No. _____

In the Supreme Court of the United States

DR. REBECCA ALBERTI,
Petitioner,

v.

DR. JOSÉ R. CARLO-IZQUIERDO, DR. SUANE E. SÁNCHEZ-COLÓN, DR. GLORIA E. ORTIZ-BLANCO, DR ANGÉLICA MATOS-RÍOS, CARMEN T. LÓPEZ-RODRÍGUEZ, LEYRA FIGUEROA-HERNÁNDEZ, DR. MARÍA C. DECLET-BRAÑA, IRIS RAMOS-VIERA, IRIS RIVERA-COLÓN, JUDITH MIRANDA, VIRGINIA SANTIAGO, and THE UNIVERSITY OF PUERTO RICO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The University of Puerto Rico terminated Dr. Alberti's tenure-track professorship without a hearing. The First Circuit determined the failure to hold a hearing prior to Dr. Alberti's termination did not violate the Due Process Clause of the Fourteenth Amendment. According to University Rules and Regulations, Dr. Alberti could only be fired "when so justified." Dr. Alberti argued that the "when so justified" language is tantamount to a "for cause" requirement, which entitled her to a pretermination hearing.

While the First Circuit acknowledged that Dr. Alberti's reading had merit, it ultimately concluded that her right to a pretermination hearing was not "clearly established" because the Rules and Regulations could also be interpreted to mean she could be fired without a hearing. Therefore, the First Circuit held that qualified immunity shielded university personnel from any liability arising from the failure to hold a pretermination hearing.

1. Does the existence of two possible readings of a University's Rules and Regulations – one that supports a finding that an employee is "at will" and another that the employee can only be fired "for cause" – mean that an employee's right to a pretermination hearing is not "clearly established"?

2. Does Dr. Alberti have a property interest in her employment that entitled her to a pretermination hearing?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dr. Rebecca Alberti, respectfully petitions the Court for a writ of certiorari to review the Opinion of the United States Court of Appeals for the First Circuit, which affirmed the United States District Court for the District of Puerto Rico's entry of summary judgment in favor of the Respondents on Dr. Alberti's § 1983 and Title VII claims.

OPINIONS BELOW

The United States District Court for the District of Puerto Rico entered summary judgment against Dr. Alberti on October 13, 2011. App. 35. The District Court's summary judgment order is published at 818 F.Supp.2d 452 (D.P.R. 2011). The District Court denied Dr. Alberti's motion for reconsideration on June 21, 2012, in a written order published at 869 F.Supp.2d 231 (D.P.R. 2012). App. 95.

Dr. Alberti appealed to the United States Court of Appeals for the First Circuit, which affirmed the District Court's entry of summary judgment in a written opinion on December 18, 2013. App. 1. The opinion is unpublished, but available at 2013 WL 6645581 (1st Cir. 2013). On January 1, 2014, Dr. Alberti's counsel filed a motion to extend the time for filing a rehearing motion, which was denied on January 8, 2014.

STATEMENT OF JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Dr. Alberti is a family nurse practitioner with a nursing doctorate. She was born in the United States but considers herself Puerto Rican–American and is fluent in Spanish. Dr. Alberti worked for the University of Puerto Rico on two separate occasions. Both times her job included developing a family nurse practitioner ("FNP") program at the University's School of Nursing and acquiring funding for that program.

Her first stint at the University began in 2001 and continued until she resigned in December 2002. She resigned because, although she had procured a $1 million federal grant for the FNP program, the University failed to approve the FNP program, and the funds had to be returned. Dr. Alberti began working for the University's School of Nursing for the second

time in August 2005. Initially, she worked for the University under a temporary contract.

By the middle of 2006, however, the FNP program had been approved, and Dr. Alberti had again procured a federal grant to fund the FNP program. The University appointed her to three positions: 1) director of the School of Nursing's FNP program, 2) grant director, and 3) a tenure-track associate professor.

While working at the University, Dr. Alberti's relationships with a few of her students and colleagues became contentious. Dr. Alberti claimed many of her students did not like her because her teaching style was too "Americana." Much of the tension stemmed from an ongoing conflict between Dr. Alberti and one of her nursing students, Respondent Iris Ramos-Viera. When Ramos-Viera failed one of Dr. Alberti's courses because she did not accumulate sufficient clinical hours, she attempted to make up these hours independently and without Dr. Alberti's knowledge. According to Dr. Alberti, the student's improperly supervised practice of nursing violated the Health Insurance Portability and Accountability Act (HIPAA).

On December 4, 2007, Dr. Alberti wrote to Respondent Dr. José Carlo-Izquierdo, the Chancellor and nominating authority of the University's Medical Science Campus. Dr. Alberti complained about Ramos-Viera's HIPAA violations and that Respondents Dr. Angélica Matos–Ríos and Leyra Figueroa-Hernández, fellow faculty members, and Dr. Suane Sánchez-Colón, the Dean of the School of Nursing, were interfering with Dr. Alberti's work as director of the FNP program. Later, Dr. Alberti refused to approve Ramos's proposed

research project, which was part of her required course work.

On February 4, 2008, Sánchez–Colón wrote to Chancellor Carlo-Izquierdo. Citing a lack of trust and claiming that Dr. Alberti's December 4 letter inappropriately bypassed the chain of command, Sánchez-Colón recommended Carlo-Izquierdo terminate Dr. Alberti's director positions. Carlo-Izquierdo concluded that, under the University Rules and Regulations, Dr. Alberti's director positions were positions of trust. Further, based on the combination of Dr. Alberti's direct complaint to him and Sánchez-Colón's request for Dr. Alberti's termination, Carlo-Izquierdo concluded the relationship between the two had deteriorated to the point of being "non-functional." On February 13, 2008, Carlo-Izquierdo removed Dr. Alberti from her two director positions. He informed her of her removal in writing, but did not provide her with a pretermination hearing. Dr. Alberti remained employed as a tenure-track professor.

Dr. Alberti's relationships with some of her students and the University faculty became more strained after she was removed from her director positions. On June 3, 2008, Sánchez–Colón again wrote to Chancellor Carlo-Izquierdo, requesting he terminate Dr. Alberti's tenure-track associate professor position. Sánchez–Colón's letter included a number of evaluations drafted between February 14 and June 3, 2008, by other School of Nursing faculty members - namely, Respondents Figueroa-Hernández and Matos-Ríos, as well as Respondents Virginia Santiago,

Carmen T. López-Rodríguez, and Dr. Gloria E. Ortiz-Blanco - that supported terminating Dr. Alberti.

On June 12, 2008, Carlo–Izquierdo notified Dr. Alberti that her tenure-track associate professor position would terminate as of August 15, 2008. Dr. Alberti was not given a pretermination hearing before receiving this letter. In the letter, Chancellor Carlo-Izquierdo cited Section 46.6 of the University Rules and Regulations, which provides: "The Chancellor . . . may terminate a probationary appointment without granting tenure *when so justified*, according to the evaluation or evaluations performed, notifying the affected person in writing." (emphasis added).

On April 25, 2008, Dr. Alberti filed a complaint against the University of Puerto Rico, seven university officials, and three former FNP Program students, alleging, *inter alia*, that her removal as FNP Program Director and later termination from probationary appointment as Associate Professor deprived her of property without due process of law in violation of Fourth, Fifth and Fourteenth Amendments and § 1983.

Before the District Court and on appeal, Dr. Alberti argued that she had a protected property right in her tenure-track professor position under the Due Process Clause, and therefore a right to pretermination hearing. Specifically, she argued that the "when so justified" language in Section 46.6 is tantamount to a "for cause" requirement. The First Circuit acknowledged that Dr. Alberti's "argument equating 'when so justified' with 'for cause' may have some merit." App. 24. Further, the First Circuit acknowledged that under this Court's decision in

Gilbert v. Homar, 520 U.S. 924, 929, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997), a public employee who is dismissible only "for cause" is entitled to a pretermination hearing. *Id*.

However, the First Circuit found that "notwithstanding the plausibility of this argument" it did not need to "decide whether Alberti in fact had a property interest" in her professor position because the individual university Respondents were "entitled to qualified immunity on this issue." App. 26. The First Circuit held that this Court's decision in *Ashcroft v. al-Kidd*, —— U.S. ——, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011), controlled its analysis on the qualified immunity question. *Id*. The First Circuit determined that to decide whether the university Respondents were entitled to qualified immunity *al-Kidd* required it to assess whether Dr. Alberti pleaded "facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Id*.

Ultimately, the First Circuit concluded that Dr. Alberti failed to show her property interest was "clearly established" when she was terminated. Instead of recognizing the general entitlement to a hearing as "clearly established," it looked to specific provisions of the Rules and Regulations to determine whether her property interest was "clearly established." Specifically, the First Circuit evaluated three provisions of the University Rules and Regulations.

First, it analyzed Section 30.1.2, which defines "Probationary Appointment" as:

> the appointment granted initially to cover a regular post or position approved in the budget, and shall have a fixed duration according to the provisions of the Regulations. During the appointment period the incumbent shall be on probation, subject to an evaluation to determine whether or not at the end of said period he or she merits retention with a permanent appointment.

(App. __). Second, it looked to Section 46.2, which provides, with very limited exceptions, that a professor may not attain tenure in her position until she renders five years of satisfactory service while on probation. Finally, it noted that Section 46.6, provides: "The Chancellor ... may terminate a probationary appointment without granting tenure when so justified, according to the evaluation or evaluations performed, notifying the affected person in writing."

Dr. Alberti argued that the "when so justified" language in Section 46.6 of the University Rules and Regulations was tantamount to a "for cause" requirement. The First Circuit disagreed, but acknowledged her reading had merit. However, the First Circuit held her property interest was not "clearly established" when the three pertinent sections of the Rules and Regulations are read together. According to the First Circuit, Dr. Alberti did not have a protected property interest in a pretermination hearing because the University Rules and Regulations "are unclear when applied to Alberti's case." Specifically, the First Circuit opined:

> Although one could reasonably read the rules as creating an expectation of continued employment for at least five years, one could also reasonably interpret Rule 46.6 as allowing the termination of Alberti's indefinite probationary contract without a pretermination hearing whenever the evaluations on file justified such action. Alberti does not cite any law to the contrary and our independent research has revealed none. As such, Alberti did not have a "clearly established" right to a pretermination hearing prior to being dismissed from her probationary professor position. Thus, the district court properly found the University Respondents were entitled to qualified immunity on this claim.

App. 27.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CLARIFY WHETHER AMBIGUITY IN A SPECIFIC EMPLOYMENT AGREEMENT AUTOMATICALLY MEANS THAT AN EMPLOYEE'S RIGHT TO A PRETERMINATION HEARING IS NOT "CLEARLY ESTABLISHED."

Approximately twenty years ago, this Court held that a public employee who is dismissible "for cause" is entitled to a limited pretermination hearing. *Gilbert v. Homar*, 520 U.S. 924, 929, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997). In this case, the First Circuit acknowledged that a fair reading of the University's

Rules and Regulations conferred a property right to Dr. Alberti for a pretermination hearing. However, the First Circuit also held that the University Rules and Regulations could be interpreted to mean she did not have a right to a pretermination hearing.

