "difficult," but conceded that, in the absence of squarely governing Supreme Court precedent and until the Supreme Court declares otherwise, the court should allow Lynn to pursue its objective. *Id.* at 27-29 (Boudin, C.J., concurring). Judge Selya, author of the original panel decision, dissented. Judge Selya argued that the Lynn Plan was not narrowly tailored because it considers only race in making student transfer decisions. This approach, he contended, is contrary to the individualized approach the Supreme Court approved in *Grutter* and more like the blanket review that the *Gratz*⁷³ court rejected. *Id.* at 29-32 (Selya, J., dissenting).

IV. DAMAGES

In *Wagner v. City of Holyoke*, 404 F.3d 504 (1st Cir. 2005) (per curiam) (Boudin, J., Selya, J., and Lynch, J.), the court considered a former Holyoke police chief's claims that the city infringed his right to freedom of speech by subjecting him to disciplinary action, harassment, and public humiliation because of his disclosures of alleged police improprieties to the press and various government agencies. The district court ruled that qualified immunity protected the individual city officials. During the jury trial, the district court denied plaintiff's motion for a directed verdict on his speech claims related to certain incidents. *Wagner*, 404 F.3d at 506-07. The jury eventually returned a verdict for the plaintiff and awarded nominal damages of \$1 on a finding that plaintiff had endured "severe harassment" in violation of his speech rights. *Id.* at 507. The district court awarded fees in the amount of \$72,840. *Wagner*, 404

72. *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 523 (Mass. 1993) (setting forth principles to guide judicial interpretation of state constitutional provisions).

73. *See Gratz v. Bollinger*, 539 U.S. 244, 255, 270 (2003) (rejecting admissions plan in which race functioned as determinative factor).

F.3d at 509. On appeal, the First Circuit upheld the fee award as well as the district court's rulings on qualified immunity and on the directed verdict motion. The court cited *Coutin v. Young & Rubicam Puerto Rico, Inc.*,⁷⁴ for the proposition that "[the court] review[s] fee awards deferentially, according substantial respect to the trial court's informed discretion [and the court] will disturb such an award only for mistake of law or abuse of discretion." *Wagner*, 404 F.3d at 510. In this case, the court identified neither a mistake of law nor abuse of discretion by the trial court. Thus, the court upheld the fee award despite the nominal damage award. *Id.*

V. FEDERAL JURISDICTION, PRACTICE AND PROCEDURE

A. Federal Rules of Civil Procedure

In *Hernandez-Santiago v. Ecolab, Inc.*, 397 F.3d 30 (1st Cir. 2005) (per curiam (Torruella, J., Howard, J., and Carter, J.)), the court reversed a district court judgment dismissing a Puerto Rican plaintiff's products liability claim against a Minnesota manufacturer of a cleaning product. The Minnesota company claimed the product was manufactured by its wholly owned Puerto Rico subsidiary. The district court dismissed the claim for lack of subject matter jurisdiction because the parties were not diverse. The First Circuit held that the district court prematurely dismissed the claim because the issue raised a defense on the merits rather than a jurisdictional issue under Rule 12(b)(1), and defendant's affidavit regarding the defense did not effectively transform the motion into one for summary judgment because the plaintiff did not have an opportunity to conduct relevant discovery. *Hernandez-Santiago*, 397 F.3d at 32-35.

B. Federal Rules of Evidence

In *Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312 (1st Cir. 2004) (per curiam) (Lynch, J., Lipez, J., and Garcia-Gregory, J.),⁷⁵ the court upheld a judgment for a lessor-defendant in a dispute regarding which party was responsible for property repairs. The lessee-plaintiff claimed the lessor was responsible under a fire regulation that the lessee did not make available to the court. The Court held that judicial notice of a private association's fire standards that were referenced by but not incorporated into a state statute was not required where the lessee did not provide the trial court with a certified copy of the particular version of the standard on which the lessee relied, and the standard was not readily available. *Getty Petroleum*, 391

74. 124 F.3d 331, 336 (1st Cir. 1997).

75. Judge Lipez authored a concurring opinion. See *Getty Petroleum*, 391 F.3d at 322-34 (per curiam) (Lipez, J., concurring).

F.3d at 316-17, 319-22.

C. Judgments

In *Fafel v. DiPaola*, 399 F.3d 403 (1st Cir. 2005) (Lipez, J.), the court considered a tangled case concerning the extent of federal jurisdiction to enforce a judgment. Fafel, a county sheriff department employee, filed suit against his employer in state and federal court claiming that his termination violated state law and his constitutional rights to freedom of association and procedural due process. The state court ordered the employer to reinstate Fafel with back pay. Thereafter, the parties entered into an agreement for judgment under Fed. R. Civ. P. 68 in the federal court action. The federal judge enjoined Fafel from taking any action to pursue relief in the state court case. Fafel did not appeal the injunction. Rather, he filed a motion to vacate the judgment, which the district court denied. *Fafel*, 399 F.3d at 405-08. On appeal, Fafel claimed that, pursuant to *Kokkonen v. Guardian Life Insurance Co. of America*,⁷⁶ federal court lacked subject matter jurisdiction to issue the injunction. *Kokkonen* established that a federal court may exercise ancillary jurisdiction to enforce a settlement agreement with no independent source for federal jurisdiction only if the dismissal order did one of the following: incorporated the terms of the settlement agreement or contained a consented to provision reserving enforcement jurisdiction. In Fafel's case, the First Circuit held the court had ancillary subject matter jurisdiction to protect its order from collateral attack because a Rule 68 judgment automatically incorporates the terms of the underlying offer. *Fafel*, 399 F.3d at 411-14.