Given the ambiguity in the University Rules and Regulations, the First Circuit determined Dr. Alberti's right to a pretermination hearing was not "clearly established," and thus university personnel was entitled to qualified immunity. As support, the First Circuit cited *Rivera–Ramos v. Roman*, 156 F.3d 276, 279–80 (1st Cir.1998), which held that:

> identifying some abstract constitutional right extant at the time of the alleged violation does not itself show that the conduct alleged is a violation of 'clearly established' law. Instead, the focus must be upon the particular conduct engaged in by (or attributed to) the Respondents; immunity is forfeited only if a reasonable official would clearly understand that conduct to be a violation of the Constitution.

App. 26-27.

The inquiry, however, should be whether the right to a pretermination hearing is "clearly established" in the law. As the First Circuit noted, an "abstract constitutional right extant at the time of the alleged violation" is not enough. But the right at issue in this case – the right to a pretermination hearing for a public employee dismissible only "for cause" – is clearly established. For instance, in *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d

494 (1985), this Court concluded that a public employee dismissible only for cause was entitled to a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing. The purpose of the pretermination hearing is "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id* at 545–546. The pretermination process must include an explanation of the employer's evidence and an opportunity for the employee to tell his side of the story. *Id*., at 546.

However, instead of recognizing the general entitlement to a hearing as "clearly established," the First Circuit looked to specific provisions of the Rules and Regulations to determine whether Dr. Alberti's property interest was "clearly established" for purposes of assessing qualified immunity. This Court should clarify that this is not the proper approach.

The First Circuit conflated the merits analysis with the qualified immunity analysis. Certainly, it is beyond peradventure that an employee must have a property interest in continued employment to have a Constitutional right to a pretermination hearing. Of course, whether that property interest exists depends on the terms of employment. But that analysis goes to the merits of the case. It is not appropriate to determine qualified immunity, which depends on the degree to which the right is established in the law.

Had the First Circuit properly applied the "clearly established" factor of the qualified immunity test, it

would have held, based on this Court's clear precedent, that Dr. Alberti had a clearly established right to a pretermination hearing, if, indeed, she had a property interest in continued employment. In *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972), this Court held that the Constitution requires a pretermination hearing even for a non-tenured teacher if the teacher can show she has a property interest in continued employment. *See also Perry v. Sinderman*, 408 U.S. 593, 600, 92 S.Ct. 2694, 2699 (1972). Dr. Alberti sufficiently raised a question of fact regarding her property interest under the University Rules and Regulations such that summary judgment was improper. Based on the First Circuit's own qualified immunity analysis, a fair reading of the University Rules and Regulations gives rise to an interpretation that Dr. Alberti had an expectation in continued employment. Thus, there was a genuine issue of material fact and summary judgment was improvidently granted.

CONCLUSION

This Court should grant the instant petition and clarify that ambiguity in an employment agreement regarding a continued interest in employment does not automatically mean that an employee's right to a pretermination hearing is not "clearly established" for purposes of qualified immunity. The "clearly established" prong of the qualified immunity test goes to the degree of clarity in the law regarding the right in question, not the question on the merits – whether the employee has a property interest at all.

APPENDIX

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APPENDIX A

Not for Publication in West's Federal Reporter

United States Court of Appeals
For the First Circuit

No. 12-1982

[Filed December 18, 2013]

DR. REBECCA ALBERTI,

Plaintiff, Appellant,

v.

DR. JOSÉ R. CARLO-IZQUIERDO; DR. SUANE E. SÁNCHEZ-COLÓN; DR. GLORIA E. ORTIZ-BLANCO; DR. ANGÉLICA MATOS-RÍOS; CARMEN T. LÓPEZ-RODRÍGUEZ; LEYRA FIGUEROA-HERNÁNDEZ; DR. MARÍA C. DECLET-BRAÑA; IRIS RAMOS-VIERA; IRIS RIVERA-COLÓN; JUDITH MIRANDA; VIRGINIA SANTIAGO; THE UNIVERSITY OF PUERTO RICO,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Daniel R. Domínguez, U.S. District Judge]

App. 2

Before
Torruella, Baldock,[*] and Thompson,
Circuit Judges.

Manuel R. Suárez-Jiménez, for appellant.
Diego Ramírez-Bigott, with whom Raquel M. Dulzaides and Jiménez, Graffam & Lausell, were on brief for appellees.

December 18, 2013

Baldock, Circuit Judge. Dr. Rebecca Alberti held three positions at the University of Puerto Rico. When the University discharged her from these positions, she sued the University and a number of university officials and students claiming violations of her rights under the United States Constitution and federal and local law. Defendants moved for summary judgment. The district court treated Defendants' motion as effectively unopposed because Alberti failed to comply with numerous court orders, as well as the local district court rules. The court then granted Defendants' motion for summary judgment and later denied Alberti's motion for reconsideration in two separate published opinions. Alberti v. Univ. of Puerto Rico, 818 F. Supp. 2d 452, 456–57 & n.1–2 (D.P.R. 2011) (Alberti I) reconsideration denied, 869 F. Supp. 2d 231 (D.P.R. 2012) (Alberti II). Alberti now appeals, claiming the district court (1) abused its discretion in handling her numerous extension motions and deeming Defendants' summary judgment motion effectively unopposed and (2) erred in granting summary judgment to the

[*] Of the Tenth Circuit, sitting by designation.

Defendants on the merits on all claims. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

Alberti first argues the district court abused its discretion by not granting her more time to file her opposition to Defendants' motion for summary judgment and by deeming Defendants' motion effectively unopposed. She also attempts to add an extra 1400 pages to the record on appeal, claiming these are documents the district court should have considered below. Defendants oppose this attempt. Thus, before addressing Alberti's appeal on the merits, we must first determine (1) whether the district court properly handled Alberti's numerous motions for filing extensions, (2) whether the court properly found Defendants' motion for summary judgment effectively unopposed, and, (3) on a related note, which parts of the "joint appendix" we may properly consider in this appeal. As such, we first recount the relevant procedural history of this case.

Alberti filed her original complaint on April 25, 2008. At a settlement conference three years later, on May 3, 2011, the district court issued an order stating any dispositive motions in Alberti's case were due by June 1 and any oppositions were due by June 30, 2011. This order also scheduled trial for August 15–September 9, 2011. The court emphasized that "**NO** extensions of time" would be allowed to either side. (bold in original). Defendants complied with this order and filed, on June 1, their Motion for Summary Judgment, Statement of Uncontested Material Facts, and Memorandum in Support of their Motion. Alberti, on the other hand, did not comply with the district

court's order, nor with the numerous extensions the court eventually gave her.

Rather than comply with the district court's initial order, Alberti filed a motion on June 29 seeking an extension until July 5 to file her opposition. The court granted this extension. Alberti then filed a second motion on July 5 for extension until July 6 at 8:00 a.m. The court apparently did not rule on this request, but it made no difference as, on July 6, Alberti filed a third motion for extension until 6:00 p.m. on July 6. Alberti claimed in this motion that she was having "technical difficulties" uploading her "exhibits, memorandum of law and statement." Thus, she moved in the alternative for leave to file all of these documents in hard copy that same day, July 6, as a "plan B." The Court granted this motion in part, giving Alberti until 2:00 p.m. on July 6 to file her opposition with the court and until 5:00 p.m. to provide a copy of her opposition to defense counsel. Rather than comply with this second granted extension, Alberti moved for the district court to modify its order to give her until 5:00 p.m. to file her opposition with the court. The District court granted this motion in part, stating:

> Plaintiff is granted *a final extension of time*, that is, July 6, 2011 at 2:30 p.m. to file the opposition to defendants' motion for summary judgment. Plaintiff's counsel shall try to file the exhibits by 2:30 p.m. today, or may file the exhibits through a separate motion today. If counsel still has difficulty with the filing of the exhibits, he should contact the Help Desk . . . . *No further requests for extensions of time will be entertained by the Court.* IT IS SO ORDERED.

Alberti did not comply with this third extension. Instead, she filed only her Opposing Statement of Material Facts, and even that she did not file until 4:54 p.m.—two and a half hours after her entire opposition was due. Furthermore, at a status conference the next day, July 7, Alberti admitted her Opposing Statement of Material Facts was not properly filed because she failed to file with it more than 100 supporting exhibits. In response, the court "made pellucidly clear to [Alberti's] counsel that a set of exhibits *only* is to be filed in hard copy, and shall be hand delivered to the defendants on July 8, 2011 by noon." (emphasis in original). This status conference concluded at 7:40 p.m. Alberti did not file these exhibits by noon the next day, and so the court issued an order taking notice of Alberti's failure and stating that "no further documents shall be filed by the parties . . . unless otherwise ordered by the court." Despite the court's order, Alberti submitted hard copies of her exhibits, the vast majority of which were still in Spanish, two hours later, at around 4:45 p.m. on the evening of July 8. Alberti eventually filed a Memorandum of Law in Opposition on July 20—*fourteen days* after it was due and in violation of the court's July 6 and July 8 orders. Alberti I, 818 F. Supp. 2d at 456–57 & n.1–2 (D.P.R. 2011).

When Defendants filed their motion for summary judgment, they also requested leave to file Spanish documents as exhibits and an extension until July 18 to file the certified translations of said documents, which the court granted. On July 19, Defendants moved for a second extension until August 1 to file the certified English translations of its exhibits, which the court also granted. Alberti, on the other hand, filed most of the exhibits accompanying her Opposing

Statement in Spanish but never requested leave to do so. Furthermore, she did not request leave to file certified translations of these documents until July 27, four weeks after such a motion should have been filed, and three weeks after the court's final extension to her had expired. In this motion, she requested until August 29—two weeks after trial was scheduled to begin—to submit these translations. The District court denied this motion.

Before granting Defendants' motion for summary judgment on the merits, the district court explained that Alberti "force[d]" it to "consider as uncontested most of Defendants' Statement of Uncontested Material Facts" because (1) she disregarded numerous court orders and failed to file the exhibits supporting her Opposing Statement of Material Facts on time, (2) the majority of her exhibits were filed in Spanish without certified English translations, and (3) she repeatedly violated District Court Local Rule 56 by, for example, failing to include in her Opposing Statement particularized citations to the record and supporting evidence. Alberti I, 818 F. Supp. 2d at 456 n.1. The district court also pointed out that it would not consider Alberti's Memorandum of Law in Opposition because it was filed two weeks late and in violation of a court order. Id. at 457 n.2.

On appeal, Alberti argues (1) the district court either gave her another extension to file her exhibits at the July 7 status conference until the end of the day on July 8 but failed to put it in the minutes or, in the alternative, abused its discretion by giving her only until noon on July 8 to do so; (2) the district court abused its discretion when it did not grant Alberti

leave to file English translations of her exhibits; and (3) the district court abused its discretion in deeming Defendants' motion for summary judgment effectively unopposed.

Because all of these claims are based on the district court's enforcement of its own scheduling orders, we review them for abuse of discretion. O'Connell v. Hyatt Hotels, 357 F.3d 152, 155 (1st Cir. 2004); see also Mendez v. Banco Popular de Puerto Rico, 900 F.2d 4, 7 (1st Cir. 1990) ("In the absence of a manifest abuse of discretion . . . we will not interfere with a district court's reasoned refusal to grant incremental enlargements of time."); Guzmán-Ruíz v. Hernández-Colón, 406 F.3d 31, 33 (1st Cir. 2005) (reviewing the district court's rejection of a party's belated request for abuse of discretion). With this in mind, we turn now to Alberti's procedural arguments.

A.

Alberti first alleges that at the July 7 conference the district court in fact gave her until the end of the day on July 8 to submit the exhibits supporting her Opposing Statement. Alberti provides no evidence to support this claim. She did file a motion asking the court to amend its July 7 conference minutes, which the court never ruled on. But the minutes from the July 7 conference state the court "made pellucidly clear to [Alberti's] counsel" that her exhibits were due on July 8 by noon. Furthermore, the court restated it had only granted Alberti until midday on July 8 to submit these exhibits in its published opinion granting Defendants' motion for summary judgment. Alberti I, 818 F. Supp. 2d at 456 n.1. Alberti constantly disregards court deadlines. Indeed, she filed both her briefs in this

appeal late—her reply brief *five months* tardy with no excuse. As such, we have little doubt Alberti simply failed to meet the noon deadline on July 8 and attempted to cover her tracks after the fact. Thus, we must determine whether the district court abused its discretion when it gave Alberti a *fourth and final extension* from about 8:00 p.m. until noon the next day to turn in hard copies of her exhibits.

In Mendez, we affirmed the district court's denial of a plaintiff's second and third requests for filing extensions. In affirming the district court we said:

> *Rules are rules–and the parties must play by them*. In the final analysis, the judicial process depends heavily on the judge's credibility. To ensure such credibility, a district judge must often be firm in managing crowded dockets and demanding adherence to announced deadlines. If he or she sets a reasonable due date, parties should not be allowed casually to flout it or painlessly to escape the foreseeable consequences of noncompliance.

Mendez, 900 F.2d at 7 (emphasis added).

Alberti claims the final deadline the district court set was unreasonable because it gave her effectively only four hours to produce hard copies of exhibits that totaled over a thousand pages. This claim, however, is belied by Alberti's third motion for extension. In this third request, Alberti asked for leave to file her opposition, including the exhibits, in hard copy on July 6 according to her proposed "plan B," in light of her claim that the court's electronic case filling program kept crashing. Based on this motion, the district court

could reasonably have concluded Alberti was prepared to file hard copies of her exhibits on July 6. Thus the district court did not abuse its discretion when it granted Alberti until midday on July 8 to file the hard copies of exhibits which she had implied she was prepared to submit two days prior. In any event, the court's original due date for Alberti's opposition, giving her a month to respond to Defendants' motion for summary judgment, was reasonable. As in Mendez, Alberti should not be allowed to painlessly escape the foreseeable consequences of her noncompliance with this deadline and the four extensions the court ultimately granted her.

B.

Alberti next argues the court abused its discretion when it granted Defendants' July 19 motion requesting until August 1 to submit certified English translations of their exhibits but denied her July 27 motion requesting until August 29 to file English translations of her exhibits (which we have already established she filed too late to begin with).[1]

Again, we direct Alberti to our language in Mendez: "rules are rules—and the parties must play by them . . . . [P]arties should not be allowed casually to flout . . . or painlessly to escape the foreseeable consequences of noncompliance." Mendez, 900 F.2d at 7. Here, Defendants timely filed their motion for summary

[1] The district court never officially struck Alberti's tardy submission of exhibits on July 8. As such, out of an abundance of caution, we explain why, even if the court accepted Alberti's tardy July 8 filing, it need not have granted her untimely motion to file translations of her Spanish exhibits.

judgment along with a timely motion seeking an extension to file translations of their exhibits. We acknowledge the court granted Defendants a second extension until August 1 to file their translations, even though this second motion for extension was filed one day late. This, however, does not entitle Alberti to the extension she requested where (1) she filed her exhibits late and in Spanish without any motion seeking leave to file translations, (2) she sought leave to file translations *four weeks* after her entire opposition was due and *three weeks* after the expiration of her fourth and final filing extension, and (3) she sought until two weeks *after* trial was scheduled to begin to submit these translations. As such, the district court by no means abused its discretion in denying Alberti's extremely tardy and practically absurd request for leave to file translations of exhibits which themselves were untimely filed.

C.

Alberti next contends the district court abused its discretion when it deemed Defendants' motion for summary judgment effectively unopposed. "We review a district court's finding that a party failed to timely oppose summary judgment for abuse of discretion. We will only find an abuse of discretion if there is an unreasoning and arbitrary insistence upon expeditiousness in the face of a justified request for delay." Cortes-Rivera v. Dep't of Corr. & Rehab. of Com. of Puerto Rico, 626 F.3d 21, 25 (1st Cir. 2010) (internal citations omitted).

The court considered Defendants' motion for summary judgment unopposed due to a number of fatal flaws in Alberti's opposition. We have already

recounted many of these flaws, including Alberti's repeated failures to comply with court orders and filing deadlines. Another reason the district court gave was the vast majority of the exhibits Alberti filed with her Opposing Statement of Material Facts were in Spanish. "[T]he law is clear that any submitted exhibit not directly translated into English or provided with a corresponding English translation may properly be disregarded by the district court." Colón-Fontánez v. Municipality of San Juan, 660 F.3d 17, 27 (1st Cir. 2011). Thus, the district court did not abuse its discretion by not considering the exhibits which Alberti filed in Spanish. And because Alberti filed the vast majority of her exhibits in Spanish, the district court did not abuse its discretion by considering as uncontested most of Defendants' Statement of Uncontested Material Facts.

The district court also cited Alberti's failure to comply with Puerto Rico Local District Court Rule 56, also known as an "anti-ferret" law. Local Rule 56 provides that, in the summary judgment context: "Unless a fact is admitted, the opposing statement shall support each denial or qualification by a record citation as required by this rule." D.P.R. L.Cv.R. 56(c). Subsection (e) then provides in relevant part:

> An assertion of fact set forth in a statement of material facts *shall be followed by a citation to the specific page or paragraph of identified record material* supporting the assertion. The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment. The court shall have no independent

> duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts.

D.P.R. L.Cv.R. 56(e) (emphasis added).

Alberti argues she in fact complied with Local Rule 56 because she "did make specific references to the record for almost every statement she made to create a genuine issue of material fact." This is demonstrably and blatantly false. A large portion of Alberti's opposing statements leave obvious blanks where specific record citations should be, to the point of absurdity. For example, the citation clause for an assertion on page 11 of her Opposing Statement reads: "See exhibit ___ compared to exhibit ___. See also contracts dated ___, identified herein as exhibits___, and Certification # 74 approved on ___, identified herein as exhibit ___." Further, even where Alberti provides record citations, rather than cite a "specific page or paragraph" as Rule 56(e) requires, she often cites generally to multiple exhibits which are themselves voluminous. For example, at one point she attempts to deny one of Defendants' specific statements of material fact by citing generally to two exhibits with a combined page count of 136 pages.

We need not belabor the point.

> Given the vital purpose that [Local Rules 56(c) and (e)] serve, litigants ignore them at their peril. In the event that a party opposing summary judgment fails to act in accordance with the rigors that such a rule imposes, a district court is free, in the exercise of its sound

> discretion, to accept the moving party's facts as stated.

Cabán Hernández v. Philip Morris USA, Inc., 486 F.3d 1, 7 (1st Cir. 2007). Given Alberti's egregious violations of Local Rule 56—indeed, the majority of her opposing statement clearly violated this rule—the district court did not abuse its discretion by deeming as uncontested most of Defendants' Statement of Uncontested Material Facts.

Alberti also argues she need not comply with Local Rule 56 because she filed her exhibits in hard copy. Therefore, she argues, she need only comply with Local Rule 7, which requires that one properly organize and tab exhibits filed in hard copy. She cites no authority for this argument, and for good reason, as it is ridiculous. Of course, when one files exhibits in hard copy, the hard copies must be properly organized. But filing exhibits in hard copy also makes citing them precisely under Local Rule 56 that much more essential. Indeed, Alberti's actions—filing an Opposing Statement of Material Fact with imprecise citations or no citations at all along with a voluminous hard-copy compilation of exhibits—strike us as the epitome of playing "a game of cat-and-mouse," and "leav[ing] the district court to grope unaided for factual needles in a documentary haystack." Caban Hernandez, 486 F.3d at 7–8.

Alberti also repeatedly argues the district court improperly considered as uncontested *most* of Defendants' Statement of Uncontested Material Facts. She argues first that this implied some of the facts were contested and, and as such, summary judgment was improper. Although the district court's phrasing

may not have been ideal, Alberti misunderstands her burden in opposing summary judgment. Once Defendants advanced a statement of uncontested facts, Alberti had to point to specific facts that created a genuine issue of *material* fact.

> Not every factual dispute is sufficient to thwart summary judgment; the contested fact must be "material" . . . . In this regard, "material" means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant.

McCarthy v. Nw. Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995). To the extent the court considered Alberti's Opposing Statement, it also noted that she did not provide "specific facts sufficient to defeat the 'swing of the summary judgment scythe.'" Alberti I, 818 F. Supp. 2d at 457 n.2 (quoting Noviello v. City of Boston, 398 F.3d 76, 84 (1st Cir. 2005)). The district court noted that, to the extent Alberti properly contested Defendants' Statement of Facts, the facts contested were not material. Summary judgment is proper in these circumstances. See Suárez v. Pueblo Int'l, Inc., 229 F.3d 49, 53 (1st Cir. 2000).

Alberti then argues—quite ironically, given the utter lack of precision in her court filings—that the court's failure to explain which specific parts of Defendants' Statement of Uncontested Material Facts it deemed uncontested prejudiced her case on appeal. Although we frown upon a district court's failure to state specifically which parts of a plaintiff's Opposing Statement it considered and which parts it did not, Sánchez-Figueroa v. Banco Popular de Puerto Rico, 527

F.3d 209, 214 n.8 (1st Cir. 2008), this error does not warrant reversal or remand. Indeed, in Sánchez-Figueroa, the district court deemed uncontested the defendant's statement of material facts based on flaws in the plaintiff's opposing statement that were nearly identical to the flaws in Alberti's Opposing Statement. Yet the court nevertheless considered part of the plaintiff's opposing statement of material facts. On appeal, we affirmed the decision to treat the defendant's statement as uncontested and simply excluded all of the plaintiff's opposing statement from our consideration, treating the district court's inconsistent consideration as troublesome, but harmless in that case. Id. at 214 & n.8. Because, as in Sánchez-Figueroa, we affirm the district court's decision to deem Defendants' Statement of Facts uncontested, we likewise remedy the district court's inconsistency by excluding Alberti's Opposing Statement in its entirety from our analysis.