D. Jurisdiction and Justiciability

1. Abstention

In *Diva's Inc. v. City of Bangor*, 411 F.3d 30 (1st Cir. 2005) (Stahl, J.), the court affirmed in part and reversed and remanded in part an appeal from district court orders dismissing the claims of a nightclub offering nude or seminude dancing. Plaintiff Diane Cormier-Youngs owned and operated the nightclub. Bangor city officials denied Diva's application for a special amusement permit to have bikini dancing on its premises. A Bangor administrative appellate review board reversed this decision three weeks later. Two days after the reversal, Diva's violated the city ordinance, and the city instituted enforcement proceedings in state court. Diva's asserted the constitutionality of the ordinance as a defense, challenging the validity of certain Maine statutes limiting nude dancing to specified zones; forbidding the sale of alcohol at nude

76. 511 U.S. 375 (1994).

dancing bars; and requiring clubs with live, but not nude, dancing to seek a special amusement permit. Prior to the reversal, Diva's challenged the board decision in federal court. The plaintiffs later amended their complaint to assert Section 1983, constitutional, contract, and tort claims. *Diva's*, 411 F.3d at 34-35.

The district court dismissed a number of claims on various abstention grounds, including *Younger*⁷⁷ and *Colorado River*,⁷⁸ and based on the *Rooker-Feldman* doctrine. The First Circuit sustained dismissal of the claims against the individual defendants, ruling that they enjoyed absolute immunity because they were operating in a quasi-judicial capacity when they denied Diva's permit application. The court also sustained dismissal of Cormier-Young's Section 1983 claim, ruling that her position as the sole shareholder of Diva's did not give her standing to sue under Section 1983. *Diva's*, 411 F.3d at 40-42. The First Circuit thus joined other circuits in holding that the standing requirement "also applies to actions brought to redress injuries to a corporation under Section 1983."⁷⁹ *Id.* at 42.

The court then turned to Diva's Section 1983 claim that the city defendants violated its First Amendment rights in denying it a special amusement permit. The district court dismissed this claim after the Maine Supreme Judicial Court declared the statutes governing nude and bikini dancing constitutional. The district court reasoned that, under the *Rooker-Feldman* doctrine, a decision in favor of Diva's would effectively nullify the state court's judgment. *Id.* at 42-43. The First Circuit disagreed, and held that *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*,⁸⁰ rendered the dismissal improper. *Divas*, 411 F.3d at 43. In *Exxon Mobil*, "the Supreme Court cautioned that the Rooker-Feldman doctrine 'is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" *Id.* at 43 (quoting *Exxon Mobil*, 125 S. Ct. at 1521-22). The court found the *Rooker-Feldman* doctrine did not apply because Diva's filed the federal action *before* the state court enforcement proceeding commenced. *Id.*

Finally, the court concluded that Diva's stated a claim against Bangor for deprivation of its First Amendment right to freedom of speech. Diva's had

77. See *Younger v. Harris*, 401 U.S. 37, 53-54 (1971) (announcing prohibition on federal courts enjoining pending state court criminal proceedings); see also *Maymo-Melendez v. Alvarez-Ramirez*, 364 F.3d 27, 31 (1st Cir. 2004) (extending *Younger* abstention rule to civil proceedings).

78. See *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (recognizing exceptional circumstances may require federal court to abstain out of deference to pending state court proceedings).

79. See *Potthoff v. Morin*, 245 F.3d 710, 717 (8th Cir. 2001); *Flynn v. Merrick*, 881 F.2d 446, 450 (7th Cir. 1989); *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981); *Elrich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969).

80. 125 S. Ct. 1517 (2005).

filed an earlier claim against the city and the board challenging the validity of the ordinance. The city and Diva's reached a settlement in that case. Following the settlement, Diva's applied for the special permit, which the city first denied and then granted. The First Circuit was careful to point out that if Diva's had a First Amendment claim, it only covered the time period between the city's denial of the special permit and the board's reversal, a total of three weeks. *Id.* at 34-35, 40-44.

In *Esso Standard Oil Co. v. Cotto*, 389 F.3d 212 (1st Cir. 2004) (Lipez, J.), the court affirmed a district court decision denying preliminary injunctive relief to the plaintiff. Plaintiff Esso complained that extreme bias in proceedings against it before the Puerto Rico Environmental Quality Board deprived it of due process. Esso filed suit in district court seeking to enjoin the administrative agency. The First Circuit held that, although the plaintiff produced "overwhelming" evidence of actual bias, *Younger* abstention was nevertheless appropriate because the plaintiff had access to judicial review in the territorial courts. The court held that the bias exception to the *Younger* abstention rule, carved out in *Gibson v. Berryhill*,⁸¹ did not apply in this case because, under Puerto Rico law, the territorial courts offered viable avenues for interlocutory review of the constitutional claim. *Esso Standard*, 389 F.3d at 213, 218-19.

In *Rio Grande Community Health Center, Inc. v. Rullan*, 397 F.3d 56 (1st Cir. 2005) (Lynch, J.), the court considered whether provisions of the Medicaid Act are enforceable in a Section 1983 action for injunctive relief, and whether *Younger* abstention was required where a pending state court action sought reimbursement under the Medicaid Act. The plaintiff health care center filed suit against Puerto Rico in state court for failure to pay costs reimbursable under the Medicaid Act. The plaintiff also filed a federal action based on the same facts. While the state court action sought a writ of mandamus, a declaratory judgment, and retroactive payments, the federal action sought only injunctive relief; the Eleventh Amendment barred a federal suit for damages against the state. *Rio Grande*, 397 F.3d at 60, 64-65. Affirming the district court order of preliminary injunctive relief against the defendants, the First Circuit held that the case did not require abstention under *Younger* because the federal action did not "interfere" with the state case, which was not of a "coercive" nature under *Younger*, *Middlesex County*,⁸² and *Juidice*.⁸³ *Id.* at 70. The court further held that *Colorado River* did not bar the federal action. Applying the eight factors triggering abstention in that case, the court concluded that this case did not present "'exceptional' circumstances" to which

81. 411 U.S. 564 (1973).

82. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432-33 (1982) (applying *Younger* abstention to state administrative proceedings).

83. See *Juidice v. Vail*, 430 U.S. 327, 335-36 (1977) (extending *Younger* abstention rule to state enforcement of civil contempt proceedings). The *Juidice* Court recognized that *Younger* abstention may not be appropriate if the state proceedings were pursued in bad faith. *Id.* at 838.

abstention would apply. *Id.* at 71-72. Finally, the court held that relief was available under Section 1983 where Section 1396a(bb) of the Medicaid Act supported an implied private right of action. The court applied the three part *Blessing*⁸⁴ test used to determine whether a federal statute creates an enforceable right under Section 1983. The court reasoned that Section 1983 provided a cause of action because Section 1396a(bb) of the Medicaid Act set forth in clear terms precisely what it required of the state. *Id.* at 73-75.

In *Sevigny v. Employers Insurance of Wausau*, 411 F.3d 24 (1st Cir. 2005) (Boudin, J.), the court reversed a district court order vacating and remanding to state court on *Burford*⁸⁵ abstention grounds a lawsuit involving insurance insolvency. The plaintiff, the New Hampshire Insurance Commissioner, filed suit in state court against a Wisconsin company, Wausau, seeking a declaration clarifying the amounts the defendant owed to an insolvent insurer under New Hampshire law and a liquidation order. Wausau removed the case, and the district court remanded, concluding that abstention was proper under *Burford*. *Sevigny*, 411 F.3d at 26. Analyzing *Burford* and *Colorado River*, the court held that the questions raised in the removed case were not “so intertwined with the issues of agency authority or state regulatory policy” as to compromise the state regulatory process. *Id.* at 29. The court therefore concluded abstention was not warranted. *Id.* at 29-30.

2. Diversity

In *Diaz-Rodriguez v. Pep Boys Corp.*, 410 F.3d 56 (1st Cir. 2005) (Lipez, J.), the court considered the applicability of three tests of corporate citizenship. Two plaintiffs, including Diaz-Rodriguez, brought a breach of contract claim against two defendants, including Pep Boys PR, in state court. Subsequently, the defendants removed on diversity grounds. The district court entered summary judgment for the defendants, and the plaintiffs appealed on the merits. At oral argument, the First Circuit questioned *sua sponte* whether complete diversity existed and, thus, whether the district court had subject matter jurisdiction. The First Circuit remanded to the district court, instructing the judge to conduct a factual inquiry regarding the citizenship of the parties. *Diaz-Rodriguez*, 410 F.3d at 58-59.

Following the district court’s fact finding, the First Circuit reconsidered the subject matter jurisdiction issue on a more substantial factual record. First, the

84. See *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997) (establishing three-part test used to determine whether statutory provision creates § 1983 right). In evaluating whether a statute gives rise to a federal right, a court should consider the following: “1) whether Congress intended that the provision in question benefit the plaintiff, 2) whether the right supposedly protected by the statute is vague and amorphous so that its enforcement would strain judicial competence, and 3) whether the provision unambiguously imposes a binding obligation on the States.” *Rio Grande*, 397 F.3d at 73.

85. See *Burford v. Sun Oil Co.*, 318 U.S. 315 (1943) (requiring abstention if federal litigation would interfere with complex state administrative procedures and adequate state judicial review exists).

court clarified the test to be applied to determine the principal place of business of a corporation. The court identified the three relevant tests: the nerve center test, the center of corporate activity test and the locus of the operations of the corporation test. *Id.* at 59. Next, the court held that where the nerve center test does not apply—for example, where the corporation does not have “complex and farflung activities” or physical operations—the locus of operations test applies. *Id.* at 60-61. Additionally, the court abandoned the “center of corporate activity” test. *Id.* at 61. Applying the locus of operations test, the First Circuit concluded that Pep Boys PR was a citizen of Puerto Rico, thereby stripping the federal court of diversity jurisdiction. *Id.* at 62.

3. Removal

In *Rossello-Gonzalez v. Calderon-Serra*, 398 F.3d 1 (1st Cir. 2004) (per curiam (Torruella, J., Stahl, J., and Howard, J.)), the court reversed a district court order that preliminarily enjoined the Puerto Rico State Elections Commission from counting contested ballots in the 2004 Puerto Rico gubernatorial election. The First Circuit ruled that the case was improperly removed from the state court because the federal court lacked subject matter jurisdiction. The court concluded that the plaintiffs presented no federal question claims; the case involved a local election and the issues raised were not justiciable in federal court, even though the relevant state constitutional provisions paralleled the federal constitutional provisions. *Rossello-Gonzalez*, 398 F.3d at 8-9, 10-11, 14. In concurrence, Judge Torruella distinguished this case from *Bush v. Gore*.⁸⁶ *Id.* at 18-19 (Toruella, J., concurring). Unlike *Bush v. Gore*, the case at bar did not involve a *change* in “Puerto Rico’s established rules . . . but rather a *clarification* of the status of the ballots, whose validity or invalidity had not been clearly established as a matter of Puerto Rico election policy.” *Id.* at 19 (Toruella, J., concurring).