We see nothing in the record that suggests an "unreasoning and arbitrary insistence upon expeditiousness" by the district court. Cf. Cortes-Rivera, 626 F.3d at 25. Rather, it appears the district court understandably lost patience with Alberti's constant disregard for its orders as well as her late and unorganized filings. In light of all of the flaws in Alberti's Opposing Statement, combined with the fact that she filed her Memorandum of Law in Opposition at least three weeks late and in violation of the court's orders, we cannot say that the district court abused its discretion when it deemed Defendants' motion for summary judgment effectively unopposed and we review it as such.

D.

Alberti now attempts to show factual issues in her brief on appeal by citing to the first 1400 pages (1-1399) of the nearly 4000-page "joint appendix." Alberti's initial presentation of these pages was incredibly disingenuous. In her opening brief, she asserted these pages were the hard copies of the exhibits she filed with the district court on July 8 which it should have considered in ruling on Defendants' motion for summary judgment. Defendants, however, notified us they had not consented to the inclusion of these pages in the "joint appendix" and these pages were not in fact part of the district court record. Rather, Defendants pointed out, these documents were the translations of Alberti's Spanish exhibits and, while she filed her Spanish exhibits two hours after the court's final extension to her had expired, she did not file these translations with the district court until November 23, 2011.[2] In other words, she submitted these translations nearly (1) five months after her Opposition was due in full, (2) three months after the deadline she had requested to submit translations, and (3) two months *after* the district court had already entered judgment against her. When confronted with this information, Alberti changed her tune. She now argues instead that (1) the parties agreed these pages would be part of the joint appendix, and (2) these translations are properly part of the record because she did not file them as part of her opposition but rather as part of her motion for reconsideration.

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[2] Although Alberti did file the first part of her translations on November 2, 2011, she did not finish submitting translations until November 23.

We have already concluded the district court properly rejected Alberti's tardy filings, thus we need say no more in response to the argument in Alberti's opening brief that she timely and properly filed these documents. As to Alberti's argument that Defendants consented to include these pages, we need not consider the e-mails with defense counsel that Alberti attaches as an appendix to her reply brief because she filed this brief five months after it was due and with no excuse. Fed. R.App. P. 31(a); see also Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp., 322 F.3d 56, 60 n.2 (1st Cir. 2003). Even were we to consider these e-mails, however, they are ambiguous at best, proving only that Alberti dumped on defense counsel a massive amount of files and docket entries which she wished to include in the appendix. These e-mails do not show defense counsel consented to adding 1400 pages to the record that should not be there. Furthermore, Alberti acknowledged at oral argument that she simply dropped all of these documents off in two boxes at defense counsel's office without explaining the contents, and then e-mailed defense counsel stating those would be the pages included in the "joint appendix." This strikes us as yet another attempt by Alberti to subvert the rules of the court and to perpetuate the game of cat-and-mouse she began in the district court, and we will have none of it.

Finally, we reject Alberti's argument that these documents are properly part of the record as part of her motion for reconsideration. "A motion for reconsideration 'does not provide a vehicle for a party to undo its own procedural failures and it certainly does not allow a party to introduce new evidence or

advance arguments that could and should have been presented to the district court prior to the judgment.'" Marks 3 Zet-Ernst Marks GmBh & Co. KG v. Presstek, Inc., 455 F.3d 7, 15–16 (1st Cir. 2006) (quoting Emmanuel v. Int'l Bhd. of Teamsters, Local Union No. 25, 426 F.3d 416, 422 (1st Cir.2005)). Yet this is precisely what Alberti attempted to do before the district court and now attempts before us. As such, we will not consider pages 1–1399 of the joint appendix except where it is abundantly clear the page referenced was filed with the district court on time and in English and was therefore properly a part of the district court record.

II.

Above we addressed Alberti's procedural challenges and established which parts of the joint appendix are properly part of the record before us—that is, pages 1400 on. We now address Alberti's merit-based claims. We begin by reciting the facts relevant to the merits of Alberti's appeal.

Alberti is a family nurse practitioner with a nursing doctorate. She was born in the United States but considers herself Puerto Rican-American and is fluent in Spanish. Alberti worked for the University of Puerto Rico on two separate occasions. Both times her job included developing a family nurse practitioner ("FNP") program at the University's School of Nursing and acquiring funding for that program. Her first stint at the University began in 2001 and continued until she resigned in December 2002. She resigned because, although she had procured a $1 million federal grant for the FNP program, the University failed to approve the FNP program and these funds had to be returned.

Alberti began working for the University's School of Nursing for the second time in August 2005. Initially she worked for the University under a temporary contract. By the middle of 2006, however, the FNP program had been approved, Alberti had again procured a federal grant to fund the FNP program, and the University had appointed her to three positions: 1) director of the School of Nursing's FNP program, 2) grant director, and 3) a tenure-track associate professor.

While working at the University, Alberti's relationships with some of her students and colleagues were apparently quite contentious. Alberti claims many of her students did not like her because her teaching style was too "Americana." Much of the tension stemmed from an ongoing conflict between Alberti and one of her nursing students, Defendant Iris Ramos-Viera. For example, when Ramos failed one of Alberti's courses because she did not accumulate sufficient clinical hours, she attempted to make up these hours independently and without Alberti's knowledge and, according to Alberti, violated the Health Insurance Portability and Accountability Act (HIPAA) in doing so. On December 4, 2007, Alberti "bypassed the chain of command," to use her words, and wrote to Defendant Dr. José Carlo-Izquierdo, the Chancellor and nominating authority of the University's Medical Science Campus. Alberti complained in this letter about Ramos's alleged HIPAA violations and that Defendants Dr. Angélica Matos-Ríos and Leyra Figueroa-Hernández, fellow faculty members, and Dr. Suane Sánchez-Colón, the Dean of the School of Nursing, were interfering with Alberti's work as

director of the FNP program. Later, Alberti refused to approve Ramos's proposed research project, which was part of her required course work.

On February 4, 2008, Defendant Sánchez wrote to Defendant Carlo and, citing a lack of trust and Alberti's letter bypassing the chain of command, recommended Carlo terminate Alberti's director positions. Carlo concluded that, under the University Rules and Regulations, Alberti's director positions were positions of trust. Further, based on the combination of Alberti's direct complaint to him and Sánchez's request for Alberti's termination, Carlo concluded the relationship between the two had deteriorated to the point of being "non-functional." On February 13, 2008, Carlo removed Alberti from her two director positions. He informed her of her removal in writing, but did not provide her with a pretermination hearing.

Alberti's relationships with some of her students and the University faculty became even more strained after she was removed from her director positions. She initiated the present suit against the University Defendants on April 25, 2008. On June 3, 2008, Defendant Sánchez wrote to Carlo requesting he terminate Alberti's tenure-track associate professor position. Sánchez's letter included a number of evaluations drafted between February 14 and June 3, 2008, by other School of Nursing faculty members—namely, Defendants Figueroa and Matos and Defendants Virginia Santiago, Carmen T. López-Rodríguez, and Dr. Gloria E. Ortiz-Blanco—that supported terminating Alberti. On June 12, 2008, citing Sánchez's June 3 letter, Carlo notified Alberti that her tenure-track associate professor position

would terminate as of August 15, 2008. Alberti was not given a pre-termination hearing before receiving this letter.

On appeal, Alberti argues the district court erred when it (1) concluded her director positions were positions of trust that Carlo could terminate at will; (2) found she did not have a protected property right in her tenure-track associate professor position under the Due Process Clause and therefore had no right to a pre-termination hearing; (3) concluded her letter to Carlo was not protected under the First Amendment; and (4) dismissed her Title VII National Origin Discrimination Claim.[3]

We review a district court's grant of summary judgment de novo, "taking the facts in the light most favorable to the nonmovant." Lloyd's of London v. Pagán-Sánchez, 539 F.3d 19, 21 (1st Cir. 2008). Summary judgment is only appropriate if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Furthermore, even where a motion for summary judgment is unopposed, we are still bound to review the case on the merits based on the uncontroverted facts before us. Cordi-Allen v. Halloran, 470 F.3d 25, 28 (1st

[3] Alberti also sued Dr. Maria C. Declet-Brana, a fellow teacher, and University students Iris Rivera-Colon and Judith Miranda. She fails to explain to us her claims against these defendants, however. Rather, in her fact section, citing to the first 1400 pages of the joint appendix, which we have already excluded, Alberti accuses Declet of "bullying" her, and calls Rivera and Miranda "Agents Provocateurs," apparently because they had complained about her teaching style, calling it "too American" and calling her "gringa."

Cir. 2006). We are not bound to do a party's work, however, nor to develop legal arguments merely mentioned in passing. Int'l Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 398 n.14 (1986) ("it is not our task *sua sponte* to search the record for evidence to support" a party's claims); Colón-Fontánez, 660 F.3d at 45-46 ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.") (internal citations omitted).

A.

Alberti first argues she had a protected property interest in her director positions at the School of Nursing. Under the Fourteenth Amendment, a state cannot discharge a public employee without due process of law if the employee possesses a property right to continued employment in the position at issue. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). But "[p]roperty interests are not created by the Constitution, [rather,] 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'" Id. (quoting Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)). A property interest in continued employment may derive from a statute, a contract provision, or an officially sanctioned workplace rule. Perry v. Sindermann, 408 U.S. 593, 601–02 (1972).

Alberti devotes her briefing on the issue solely to arguing her director positions do not fall within the definition of a "position of trust," which, under Section 30.1.8 of the University's Rules and Regulations, may

be "removed at will." She argues a fact issue exists because the position of "Program Director" was not added to the list of positions of trust in Article 71 of the University Rules and Regulations until after she was appointed to these positions. But even before Alberti's appointment, Section 71.3.2 of the Rules listed "[p]ositions directing organizational units" as positions of trust, and Alberti conceded at oral argument that, as a program director, she directed organizational units at the University. Thus, Alberti's argument on this point fails and she is unable to demonstrate she had a property interest in her director positions.

B.

Alberti next contends the district court erroneously found she did not have a property interest in her tenure-track associate professor position, which had no expiration date. Defendant Carlo terminated Alberti's associate professor position in writing and without a pre-termination hearing. The termination letter cites Section 46.6 of the University Rules and Regulations, the evaluations collected by Defendant Sánchez, as well as evaluations written by Defendants Santiago, Lopez, Matos, and Ortiz. These evaluations were overwhelmingly negative.

Section 30.1.2 of the University Rules and Regulations defines "Probationary Appointment" as:

> the appointment granted initially to cover a regular post or position approved in the budget, and shall have a fixed duration according to the provisions of the Regulations. During the appointment period the incumbent shall be on probation, subject to an evaluation to determine

> whether or not at the end of said period he or she merits retention with a permanent appointment.

Section 46.2 provides, with very limited exceptions, that a professor may not attain tenure in her position until she renders five years of satisfactory service while on probation. Section 46.6, on the other hand, provides: "The Chancellor . . . may terminate a probationary appointment without granting tenure *when so justified*, according to the evaluation or evaluations performed, notifying the affected person in writing." (emphasis added).

Alberti brings two coherent arguments for why the University Rules and Regulations gave her a property interest in continued employment as an associate professor. First, she argues "when so justified" in Section 46.6 is tantamount to a "for cause" requirement. Second, she argues her termination must be justified by mandatory evaluations and that, under Section 29.8, she had a pre-termination right to discuss these evaluations with her evaluators. However, because she raises this second argument for the first time on appeal, we will not consider it. McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal.").