4. Rooker-Feldman

In *Federación de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17 (1st Cir. 2005) (Lipez, J.), the court considered the effect of the Supreme Court’s interpretation of the *Rooker-Feldman* doctrine in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*⁸⁷ In *Exxon Mobil*, the Supreme Court interpreted application of the *Rooker-Feldman* doctrine to an interlocutory state court judgment. Under *Rooker-Feldman*, the lower federal courts are deprived of subject matter jurisdiction over cases brought by losing state court litigants seeking to upset final determinations made by the state court. *Exxon Mobil* made clear that *Rooker-*

86. 531 U.S. 98 (2000).

87. 125 S. Ct. 1517 (2005).

Feldman deprives the federal district court of jurisdiction only in cases where the state court proceedings have ended unfavorably to the federal plaintiff before the district court proceedings commence. *Federación*, 410 F.3d at 21, 23-24.

In *Federación*, a labor union brought an unfair labor practices charge against *Federación* before the Junta de Relaciones del Trabajo de Puerto Rico (the Board). The Board denied *Federación*'s motion to dismiss the charge on preemption grounds. *Federación* then appealed that decision to the state appeals court claiming that the Board lacked subject matter jurisdiction because federal labor law preempted Puerto Rican law. The state courts rejected the claim, finding that *Federación*'s activities were intrastate, and therefore concluding that the dispute did not fall within the exclusive jurisdiction of the National Labor Relations Board. The state court sent the parties back to the Board to proceed on the labor union's initial complaint. *Federación* then filed suit in federal court against the Board, again raising the preemption issue that the state court had considered and rejected. The district court dismissed the complaint because it lacked subject matter jurisdiction to review a state appeals court's decision. On appeal, the First Circuit discussed its pre-*Exxon Mobil* approach to the question of whether a state court proceeding had ended for *Rooker-Feldman* purposes. The court determined that *Exxon Mobil*'s clarification of the rationale for *Rooker-Feldman* reflected a change in the law. *Id.* at 19-24. The First Circuit held that whether a state court decision bars federal jurisdiction court does not turn on whether the decision was "final" within the meaning of Section 1257, or "preclusive." *Id.* at 27. Rather, the court held that if an interlocutory state decision is "final" as to the federal issue, as it was in this case, then the state court proceedings have ended under *Rooker-Feldman*, and the lower federal courts lack jurisdiction to review the state court determination. *Id.* at 27-28.

5. Political Question

In *Ungar v. Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2005) (Selya, J.), *cert. denied*, 126 S. Ct. 715 (2005), the court considered a lawsuit brought by the estate of a United States citizen who was shot and killed in a terrorist attack in Israel in 1996. In this appeal, the court affirmed a district court order entering a default judgment against the Palestine Liberation Organization (PLO) and the Palestinian Authority (PA). The court held that the defendants were not entitled to have the case dismissed on political question grounds. The defendants claimed that whether the PLO and PA were a state for purposes of sovereign immunity under the Anti-Terrorism Act (ATA) and the Foreign Sovereign Immunities Act (FSIA) was a non-justiciable political question. The defendants further argued that as governmental entities whose character was evolving, the PLO and PA were exempt under the state sovereign

immunity doctrine. In determining that this was not a non-justiciable political question, the court applied the six step test enunciated in *Baker v. Carr*.⁸⁸ *Ungar*, 402 F.3d at 279-80. The court noted that “courts must be careful to distinguish between political questions and cases having political overtones.” *Id.* at 281.

In determining whether the PLO and PA qualified for sovereign immunity under the statutes, the court first considered whether Palestine was a “foreign state.” *Ungar*, 402 F.3d at 282. The court accepted the Restatement (Third) of Foreign Relations definition, which incorporates international law and defines a state as a defined area under its own control that has relationships with other states. *Id.* at 283 (quoting Restatement (Third) of Foreign Relations § 201 (1987)). The First Circuit reviewed the history of the Israeli-Palestine conflict and concluded that Palestine was not self-controlled, and thus did not meet the definition of a state. Therefore, the court held, neither the PLO nor the PA were entitled to sovereign immunity. The First Circuit affirmed the district court ruling, which entered a default judgment of over \$116 million against each defendant. *Id.* at 276.

PRECLUSION

In *Gener-Villar v. Adcom Group, Inc.*, 417 F.3d 201 (1st Cir. 2005) (per curiam) (Selya, J., Coffin, J., and Lipez, J.), the court vacated and remanded a district court order granting summary judgment based on res judicata. The case involved a dispute between a graphic artist and an advertising company over ownership of the designs produced by the artist. The issue was whether a decision in the courts of Puerto Rico over ownership of the diskettes holding the art precluded the artist’s federal claim for copyright violation. The First Circuit vacated and remanded the district court’s decision that the claim was precluded, reasoning that ownership was different from copyright violation. The court held that the courts of Puerto Rico could not have decided the copyright issue because the federal courts have exclusive jurisdiction over claims arising under federal copyright law. *Gener-Villar*, 417 F.3d at 202-03.