Although the issue is far from clear, we acknowledge Alberti's argument equating "when so justified" with "for cause," may have some merit. A public employee who is dismissible only "for cause" is entitled to a very limited pre-termination hearing. Gilbert v. Homar, 520 U.S. 924, 929 (1997).

Furthermore, Alberti's case is indeed distinguishable from Lovelace v. Se. Mass. Univ., 793 F.2d 419 (1st Cir. 1986), on which both the district court and the University rely. In Lovelace, the teaching contract for a nontenured professor was not renewed and we held the professor did not have a cognizable property interest in reappointment. In so holding, we rejected the professor's argument that he had a property interest in reappointment simply because the university's rules required "justification" in order to not renew his contract. Id. at 421.

Unlike in Lovelace, however, the University here did not deny Alberti reappointment after her contract expired. Rather, the University terminated her from a position she still occupied. Section 30.1.2 of the University Rules states a probationary appointment "shall have a fixed duration;" however, Alberti's probationary appointment was for an "indefinite" period. As such, it appears the only "fixed duration" the University could reference is the five years of probationary employment required before either attaining tenure or being dismissed without attaining tenure in Section 46.6. Thus, one could plausibly read the University Rules and Regulations in Alberti's case as giving her a property interest in at least a five-year term of probationary employment. The district court found this interpretation untenable because it "would allow a professor to violate the norms of the institution for five (5) years while under probation, and the institution would be powerless to act within the probationary period." Alberti I, 818 F. Supp. 2d at 467. But this goes too far. Even assuming Alberti had a property interest in a five-year term of employment at the University, the University would not be powerless

to act within that probationary period. Rather, it would simply have to give her "a very limited hearing prior to [her] termination, to be followed by a more comprehensive post-termination hearing" to comply with due process. See Gilbert, 520 U.S. at 929.

That being said, notwithstanding the plausibility of this argument, we need not decide whether Alberti in fact had a property interest in her probationary professorship because the Individual University Defendants are entitled to qualified immunity on this issue. "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011).[4] We have discretion as to which of the two prongs to tackle first in this analysis. Id.

We choose to address the "clearly established" prong first, as this is where Alberti's claim clearly fails. We have repeatedly stated:

> "identifying some abstract constitutional right extant at the time of the alleged violation does not itself show that the conduct alleged is a violation of 'clearly established' law. Instead, the focus must be upon the particular conduct

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[4] We treat the University of Puerto Rico as an arm of the state for Eleventh Amendment purposes, see Irizarry-Mora v. Univ. of Puerto Rico, 647 F.3d 9, 11–17 (1st Cir. 2011), and University of Puerto Rico officials as state actors for qualified immunity purposes, see Meléndez-García v. Sànchez, 629 F.3d 25, 35-36 (1st Cir. 2010).

> engaged in by (or attributed to) the defendants; immunity is forfeited only if a reasonable official would clearly understand *that conduct* to be a violation of the Constitution.

Rivera-Ramos v. Roman, 156 F.3d 276, 279–80 (1st Cir. 1998) (emphasis in original).

The only legitimate source Alberti cites to argue the University Defendants' particular conduct violated clearly established law is the University Rules and Regulations. But these rules, as discussed above, are unclear when applied to Alberti's case. Although one could reasonably read the rules as creating an expectation of continued employment for at least five years, one could also reasonably interpret Rule 46.6 as allowing the termination of Alberti's indefinite probationary contract without a pre-termination hearing whenever the evaluations on file justified such action. Alberti does not cite any law to the contrary and our independent research has revealed none. As such, Alberti did not have a "clearly established" right to a pretermination hearing prior to being dismissed from her probationary professor position. Thus, the district court properly found the University Defendants were entitled to qualified immunity on this claim.[5]

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[5] Qualified immunity would *not* bar granting Alberti injunctive relief. Alberti, however, seeks injunctive relief only against the University itself; and she specifically excluded the University from her due process claim in her third amended complaint. Dist. Doc. # 123 at ¶ 121. We are not inclined to remedy her counsel's tactical errors. Because Alberti does not seek injunctive relief against anyone based on this claim, we need not decide whether she is entitled to such relief.

C.

Alberti's First Amendment argument concerns her letter to Defendant Carlo complaining about Defendant Ramos's alleged HIPAA violation and the actions of Defendant Sánchez and other faculty members in the FNP program. She argues the district court erred when it relied on Garcetti v. Ceballos, 547 U.S. 410 (2006), instead of using the legal framework from Decotiis v. Whittemore, 635 F.3d 22 (1st Cir. 2011), to dismiss her First Amendment claim. Furthermore, Alberti argues, to the extent her letter is not protected under a traditional First Amendment analysis, it is protected under the concept of "academic freedom." These arguments fail to create a genuine issue of material fact.[6]

As to Alberti's first argument, Supreme Court precedent controls over our precedent and, under both Garcetti and Decotiis,"public employees do not speak as citizens when they 'make statements pursuant to their official duties,' and . . . accordingly, such speech is not protected by the First Amendment." Decotiis, 635 F.3d at 30 (quoting Garcetti, 547 U.S. at 422). Alberti attempts to argue that, by bypassing the chain of command with her grievances, she was not speaking as an employee on a matter related to her employment, but as a private citizen on a matter of public concern.

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[6] Alberti also argues she filed the instant suit before a number of the evaluations that led to her termination were filed, and that filing the instant suit should therefore be protected under the First Amendment. She makes this argument in one brief paragraph with no citations or further explanation. Accordingly, we do not address it. Colón-Fontánez, 660 F.3d at 45–46.

It is clear, however, that the complaints Alberti relayed to the Chancellor were made in her supervisory capacity over Defendant Ramos, as her teacher, and in her capacity as FNP program director, concerning the administration of the FNP program. Accordingly, because Alberti made these complaints pursuant to her official duties as a teacher and as the FNP director, not as a private citizen, they are not protected under the First Amendment. Id.

In her reply brief, Alberti points us to a recent case, Dahlia v. Rodriguez, 10-55978, ___ F.3d ___, 2013 WL 4437594 (9th Cir. Aug. 21, 2013) (en banc), where the Ninth Circuit reversed prior precedent and held the court must make a "practical inquiry" when determining whether the speech is within the scope of the employee's duties and thus not protected by the First Amendment. But a *practical inquiry* shows Alberti signed the letter as FNP director, and it pertained to issues regarding the administration of the FNP program. Furthermore, "while the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize employee grievances." Garcetti, 547 U.S. at 420. Yet this appears to be exactly what Alberti is trying to do. Thus, this argument fails.

Alberti's "academic freedom" argument also fails. Alberti cites Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 679 (6th Cir. 2001), for this argument, but even Hardy makes clear that academic freedom protects only speech in the context of classroom teaching that communicates "an idea transcending personal interest or opinion which impacts our social and/or political lives." Id. (internal citations omitted). This protection

is far removed from a teacher's administrative complaints that concern a program she is directing and that "bypass the chain of command." Furthermore, to the extent Alberti argues Defendants retaliated against her for her grading decisions and thereby violated her right to academic freedom, we already rejected this specific argument in Lovelace. 793 F.2d at 426 ("To accept plaintiff's contention that an untenured teacher's grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission. The first amendment does not require that each non-tenured professor be made a sovereign unto himself.").

D.

Finally, we address Alberti's Title VII claim. The district court found Alberti met the initial burden of showing a prima facie case of unlawful discrimination based on national origin. Alberti I, 818 F. Supp. 2d at 477. The court also found, however, that Defendants articulated legitimate non-discriminatory reasons for the adverse employment actions at issue and that Alberti could not then establish that these reasons were merely pretextual and that the true reason behind the adverse action was her national origin. Id.

Under the McDonnell Douglas framework for handling Title VII claims, if the plaintiff establishes a prima facie case of discrimination, "the burden of production shifts to the defendant to produce evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason." Pearson v. Mass. Bay Transp. Auth., 723 F.3d 36, 40 (1st Cir.

2013) (Souter, J.) (internal quotations omitted). "If the defendant produces such evidence, the McDonnell Douglas framework disappears and the sole remaining issue is discrimination *vel non*." Id. (internal quotations and alterations omitted). Although the burden of production may shift, "[t]he burden of persuasion remains at all times with the plaintiff." Mariani-Colón v. Homeland Sec. ex rel. Chertoff, 511 F.3d 216, 221 (1st Cir. 2007). That is, "the plaintiff must prove not only that the reason articulated by the employer was a sham, *but also that its true reason was plaintiff's race or national origin*." Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 19 (1st Cir. 1999) (emphasis added).

Even assuming Alberti made out a prima facie case of unlawful discrimination, we agree Defendants established legitimate non-discriminatory reasons for Alberti's termination, including, among other things, her failure to attend faculty meetings, her failure to comply with her administrative duties, and her failure follow the proper channels of communication within the School of Nursing. And even if we agreed with Alberti that these reasons were in fact a sham, she does not argue on appeal, or advance any evidence to show, the true reason for her termination was her race or national origin. We will not make the argument nor scour the record for evidence to support it for her. Davis, 476 U.S. at 398 n.14; Colón-Fontánez, 660 F.3d

at 45-46. Thus, on the record and argument before us, the district court properly granted summary judgment to Defendants on this claim.[7]

Accordingly, the judgment for the district court is AFFIRMED.

[7] Alberti brings two other coherent-but-meritless claims. First, she argues the district court erred when it found the University Defendants were entitled to qualified immunity. As we stated above, the University Defendants are indeed entitled to qualified immunity from Alberti's due process claim. Furthermore, because we affirm the rest of the issues presented on the merits, we need not address whether Defendants are entitled to qualified immunity on those issues. Alberti also argues she has a right to a name-clearing hearing. She did not raise this issue or seek this relief before the district court, so we will not address it now. McCoy, 950 F.2d at 22.

United States Court of Appeals
For the First Circuit

No. 12-1982

[Filed December 18, 2013]

DR. REBECCA ALBERTI,

Plaintiff, Appellant,

v.

DR. JOSÉ R. CARLO-IZQUIERDO; DR. SUANE E. SÁNCHEZ-COLÓN; DR. GLORIA E. ORTIZ-BLANCO; DR. ANGÉLICA MATOS-RÍOS; CARMEN T. LÓPEZ-RODRÍGUEZ; LEYRA FIGUEROA-HERNÁNDEZ; DR. MARÍA C. DECLET-BRAÑA; IRIS RAMOS-VIERA; IRIS RIVERA-COLÓN; JUDITH MIRANDA; VIRGINIA SANTIAGO; THE UNIVERSITY OF PUERTO RICO,

Defendants, Appellees.

JUDGMENT

Entered: December 18, 2013

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
/s/ Margaret Carter, Clerk

cc: Ms. Dulzaides, Mr. Ramirez-Bigott & Mr. Suarez-Jimenez.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 08-1484 (DRD)

CIVIL RIGHTS VIOLATIONS
42 USC § 1983

[Filed October 13, 2011]

DR. REBECCA ALBERTI, FNP, ND

Plaintiff

vs.

UNIVERSITY OF PUERTO RICO; DR. JOSE R. CARLO IZQUIERDO; DR. SUANE E. SÁNCHEZ COLON; DR. GLORIA E. ORTIZ BLANCO; DR. ANGELICA MATOS RIOS; CARMEN T. LOPEZ RODRIGUEZ; LEYRA FIGUEROA HERNANDEZ; DR. MARIA C. DECLET BRAÑA; IRIS RAMOS; IRIS RIVERA COLON; AND JUDITH MIRANDA

Defendants

AMENDED OPINION AND ORDER
NUNC PRO TUNC

Pending before the Court is Defendants' *Motion for Summary Judgment* **(Dockets #161, #163 and #164)**, and *Plaintiff's "Opposing Statement of Material Facts"*

(**Docket #179**),[1] accompanied by *Defendants' "Opposition to Plaintiff's Opposing Statement of*

[1] *Plaintiff's "Opposing Statement of Material Facts"* was originally filed on July 6, 2011, without appropriate supporting Exhibits. (**Docket # 179**) The Court graciously granted Plaintiff until midday of July 8, 2011, to file the Exhibits. (**Docket # 181**) However, Plaintiff failed to comply with the Court's Order, and filed the supporting Exhibits at 4:45 p.m. (**Docket # 186**) Moreover, we note that Plaintiff did not file certified translations of the Exhibits in the Spanish language; to wit: Exhibits 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 51, 52, 53, 54, 55, 58, 59, 62, 63, 66, 67, 68, 69, 70, 73, 76, 84, 86, 87, 88, 89, 91, 92, 94, 96, 97, 98, 100, 101, 102, 103, 105, 107, 110, 111, 114, 115, 116, 119, 120, 121, 123, 125, 133, 135, 136, 137, 138, 139, 140, 141, 142, and 146. Hence, the Court is barred from considering said documents at the time of our analysis, as to the outcome of the instant summary judgment. *United States v. Rivera Rosario*, 300 F.3d 1, 5-6 (1st Cir. 2002); *Cordero-Soto v. Island Finance, Inc.,* 418 F.3d 114, 118 (1st Cir 2005); *Peña-Crespo v. Commonwealth of Puerto Rico*, 408 F.3d 10, 14 (1st Cir. 2005).

Plaintiff reiteratedly violated L.Cv.R.56 by: (1) failing to include particularized citations to the record and supporting evidence; and (2) mixing Plaintiff's Opposing Statement of Material Facts with statements admitting, denying, or qualifying Defendants' Statement of Material Facts, as well as legal arguments. These fatal flaws force the Court to consider as uncontested most of Defendants' Statements of Uncontested Material Facts. *Morales v. A.C. Orssleff's EFTF*, 246 F.3d 32, 33-34 (1st Cir. 2001) (finding that, where a party fails to buttress factual issues with proper record citations, judgment against the party may be appropriate); *Gutiérrez-Lines v. Puerto Rico Electric and Power Authority*, 751 F. Supp. 2d 327, 334 (D.P.R. 2010); *Cabán-Hernández v. Phillip Morris USA, Inc*., 486 F.3d 1 (1st Cir. 2007).

Material Facts" (**Docket #194**).[2] For the reasons set forth below, the Court will **GRANT** the Motion for Summary Judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Dr. Rebecca Alberti (**"Plaintiff" or "Alberti"**), who was born in the continental United States, is a Family Nurse Practitioner with a nursing doctorate. Alberti worked on two (2) separate occasions for the Co-Defendant University of Puerto Rico **("University" or "UPR").** Both times she was, *inter alia*, responsible for acquiring funds and developing a Family Nurse Practitioner (**"FNP"**) Program in the School of Nursing (**"SON"**). She first worked for the University from 2001 until November 2002, when she resigned. (**Docket #164, Exhibits 3, 4, 5, 6 and 7**)

[2] On July 20, 2011, Plaintiff filed a *Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment*. (**Docket # 191**) Plaintiff's Memorandum was filed **fourteen (14) days** after it was due, and in violation of a Court Order. (**Docket # 181; *see also* Docket # 192, *Defendants' Motion to Strike***) The Court had granted Plaintiff several requests for extension of time to file an Opposition to Defendants' Motion for Summary Judgment, and had advised Plaintiff on various occasions that it would not grant further extensions, or allow the filing of any additional documents. (**Dockets #172, #173, #175 and #181**) Consequently, because the Memorandum was untimely, the Court will not consider *Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment*. (**Docket # 191**) The Court notes that even if it would have considered Plaintiff's Memorandum, its decision to dismiss this case would not have changed, because Plaintiff has not met the burden of producing specific facts sufficient to defeat the "swing of the summary judgment scythe." *Noviello v. City of Boston*, 398 F.3d 76, 84 (1st Cir.)); see also *Morales*, st 246 F.3d at 34.

Three (3) years after the academic Senate approved the creation of the FNP Program, Co-Defendant Dr. Suane Sánchez (**"Sánchez"**), the then Dean of the SON, recruited Alberti and offered Plaintiff a position as FNP Program and Grant Director of the SON (**hereinafter collectively referred to as "FNP Program Director**"), a non-career trust position as discussed *infra*, and a probationary appointment as "Associate Professor", also as discussed infra. (**Docket #164, Exhibits 8, 9, 10, 11, 12, 13, 14, 15, and 16**).

Alberti accepted the job and worked as FNP Program Director from May 23, 2006 until February 14, 2008, when she was removed by Co-Defendant Dr. Jose Carlo (**"Carlo"**), the then Chancellor and nominating authority of the Medical Science Campus of the University. (**Docket #164, Exhibits 13 and 59**) Approximately six (6) months later, on August 15, 2008, Alberti's probationary appointment as Associate Professor was terminated, because of a myriad of administrative issues and problems with Plaintiff's performance. **(Docket #164 Exhibits 21- 55, 59, 64, 65, 66, 67, 68, 69, 70)**

On April 25, 2008, Plaintiff filed a Complaint alleging that her removal as FNP Program Director, and later termination from of the probationary appointment as Associate Professor: (1) deprived her of property without due process of the law in violation of the Fourth, Fifth and Fourteenth Amendment of the United States Constitution and 42 U.S.C. §§ 1983; and (2) were acts of retaliation in violation of the First Amendment of the United States Constitution, 42 U.S.C. § 1983 and Puerto Rico Law No. 115 of December 20, 1991 ("Law 115"), 29 L.P.R.A. §§ 194-

194b **(Docket #1).** Later, Alberti amended the *Complaint* several times to include a cause of action under 42 U.S.C. §1985(3) for an alleged conspiracy to deprive her of constitutional rights; under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000-e and Puerto Rico Law No. 100 of June 30, 1959 ("Law 100"), 29 L.P.R.A. §§ 146-151, alleging national origin discrimination. **(Dockets #8, #9, #56 and #123).**

Plaintiff also includes as Co-Defendants seven (7) officials of the UPR (Dr. José Carlo, Dr. Suane Sánchez, Dr. Gloria Ortiz, Dr. Carmen López, Virginia Santiago, Esq., Dr. Angélica Matos and Prof. Leyra Figueroa) and three (3) former students of the FNP Program (Ms. Judyth Miranda, Ms. Iris Ramos and Ms. Iris Rivera).

APPLICABLE LAW AND DISCUSSION

I. The Summary Judgment Standard

Generally, "[s]ummary judgment is proper where 'the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c)." *Richardson v. Friendly Ice Cream Corporation*, 594 F.3d 69, 74 (1st Cir. 2010). See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-325 (1986); *Thompson v. Coca-Cola, Inc.*, 522 F.3d 168, 175 (1st Cir. 2008). "The object of summary judgment is 'to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required'." *Dávila v. Corporación de Puerto Rico para la Difusión Pública*, 498 F.3d 9, 12 (1st Cir. 2007), citing from *Acosta v. Ames Dep't Stores, Inc.*, 386 F.3d 5, 7 (1st Circ.

2004),(quoting *Wynne v. Tufts Univ. Sch. Of Med.*, 976 F.2d 791, 794 (1st Cir. 1992). In *Dávila*, the Court held:

> For this purpose, an issue is genuine if a reasonable jury could resolve the point in favor of the nonmoving party. *Suárez v. Pueblo Int'l, Inc.*, 229 F.3d 49, 53 (1st Cir. 2000). By like token, a fact is material if it has the potential to determine the outcome of the litigation. See *Calvi v. Knox Country*, 470 F.3d 422, 426 (1st Cir. 2006). Where, as here, the nonmovant has the burden of proof and the evidence on one or more of the critical issues in the case "is … not significantly probative, summary judgment may be granted." *Acosta*, 386 F.3d at 8 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986)).

At the summary judgment stage, the Court "must scrutinize the evidence in the light most agreeable to the nonmoving party, giving that party the benefit of any and all reasonable inferences". *Noviello v. City of Boston*, 398 F. 3d 76, 84 (1st Cir. 2005), citing *Cox v. Hainey*, 391 F. 3d 25, 27 (1st Cir. 2004). See also *Richardson*, 594 F.3d at 74. "[T]he nonmovant bears 'the burden of producing specific facts sufficient to defect the swing of the summary judgment scythe.'" *Noviello*, 398 F.3d at 9. "Those facts, typically set forth in affidavits, depositions, and the like, must have evidentiary value; as a rule, '[e]vidence that is inadmissible at trial, such as, inadmissible hearsay, may not be considered on summary judgment." *Id.* at 84, citing *Vázquez v. López-Rosario*, 134 F.3d 28, 33 (1st Cir. 1998); accord *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990). "The evidence presented by the

non-moving party may not be 'conclusory allegations, improbable inferences, [or] unsupported speculation.'" *Torres-Negrón v. Merck & Company, Inc.*, 488 F.3d 34, 39, citing *Medina-Muñoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

Lastly, whether a motion for summary judgment is formally opposed or unopposed, the Court is still obligated to resolve the motion on the merits. *See Cordi-Allen v. Halloran*, 470 F.3d 25, 28 (1st Cir. 2006) (noting that a district court is bound to review an unopposed motion for summary judgment on the merits). Moreover, the court cannot grant a motion for summary judgment as a sanction. *See De La Vega v. The San Juan Star, Inc.*, 377 F.3d 111, 113, 116 (1st Cir. 2004). *See also Sterling Merchandising, Inc. v. Nestle, S.A., et al.*, ___ F.3d ___, 2011 WL 3849828 (1st Cir. 2011 (Puerto Rico) (September 1, 2011) (Lynch, J.)); *Curet-Velázquez, et al. v. ACEMLA de Puerto Rico, Inc., et al.*, ___ F.3d ___, 2011 WL 3795601 (1st Cir. 2011 (Puerto Rico) (August 29, 2011) (Torruella, J.)).

Based on this premise, the Court proceeds with the analysis.