F. PREEMPTION

In *Liberty CableVision of P.R., Inc. v. Caguas*, 417 F.3d 216 (1st Cir. 2004) (Torruella, J.), the court reversed one district court judgment and affirmed another. The underlying cases involved a cable operator who sued several municipalities for imposing a surcharge on its operations in their cities and towns. The cable company, Liberty, claimed that the federal Cable Communications Policy Act of 1984, 47 U.S.C. § 521 (Cable Act) preempted the local ordinance, and the First Circuit agreed. The court, hearing two cases

88. 369 U.S. 186 (1962).

together, affirmed the lower court decision holding that the Cable Act superseded the local ordinance imposing the surcharge, and reversed the decision that held it did not. The First Circuit held that the federal statute preempted a surcharge by the municipalities, where the territorial franchising authority, proceeding under the Cable Act, had already imposed a fee on cable operators. *Liberty CableVision of P.R., Inc.*, 417 F.3d at 218, 223-24.

VI. INDIAN CLAIMS SETTLEMENT ACT

In *Carcieri v. Norton*, 423 F.3d 45 (1st Cir. 2005) (Torruella, J.), the court, in a rehearing, affirmed a district court decision denying relief to Rhode Island in a suit challenging a decision of the Bureau of Indian Affairs (BIA) to take into trust a thirty-one acre parcel of land for the benefit of the Narragansett Tribe. In 1975 the Narragansett Tribe filed two suits against the State of Rhode Island and others to recover 3,200 acres of land they claimed was illegally taken from their Tribe. A settlement was reached between the Narragansett community and Rhode Island in 1978, resulting in the Rhode Island Indian Claims Settlement Act. The settlement provided for 1,800 acres of land to be held in trust for the benefit of the Narragansett Tribe, and that the Narragansett would give up all claims to land in Rhode Island. At the time of the settlement, the Narragansett were not a federally recognized tribe; they became one in 1983. *Carcieri*, 423 F.3d at 50.

The present suit involved a 31-acre parcel that was part of the original claimed 3200 acres, but did not become part of the 1800-acre settlement. In 1998 the BIA placed the thirty-one-acre parcel into trust, and in 2000, the Interior Board of Indian Appeals (IBIA) affirmed the BIA's decision. The State argued that the prior settlement barred the Secretary of the Interior from placing the disputed parcel into trust. The court rejected the State's claim that, insofar as it granted broad authority to the Secretary to take state lands into trust, the Indian Reorganization Act (IRA) violated various provisions of the Constitution, including the Non-delegation Doctrine, the Tenth Amendment, the Enclave Clause, the Admissions Clause, and that it fell outside Congress's power under the Indian Commerce Clause. The court also rejected the State's argument that the BIA exceeded its authority under the Administrative Procedure Act. *Carcieri*, 423 F.3d at 51-52, 56-60, 66-70.

In *Greene v. Rhode Island*, 398 F.3d 45 (1st Cir. 2005) (Torruella, J.), the court affirmed the district court's dismissal of the Seaconke Wampanoag Tribe's land claims against Rhode Island. The Wampanoag are recognized as a tribe under Massachusetts state law and "active in Rhode Island," but are not recognized as a tribe under federal law. *Greene*, 398 F.3d at 47. They brought a suit to recover land that they claim was unlawfully taken from their ancestors. *Id.* at 46-47. Their claim to approximately thirty-four square miles of land in Rhode Island is based on a 1661 transaction between the Chief of the

Wampanoags and “Captain Thomas Willet, a colonist who was authorized by the General Court of New Plymouth to purchase land from the Indians.” *Id.* at 47. The grant to Captain Willet from the Wampanoags reserved a portion of the land for the tribe to “plant and sojourn upon.” *Id.* (quoting the “North Purchase” deed). Rhode Island asserted that any Wampanoag claim to the land was extinguished by the Rhode Island Indian Claims Settlement Act (Settlement Act), enacted by Congress in 1978. The First Circuit rejected the Wampanoag’s argument that the district court transformed the 12(b)(6) motion into a motion for summary judgment by permitting Rhode Island to argue in its defense that the Settlement Act extinguished the Wampanoag claims. The court held that the motion to dismiss was not transformed because the Settlement Act was a matter of public record of which the trial court could take cognizance. *Id.* at 48-49 (quoting *Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 60 (1st Cir. 2000)). The court further held that the Wampanoags did not have a fee simple title to the land, but rather had a right that “[fell] somewhere between aboriginal title and recognized title,” and that whatever claim the Wampanoags did have was extinguished by the Settlement Act. *Id.* at 51-52.

VII. EMPLOYMENT LAW

A. Age Discrimination in Employment Act

In *Currier v. United Technologies Corp.*, 393 F.3d 246 (1st Cir. 2004) (Coffin, J.), a jury awarded an employee \$376,000 in damages on his state and federal age discrimination claims. The First Circuit affirmed the district court’s denial of the employer’s motions for directed verdict, new trial or remittitur. The employer’s central complaint concerned the allegedly flawed testimony of an expert statistician, the admission of which the defendant claimed was reversible error. *Currier*, 393 F.3d at 248, 250, 256. The expert testified that the reduction in force disproportionately affected older employees. Reviewing the trial court’s decision to admit the testimony for abuse of discretion, the court declined to reverse, although it agreed with the district court that the “case was close.” *Currier*, 393 F.3d at 248, 250-53.