II. Eleventh Amendment Immunity

The Eleventh Amendment proscribes that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." 1 U.S.C. Const. Amend. XI. It has long been held that under the Eleventh Amendment, federal courts lack jurisdiction to hear suits seeking damages against a state or its

instrumentalities. *Rios-Montoya v. Puerto Rico*, Civ. 09-2229 (CCC), 2011 WL 3322556 (D.Puerto Rico 2011 (August 2, 2011)), (citing *Figueroa–Rodríguez v. Aquino*, 863 F.2d 1037, 1044 (1st Cir. 1988)); *Ramírez v. Puerto Rico Fire Service*, 715 F.2d 694, 697 (1st Cir. 1983)).

Nonetheless, a state can waive its Eleventh Amendment immunity or it can be abrogated by Congress. "A state can waive its Eleventh Amendment immunity to suit in three ways: (1) by a clear declaration that it intends to submit itself to the jurisdiction of a federal court or administrative proceeding, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); (2) by consent to or participation in a federal program for which waiver of immunity is an express condition, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985); or (3) by affirmative conduct in litigation, *Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947)." *New Hampshire v. Ramsey*, 366 F.3d 1, 15 (1st Cir. 2004).

"Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects." *Ezratty v. Commonwealth of Puerto Rico*, 648 F.2d 770, 776 (1st Cir. 1988). Moreover, "[a]n administrative arm of the state is treated as the state itself for the purposes of the Eleventh Amendment, and it thus shares the same immunity." *Vaquería Tres Monjitas v. Irizarry*, 587 F.3d 464, 477 (1st Cir. 2009) (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). "Indeed, the UPR has been deemed an arm of [Puerto Rico] for

more than three decades". *Irizarry-Mora v. University of Puerto Rico*, 647 F. 3d 9, 13 (1st Cir. 2011), (citing *Pinto v. Universidad de P.R.*, 895 F.2d 18, 18 (1st Cir.1990)); *Pérez v. Rodríguez Bou*, 575 F.2d st 21, 25 (1st Cir. 1978)).[3]

In *Irizarry Mora*, the Court considered anew the factors under which the UPR was to be considered an arm of state. Among the factors the Court took into consideration to confirm the long standing precedent, are: the purpose of the UPR to service the people of Puerto Rico, 18 L.P.R.A. § 601(a); and that the University is also exempt from paying taxes. *Id.* § 612(f).

Further, the Governor with the consent of the Senate of Puerto Rico appoints ten (10) of the thirteen (13) members of the Board of Trustees. *Id.* § 602(b)(1) and Article 13, Sec. 13.1 of the Rules and Regulations of the UPR. The Board of Trustees is the entity that appoints the President, Chancellor and the Director of Finance of the University; with the advice of the academic senates of the Institution. *Id.* §602(e)(7), (8) and Articles 14 and 19 of the Rules and Regulations. The Board of Trustees is the statutory entity that

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[3] Notwithstanding, Plaintiff questions the often repeated doctrine that the University of Puerto Rico is indeed an arm of the state. **(Docket #204)**. The Commonwealth of Puerto Rico and the arms of the State are entitled to Eleventh Amendment immunity as agreed by the Supreme Court in *Puerto Rico Aqueduct And Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-147 (1993) ("Petitioner maintains, and we agree, that the same rationale ought to apply to claims of Eleventh Amendment immunity made by States and state entities possessing a claim to share in that immunity").

oversees the progress of the Institution. *Id.* § 602(d) and Articles 13 and 16 of the Rules and Regulations. The annual budget of the University is approved by the Board of Trustees, who yearly are required to report to the Governor and the Legislature the financial status of the University. *Id.* §602(e), (9), (10). It is the Government of Puerto Rico who provides the vast majority of the funds for the University's operations. *Id.* §621-1; see generally *Irizarry Mora*, 647 F.3d at 14-17.

Since there exists an imbued Eleventh Amendment immunity issue, the Court finds prudent to examine the extension of the doctrine to the School of Nursing ("SON"). The 2005 By-Laws of the SON reveal that the school is an integral part of the UPR Medical School Campus; the By-Laws are congruent with those of the UPR; the Dean of SON responds to the Chancellor of the Medical Sciences School; and the appointed Dean, as part of the duties inherent to the position, prepares an annual budget in harmony with the Medical Science Campus and the UPR's budget. **(Docket #164, Exhibit 13, Introduction and p.2).** Further, the SON constitutes an integral part of the UPR's system, as verified in the Proposal for HRSA, Advanced Practice Nursing Family Nurse Practitioner prepared by Plaintiff in performance of her duties, for purposes of obtaining the federal funds. **(Docket #164, Exhibit 12).** Page 4 of the Proposal identifies the Applicant's name as: University of Puerto Rico, Medical Sciences Campus, School of Nursing. Therefore, the Court concludes easily that the SON constitutes an integral part of the University of Puerto Rico; and as such is entitled to the same treatment as an arm of the state

entity under the Eleventh Amendment immunity as extended to the UPR.

Resulting from the recent holding in *Irizarry Mora*, this Court anew evaluates whether the States' Eleventh Amendment immunity afforded to the UPR as an arm of the Commonwealth of Puerto Rico is abrogated as to Title VII. *Irizarry Mora* was a case under the Age Discrimination and Employment Act, and under the particular circumstances of said case, the Eleventh Amendment Immunity was afforded to the UPR.

On the other hand, the United States Supreme Court held that Title VII claims are not barred by the Eleventh Amendment. *Fitzpatrick v. Blitzer*, 427 U.S. 445, 447-448 (1976). Congress in the 1972 Amendments to Title VII, "authorized federal courts to award money damages in favor of a private individual against a state government found to have subjected that person to employment discrimination on the basis of 'race, color, religion, sex, or national origin.'" *Id*. In the 1991 Amendments, Congress added punitive and compensatory damages to the relief that a plaintiff may recover under Title VII. *Cardona Román v. University of Puerto Rico*, ___ F.Supp.2d ___, 2011 WL 3204837, at p. 5 (D. Puerto Rico (July 27, 2011)).

In 2003 the Government of Puerto Rico raised before the First Circuit the issue that the 1991 Civil Rights Act failed to validly abrogate the States' Eleventh Amendment immunity in relation to the incorporation of compensatory damages. However, the First Circuit did not decide the issue because it fell beyond their purview at that time. *Espinal-Domínguez*

v. Commonwealth of Puerto Rico, 352 F.3d 490, 492 (1st Cir. 2003).

The Court recognizes that the express language in Title VII's 1972 Amendments, enabling private individuals to bring suit against a state government, has since been found to have abrogated Puerto Rico's Eleventh Amendment immunity, allowing the filing of Title VII claims against Puerto Rico and its instrumentalities in this District Court. *Roman v. Commonwealth of Puerto Rico*, No. 08-1378, slip op., 2010 WL 3419974 (D. Puerto Rico); *Nieves-Garay v. Puerto Rico Police Dept.*, No. 09-1959, slip op., 2011 WL 2518801 (D. Puerto Rico); *Rey-Cruz v. Forensic Sci. Inst.*, ___ F. Supp.2nd ___, 2011 WL 1868841 (D. Puerto Rico (May 16, 2011)).

The Court clearly also finds that Title VII applies to the University of Puerto Rico. *Cardona Román,* 2011 WL 3204837, at p. 5. Therefore, we analyze Plaintiff's claim as to Title VII later in this Opinion considering the full application of Title VII employment rights to the University.

III. Property Rights

Plaintiff is seeking relief against the individual Defendants for an alleged deprivation of property without due process of the law in violation of the Fourth, Fifth and Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983, as Plaintiff alleges being removed from her administrative

role as Director of the FNP Program and terminated from her probationary appointment as Associate Professor at the SON.[4]

The record shows that Alberti became FNP Program Director and Associate Professor in a tenure-track probationary position, effective July 1, 2006. (**Docket #164 Exhibits #12 and #13).**[5] On February 13, 2008, she was removed from the position as FNP Program Director, and on August 15, 2008, Plaintiff's probationary appointment as Associate Professor was terminated. (**Docket #164, Exhibits #34 and #37**) According to Plaintiff she had a cognizable property interest in both positions. Defendants argue that the FNP Program Director position constituted undoubtedly a position of trust, which according to the Article 30, Section 30.1.8 of the Rules and Regulations of the University could be terminated at will by the Chancellor. **(Docket #164, Exhibit 4, Rules and Regulations of the University, Article 30, Sec. 30.1.8).** Pursuant to Article 30, Section 30.1.2 Plaintiff's appointment of Associate Professor was probationary, falling short of the threshold of a position that had earned a property interest. Defendants alleged that Plaintiff at the time of termination had not earned a cognizable property interest in the professorship job under a probationary contract.

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[4] Plaintiff specifically **excluded Co-Defendant the University from this cause of action**. (**Docket 123, *Third Amended Complaint*, p. 4-5, ¶ 1, 6 and 7, p. 36, ¶121- 123**)

[5] **Exhibit 12 is Plaintiff's probationary appointment contract as Associate Professor, and Exhibit 13 the letter appointing Alberti FNP Director.**

It is well established that the Constitutional procedural protection of property is a safeguard of the property interests that a person has already acquired in specific benefits. *Bd. of Regents of State Colls v. Roth*, 408 U.S. 564, 576 (1972). These property interests may take many forms. In the area of public employment it has been held that a public college professor dismissed from an office held with tenure; and college professors dismissed during the terms of a contract that has not expired, have interests in continued employment that are safeguarded by due process. *Id*.; see also *Slochower v. Board of Education*, 350 U.S. 551 (1956); and *Wieman v. Updegraff*, 344 U.S. 183 (1952).

Under the Fourteenth's Amendment, a state is prohibited from discharging a public employee who possesses a property interest in continued employment without due process of the law. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); meaning that the Fourteenth Amendment guarantees public employees with a property interest in continued employment the right to an informal hearing prior to being discharged. *Id.* at 542. However, the Constitution does not create property interests, instead "they [the party's rights] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents of State Colls*, 408 U.S. at 577 In order to establish a constitutionally protected property interest, the Plaintiff must demonstrate that she has a legally recognized **expectation** that she will retain the position. A legitimate expectation of continued employment may derive from a statute, a contract

provision, or an officially sanctioned rule of the workplace. *Perry v. Sindermann*, 408 U.S. 593, 601-602 (1972).

The Court is mindful that the only source of state law that could grant a property right in an employment position at the UPR is found in the General Rules and Regulations of the University, which were enacted pursuant to 18 L.P.R.A. §§ 602 and 608. Therefore, it follows that if the law and/or the Rules and Regulations of the University do not afford an individual with a property right and/or create a legally recognized expectation of having a property right at the time of termination, the person simply does not possess such right. "A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown." *Perry v. Sinderman*, 408 U.S. at 601-602.

It is also worth noting that if the individual's claim to a property right is predicated on acts which contravene the referenced Rules and Regulations, the individual would not possess a legally cognizable property right. *Kauffman v. PRTC*, 841 F. 2d 1169, 1173 (1st Cir. 1988); *see also Colón v. Mayor of Municipality of Ceiba*, 112 D.P.R. 740, 746 (1982).