In *Campbell v. General Dynamics Government Systems Corp.*, 407 F.3d 546 (1st Cir. 2005) (Selya, J.), the court affirmed the district court judgment denying the employer’s interlocutory motion to stay proceedings and to compel the employee to arbitrate his Americans with Disabilities Act (ADA) claim. The employer claimed that arbitration was required by terms set forth in a company-wide email. The email mentioned the arbitration provision, but failed to state that the email constituted an “agreement” or that it was binding. The email directed employees’ attention to two documents, embedded in and linked to the email, which addressed the company’s new policy. The new policy

required the arbitration of employment disputes including disability discrimination claims. The First Circuit, relying on a totality of the circumstances test, determined that the email communication was ineffective notice of a new contractual term. Although it was the company's practice to communicate with its employees by email, it could not show a practice of using email to give notice of contractual changes in the employment relationship. The company made no effort to determine whether employees had actual notice of the documents linked to the email. The language used in the email communication did not clearly put the employee on notice of the mandatory nature of the arbitration provision. The court noted that "[t]o be blunt, the e-mail announcement undersold the significance of the Policy and omitted the critical fact that it contained a mandatory arbitration agreement." *Campbell*, 407 F.3d at 548-49, 555-58.

In *Jorge v. Rumsfeld*, 404 F.3d 556 (1st Cir. 2005) (Selya, J.), the court affirmed a district court judgment dismissing the employee's complaint alleging Age Discrimination in Employment Act (ADEA) and Title VII violations as the statute of limitations had run on the ADEA claim and she had not exhausted the available administrative remedies on the Title VII claim. Following the Supreme Court's teaching in *Delaware State College v. Ricks*,⁸⁹ the First Circuit held that the date of the adverse employment action that led to the employee's resignation, and not the date of the resignation, was dispositive in determining the whether the claim was within the statutory period. Here the employee, a commissary manager employed by the United States military, was transferred to another Army store. She refused to accept the transfer and was therefore forced to retire a few months later. The court held that the relevant date for the limitations period was the date of the unilateral transfer and not the date of the retirement. *Jorge*, 404 F.3d at 558, 559-60, 563-64.

In *Ronda-Perez v. Banco Bilbao Vizcaya Argentaria-Puerto Rico*, 404 F.3d 42 (1st Cir. 2005) (Coffin, J.), the court affirmed a district court ruling granting summary judgment in favor of the employer on an employee's claim of unlawful age discrimination. The court held that the employee made out a prima facie case under the ADEA, but failed to show that the proffered reason for his dismissal – violating the company's policies on sexual harassment and on the confidentiality of company information – were pretextual. The court held that the employee did not present sufficient evidence of pretext to fall within *Reeves v. Sanderson Plumbing Products, Inc.*⁹⁰ *Ronda-Perez*, 404 F.3d at 45. In *Reeves*, the Supreme Court held that an employment discrimination claim could be established on a showing that an employer's proffered reason for its adverse employment action provided a trier of fact with sufficient information from which it could reasonably be "infer[red] from the falsity of

89. 449 U.S. 250 (1980).

90. 530 U.S. 133 (2000).

the explanation that the employer is dissembling to cover up a discriminatory purpose.” *Id.* at 44 (quoting *Reeves*, 530 U.S. at 147). The employee in *Ronda-Perez* did not introduce evidence that was sufficient to base a finding that the reasons given for his termination were a pretext for age discrimination. *Id.* 404 F.3d at 45-47.

AMERICANS WITH DISABILITIES ACT

In *Guzmán-Rosario v. United Parcel Service, Inc.*, 397 F.3d 6 (1st Cir. 2005) (Boudin, C.J.), the First Circuit affirmed a district court grant of summary judgment for the employer in an action under the ADA and the Rehabilitation Act. The court determined that the analysis for the ADA and Rehabilitation Act claims was the same and so only referred to the ADA. The employee complained that ovarian cysts rendered her disabled within the meaning of the ADA, and that her employer discharged her for requesting accommodation. *Guzmán-Rosario*, 397 F.3d at 9-10. The court held that the illness was not a “disability” because the employee could not show that her illness impaired a “major life activity.” *Id.* at 10. Following the guidance of the Equal Employment Opportunity Commission, the court observed that it would deem working to be a “major life activity” within the meaning of the ADA. *Id.* at 11. To successfully state an ADA claim asserting working as the “major life activity,” however, the court required the employee to demonstrate that her illness prohibited her from performing more than a single work task. *Id.* The court held that needing to sit down or occasionally miss work did not meet this requirement. *Id.*

In a non-employment related ADA case, *Disabled Americans for Equal Access, Inc. v. Ferries Del Caribe, Inc.*, 405 F.3d 60 (1st Cir. 2005) (Lipez, J.), the court vacated and remanded a district court decision rejecting a claim.

C. Equal Pay Act

In *Ingram v. Brink's, Inc.*, 414 F.3d 222 (1st Cir. 2005) (Gertner, J.), the plaintiff filed a sex discrimination claim against her former employer in state court. After the defendant removed the action to federal court, the plaintiff added an Equal Pay Act (EPA) claim. The court affirmed the district court’s grant of summary judgment on all claims. It found no support for an EPA claim where plaintiff did not show she was paid less than male employees for a job of “equal skill, effort, and responsibility” under the burden-shifting framework established in *Corning Glass Works v. Brennan*.⁹¹ The male

91. 417 U.S. 188, 195 (1974). The Court explained in *Corning* that, “[t]o prevail on a claim under the EPA, the plaintiff must first establish a prima facie case by showing that the employer paid different wages to specific employees of different sexes for jobs performed under similar working conditions and requiring equal skill, effort and responsibility.” *Id.* at 195.

employees Ingram alleged made more than she did held different positions with more demanding duties and responsibilities.⁹² *Ingram*, 414 F.3d at 228-33.

D. False Claims Act

Maturi v. McLaughlin Research Corp., 413 F.3d 166 (1st Cir. 2005) (Stahl, J.), required the court to address the whistleblower provision of the False Claims Act.⁹³ It affirmed summary judgment of a FCA whistleblower claim for the employer, a federal contractor, holding that plaintiffs failed to satisfy their burden of proving their employer was on notice that they were engaging in protected conduct. The plaintiffs alleged that the chairman of the company's board terminated them in retaliation for reporting to the chairman that her son, a fellow employee, was drawing a double salary and therefore defrauding the government. The First Circuit noted that where employees are responsible for overseeing government billings, they have a heightened burden to prove their reporting of financial wrongdoing put their employer on notice that they were engaged in protected conduct. *Maturi*, 413 F.3d at 170-71, 173. In applying the heightened standard to plaintiffs' claim, the court followed the Sixth, Fourth, Tenth, and Fifth Circuits in requiring a whistleblower with financial reporting duties to "make it clear that his actions go beyond his regular duties to establish that his employer was on notice that he was engaged in protected conduct." *Id.* at 172-73.

E. Title VII

In *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004) (Lipez, J.), *cert. denied*, *Cloutier v. Costco Wholesale Corp.*, 125 S. Ct. 2940 (2005) the court considered the plaintiff's claim for religious discrimination in violation of Title VII and Massachusetts non-discrimination laws. The plaintiff alleged that Costco, her employer, unlawfully refused to accommodate her religious practice of body piercing.⁹⁴ Cloutier alleged that the enforcement of Costco's no-piercing policy interfered with her religious exercise as a member

92. Ingram held positions as an operations manager and a branch supervisor while the male employees were assistant managers. *Id.* at 233.

93. See 31 U.S.C. § 3730(h) (2000). The statute provides in relevant part:

Any employee who is discharged . . . or in any . . . manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed under this section, shall be entitled to all relief necessary to make the employee whole.

Id.

94. Cloutier belonged to the Church of Body Modification (CBM), established in 1999. *Cloutier*, 390 F.3d at 129. The religious purpose of CBM is to promote its members' "grow[th] as individuals through body modification and its teachings," and to enhance the members' ability to be "confident role models in learning, teaching, and displaying body modification." *Id.* Cloutier had an eyebrow piercing, facial cutting, and multiple earrings. *Id.*

of the Church of Body Modification (CBM). She claimed her religion required her to display her facial piercings at all times, and that an accommodation such as covering them or replacing them with a clear retainer would contradict her religious beliefs. She sought an absolute exemption from the no-piercing rule. While the First Circuit affirmed the district court's determination that the employer had offered the plaintiff a reasonable accommodation, it did so on different grounds. *Cloutier*, 390 F.3d at 128, 130-31. It held the plaintiff's Title VII claim fails because "the only accommodation [the plaintiff] considers reasonable would impose an undue hardship on [the employer]." *Id.* at 134. The court reasoned that exempting the plaintiff from the employer's neutral dress code hurt the employer's public image because it detracted "from the neat, clean, and professional image that it aims to cultivate." *Id.* at 136. The First Circuit also found no violation of Massachusetts law, which imposes a similar duty on employers to provide a reasonable accommodation that does not cause undue hardship to the employer. *Id.* at 138.

In *Mercado v. Ritz Carlton*, 410 F.3d 41 (1st Cir. 2005) (Coffin, J.), the court reversed a district court judgment dismissing plaintiffs' Title VII action on grounds that Title VII's limitations period barred the action. The plaintiffs invoked the doctrine of equitable tolling after missing Title VII's filing deadline and argued that the filing period should be tolled because their employer failed to post statutorily mandated notices of employment rights, including the filing procedures. The First Circuit held that the plaintiffs' no posting argument met the threshold requirement to avoid dismissal, and the plaintiffs should have been given the opportunity to proceed and develop the facts of their claim that the statute was equitably tolled. *Mercado*, 410 F.3d at 46-48.

In *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1 (1st Cir. 2005) (Lynch, J.), the court, reversing a district court judgment to stay judicial proceedings and compel arbitration, considered how properly to divide legal issues arising from an arbitration clause between the judicial forum and the arbitrator. The plaintiff employee proceeded against her employer in the EEOC, claiming sexual harassment and wrongful termination. After the employee commenced her state court action, the employer removed the case to federal court and sought a stay or dismissal pending arbitration. Although the parties agreed the claims were covered by the arbitration clause, the employee argued the employer had waived the right to have the dispute arbitrated because its demand for arbitration was untimely given the clause's time limit for filing and the commencement of the EEOC claim.⁹⁵ In holding that the question of

95. The applicable provision in the employment agreement was that "arbitration . . . must be initiated within sixty days of the action, inaction, or occurrence about which the party initiating the arbitration is complaining." *Marie*, 402 F.3d at 4. Defendant-employer demanded arbitration within sixty days of service of the lawsuit, but long after the initiation of proceedings in the EEOC, which began in April, 2003. *Id.* at 4-5.

waiver was properly for the judge to decide, the court considered what bearing the recent Supreme Court decisions in *Howsam v. Dean Witter Reynolds, Inc.*,⁹⁶ and *Green Tree Financial Corp. v. Bazzle*⁹⁷ had on the question. As to the merits of the employer's alleged waiver, the court relied in part on *EEOC v. Waffle House, Inc.*,⁹⁸ in which the Supreme Court held that the EEOC is a nonparty to an arbitration agreement and therefore cannot be bound by one. *Marie*, 402 F.3d at 3, 4-6, 13-16. The First Circuit applied the Supreme Court's *Waffle House* holding to *Marie* and reasoned "[i]f the EEOC's investigation of an employer cannot be stopped by invoking an arbitration agreement, then forcing the employee and employer to begin an arbitration proceeding during the pendency of that investigation will automatically result in two adjudications involving the same issues at the same time." *Id.* at 16. It concluded that the employer did not waive its right to arbitration because to require the employer to assert its right to mandatory arbitration at the EEOC phase would "lead to wasteful, duplicative proceedings." *Id.* at 4.

In *Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005) (Selya, J.), the plaintiff, a City of Boston parking enforcement officer, brought a Title VII claim and an analogous retaliatory harassment claim under Massachusetts law against the City. Plaintiff complained about the sexually harassing conduct of a supervisor, who as a result was fired by the City. Plaintiff was subsequently subjected to harassment by coworkers, who took the side of the dismissed supervisor. The court considered two questions of first impression in the circuit. First, the court considered whether retaliation against an employee who has complained about unlawful harassment can create a hostile work environment. The employee argued the hostile work environment constituted an adverse employment action under Title VII and under Massachusetts law. *Noviello*, 398 F.3d at 81-83, 84, 89. The court agreed, holding that "under Massachusetts law [and] under Title VII, subjecting an employee to a hostile work environment in retaliation for protected activity constitutes an adverse employment action . . ." *Id.* at 91. Second, the court considered whether the alleged perpetrators of the retaliatory harassment qualified as supervisors. *Id.* at 94-95. The court adopted the Seventh Circuit's definition of a supervisor as an employee with "the power to hire, fire, demote, promote, transfer, or discipline an employee." *Id.* at 96. (adopting definition from *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1034 (7th Cir. 1998)). Applying this definition to the facts in the record, the court concluded plaintiff presented no evidence that her harassers had supervisory power over her, and accordingly, plaintiff's claim was reduced to coworker harassment. *Id.* at 96-97.

96. 537 U.S. 79 (2002).

97. 539 U.S. 444 (2003).

98. 534 U.S. 279 (2002).

In *Pe na-Crespo v. Puerto Rico*, 408 F.3d 10 (1st Cir. 2005) (Baldock, J.), plaintiff, a native of the Dominican Republic, prevailed on her Title VII claim alleging that she was subjected to a hostile work environment in Puerto Rico based on her national origin. The district court judge awarded her damages in the amount of \$12,000. She appealed from the district court's judgment denying her motion to alter or amend the judgment with respect to the damages amount and the exclusion of her psychiatric expert. Reviewing the district court judgment for abuse of discretion, the First Circuit found the court was justified in excluding the testimony where plaintiff did not submit a written report of the expert's findings as required by F.R.E. 26(a), and in awarding damages in the amount of \$12,000. *Pe Na-Crespo*, 408 F.3d 10, 11-12, 13-14.

In *Rodriguez-Torres v. Caribbean Forms Manufacturer, Inc.*, 399 F.3d 52 (1st Cir. 2005) (Howard, J.), the plaintiff sued under Title VII and Puerto Rico law, claiming her employer subjected her to discrimination based on age and gender. Judgment entered in her favor in the amount of \$305,000 on the Title VII claims and \$499,998 on the Commonwealth [of Puerto Rico] claims. On the parties' cross-appeal, the court affirmed the judgment and remanded the case for a decision on attorneys' fees. Applying the *McDonnell Douglas* paradigm, the court held that it was not necessary—and improper, in this case—to show, under the fourth prong of the *prima facie* test: that the employee claiming wrongful termination was replaced by a new hire or that a current employee was formally designated to perform the same work. Rather, it was adequate to demonstrate that her employer had a continuing need for her job functions and that they were carried out by other employees. *Rodriguez-Torres*, 399 F.3d 52, 55-56, 58-59.

F. Employment Miscellaneous

In *Webber v. International Paper Co.*, 417 F.3d 229 (1st Cir. 2005) (Cyr, J.), *cert. denied*, 2006 WL 452489 (2006), the First Circuit affirmed a district court judgment vacating a three million dollar jury verdict in a disability discrimination case alleging a violation of the Maine Human Rights Act (MHRA). The employee, a mechanical draftsman, was a long-term employee of International Paper. He suffered an injury to his knee, which required surgery and ultimately a knee replacement. He requested accommodations, which his employer provided, along with comments from supervisors suggesting he was malingering. Subsequently, the employer discharged the employee in accordance with a reduction in force order from headquarters. The employee's supervisor allegedly selected him because he did not have an engineering degree. The district court judge granted the employer's motion for judgment as a matter of law, concluding that the employee did not introduce sufficient evidence to demonstrate discriminatory animus. *Webber*, 417 F.3d at 232-33.

The First Circuit applies the *McDonnell-Douglas* framework to employment discrimination claims based on circumstantial evidence. To make out a prima facie case, the court held, the employee had to establish that: (1) he was a member of a protected class; (2) he satisfied the employer's legitimate job performance expectations; (3) he was terminated by the employer; and (4) the employer did not accord similar treatment to persons outside the protected class. The court concluded that the employee failed to produce any evidence related to the fourth prong of the test. The employee did not present any evidence that the eight retained engineers were not disabled, or that the employer had laid off any other disabled employee. Additionally, the court concluded that the employee did not show that the employer harbored or demonstrated any discriminatory animus toward him. The employee did not prove that the employer's stated reason for discharging him – his lack of an engineering degree—was pretextual, nor did he prove that the employees who made disparaging comments participated in or influenced the decision to terminate him. *Webber*, 417 F.3d at 234, 237-41.