Based on the above mentioned case law, the Court must review all pertinent Articles and Sections of the Rules and Regulations of the University in conjunction with the relevant evidence on the record, to determine if Plaintiff possessed a constitutionally protected property interest. Since Plaintiff's claim encompasses two (2) different types of appointments, the Court will

first analyze Plaintiff's position as FNP Program Director, followed by an analysis of the probationary appointment as Associate Professor.

A. **Property Interest as the FNP Program Director**.

To demonstrate that there was a constitutionally protected property interest in the position of Director of the FNP Program, Plaintiff has to show that she had a legally recognized expectation that she would retain said position. *Perry*, 408 U.S. 601-602. After reviewing the Rules and Regulations of the University and the evidence on record, the Court finds that Plaintiff could never have attained such expectation, given that: (1) the position was one of trust, which could be terminated at the will of the Chancellor; (2) the Rules and Regulations of the University specifically prohibit individuals who occupy teaching and managerial positions, like Plaintiff, from attaining permanence in the managerial position; and (3) the Rules and Regulations of the University prohibit anyone from obtaining permanence in a position without first undergoing a probationary period for a minimum of five (5) years.

Position of Trust v. Tenure

Pursuant to Article 30, Sec. 30.1.8 of the Rules and Regulations of the UPR a position of trust is one which can be terminated at the will of the Chancellor. Article 30, Sec. 30.1.8 defines "Trust Appointment" as one:

> ...awarded to university personnel that is classified as trust personnel under Chapter VIII, Article 71 of these Regulations. **Trust personnel shall be chosen and removed at**

> **will** when posts and positions are so classified, but shall retain the rights that may have been acquired by virtue of some prior regular appointment within the system. (emphasis ours) **(Docket # 164, Exhibit 4, Rules and Regulations of University of Puerto Rico, Article 30, Sec. 30.1.8)**

Also, Article 66, Sec. 66.2.1, states that a person who occupies a faculty and administrative position, like Alberti did, directly participates in the formulation of academic policy. The Section states:

> The teaching-administrative function includes: supervising, evaluating, coordinating or directing teaching programs; participating in a direct and non-incidental manner in the creation of academic policies in the faculty, institutional unit, and system level. **(Docket # 164, Exhibit 4, Rules and Regulations of University of Puerto Rico, Article 66, Sec. 66.2.1)**

Pursuant to Article 71, Sec. 71.3.1 of the Rules and Regulations of the University:

> The designation of a post or position of trust, whether by law or regulation, or pursuant to the exercise of administrative discretion as authorized by regulation, essentially answers to the demand of harmony and empathy between the person holding said position and the appointing authority." **(Docket # 164, Exhibit 4, Rules and Regulations of University of Puerto Rico, Article 71, Sec. 71.3.1.1)**

Further grounds and criteria for determining whether a position is of trust appears in Article 71, Sec. 71.3.1.2, which specifies that:

> The criteria to designate a post or position of trust in the exercise of the approved authority's discretion as allowed by these regulations, are the following: a) That given the nature and functions thereof, the person occupying said position must intervene or collaborate substantially with the creation of the institution's public policy; or b) That the person occupying said position, although he or she may not participate in the creation of public policy, does provide auxiliary or support services to the appointing authority that involve a high degree or personal trust; or c) That the person occupying said position advises or renders services directly to the appointing authority; or d) That the regulations approved by the Board of Trustees has designated such post or position as one of trust. **(Docket #164, Exhibit 4, Rules and Regulations of University of Puerto Rico, Article 71, Sec. 71.3.1.2)**

Moreover, Section 71.3.2(f) as amended, titled "**Posts or Positions of Trust by Designation of Law or Regulation as amended",** states, in its pertinent part:

> The following shall be posts or positions of trust and the persons appointed to occupy them shall be trust personnel:
>
> a) ...

b) ...

c) ...

e) ...

f)Head of organizing units assigned to the institutional units, including Central Administration that, in addition, meet the criteria stated in Section 71.3.1 of Article 71 of the General Rules:

1. Program/Project Administrator
2. Special Aide to the Dean
3. Special Aide to the Director
4. Program/Project Coordinator
5. Associate Dean
6. Assistant Dean
7. Associate Director
8. Assistant Director
9. Library Director
10. Investigation Center Director
11. Pre-School Development Center Director
12. Department Director
13. School Director
14. Institute Director
15. Museum Director
16. Office Director
17. **Programs Director**
18. Magazine Director
19. Professional Studies and Continuing Education Director
20. Medical Director
21. Registrar
22. Associate Vice-President

23. Assistant Vice-President
(emphasis ours)

After considering the applicable Rules and Regulations defining trust appointments in the UPR, the Court will now focus on the duties and responsibilities of Plaintiff as Director of the FNP Program. The uncontested material facts in the record show that as Director of the FNP Program, Plaintiff was responsible for, *inter alia*, administering over one million dollars of federal funds approved for the FNP Program; selecting and purchasing program related equipment; hiring personnel; preparing the academic curriculum for the Program; recruiting students for the Program; evaluating existing classes in the School of Nursing; finding and contracting outpatient clinics where the students could get hands on clinical experience; insuring that the funds were used according to the grant's terms and conditions. (**Docket #164, SUMF #16**)

Plaintiff was also responsible for assuming the general direction of all the administrative and academic work of the FNP Program; plan, develop and implement the program of studies; prepare the petition of courses for the Program; prepare the yearly academic load for the faculty of their program following the procedures established in the By Laws of the UPR; establish a systematic and continuous process of evaluation of the academic program; summarize progress and prepare annual progress reports; teach; prepare collaborative research proposal for funding; and participating in the formulation of academic policy. (**Docket #164, SUMF #15)**

Carlo, the then Chancellor of the Medical Science Campus, and nominating authority indicated under oath in his deposition that Alberti participated in the formulation of academic policy. Specifically, Carlo testified that Plaintiff had authority to intervene in various academic functions, including, *inter alia*, creating the policy for grades, for passing a course, the requirements for the course, and academic requirements for the Program. (**Docket #164, SUMF #63**).

Moreover, in an admission by Alberti through a letter prepared by her dated December 4, 2007 and sent to Carlo, she admits her participation in the formulation of academic policy. In this letter, Plaintiff lists her responsibilities as FNP Program Director, including "creating, developing, and evaluating courses of the FNP specialty that comply with the accreditation agencies and national certification requirements". (**Docket #164, Exhibit 25, p. 2**).

Similarly, in Plaintiff's letter of December 11, 2007, to Carlo, Alberti admitted that "as Director of this program, I am obligated to supervise the administration of the funds and assure that the objectives are met, adhering to the rules and regulations of the Federal Department of Education, Council of Higher Education, University of Puerto Rico and HRSA." (**Docket #164, Exhibit 27, p. 1**). These admissions by Plaintiff buttress Defendants' position that Plaintiff participated in the formulation of University policy.

It is evident to the Court that based on the Rules and Regulations a position of trust requires harmony and empathy between the individual who holds the

position and the nominating authority, in this case between Alberti and Carlo. (**Docket #164, Exhibit 4, Rules and Regulations of the University, Article 71, Sec. 71.3.1, cited above in p. 17**) Further, said position is one that requires intervention and collaboration in the creation of the University's public policy and/or academic policy. (**Docket #164, Exhibit 4, Rules and Regulations of the University, Article 66, Sec. 66.2.1 and Article 71, Sec. 71.3.1.2, cited above in p. 17 and 18**).

The Court also notes that Article 71, Sec. 71.3.2 (f) of the Rules and Regulation of the University clearly specifies that the position of Program Director, like the one held by Alberti, is a position of trust. (**Docket #164, Exhibit 4, Rules and Regulations of the University, Article 71, Sec. 71.3.2 (f) as amended, cited above p.p. 18 and 19**). The referenced Rule categorically classifies the position of Program Director held by Alberti as one of trust. Thus, it follows that she could not have attained an expectation of a property right as a Program Director.

Further, and perhaps dispositive by itself, the Court notes that Plaintiff could not have attained an expectation of a property interest in the position as Program Director because pursuant to **Article 46, Section 46.4.4.1** of the Rules and Regulations of the University, a person who occupies a managerial position and a teaching position at the same time, like Alberti who was the Director of the FNP Program and an Associate Professor, cannot obtain permanence in the managerial position nor receive teaching tenure while performing managerial functions. Specifically, **Article 46, Sec. 46.4.4.1**, **"Teaching Personnel will**

not Get Tenure in Managerial Functions", indicates:

> **There will be no tenure for managerial positions. Members of the teaching staff who get assigned to managerial functions will [not] be able to get teaching tenure while performing those additional functions and tasks, consistent with the principles established in Article 66.** (Emphasis ours, brackets in the original). **(Docket #164, Exhibit 4, Rules and Regulations of the University, Article 46, Sec. 46.4.4.1).**

Finally, the Rules and Regulations of the University in Article 30, Sec. 30.1.1 and **Article 46, Sec. 46.2** also clearly state that in order to acquire permanence in the University a position has to be approved in the budget and the individual has to successfully comply with the probationary work period, which can be no less than five (5) years. (**Docket #164, Exhibit 4, Rules and Regulations of the University, Article 30, Sec. 30.1.1 and Article 46, Sec. 46.2, cited *infra*).** There is no evidence on the record showing that there was an approved budget for the FNP Program Director position or that Alberti held the job for at least five (5) years. Alberti was FNP Program Director from July 1, 2006 to February 13, 2008, when she was removed by Carlo. **(Docket #164, SUMF #13 and #59).**

In light of the referenced Rules and Regulations of the University and the uncontested material facts on record, the Court finds that Alberti evidently did not have a property interest in the position of FNP Program Director.

B. **Plaintiff's Probationary Appointment as Associate Professor**.

The Rules and Regulations of the University also prove to be of considerable assistance in disposing of Plaintiff's claim that she had a constitutionally protected property right in the probationary appointment as Associate Professor.

Pursuant to **Article 30, Section 30.1.2** of the Rules and Regulations of the University, a probationary appointment like the one held by Alberti, is:

> ...the appointment granted initially to cover a regular post or position approved in the budget, and shall have a fixed duration according to the provisions of these Regulations. During the appointment period the incumbent shall be on probation, subject to an evaluation to determine whether or not at the end of said period he or she merits retention with a permanent appointment. **(Docket #164, Exhibit 4, Rules and Regulations of the University, Article 30, Sec. 30.1.2).**

The probationary appointment can be terminated by the Chancellor pursuant to **Article 46, Section 46.6** of the Rules and Regulations of the University, **"Termination of Probationary Appointments without Granting Tenure"** which states:

> The Chancellor, or President when the personnel is under his or her administrative jurisdiction, may terminate a probationary appointment without granting tenure **when so justified**, according to the evaluation or evaluations performed, notifying the affected

person in writing. **(Docket #164, Exhibit 4, Rules and Regulations of the University, Article 46, Sec. 46.6).** (Emphasis ours).

On the other hand a career and/or permanent position, which is equivalent to tenure in the UPR, is defined in Article 30, Sec. 30.1.1 as:

> ... the appointment granted to cover a regular post or position approved in the budget, after the incumbent has satisfactorily complied with his or her probationary work period. The incumbent shall have all the rights and protections established by these Regulations. **(Docket #164, Exhibit 4, Rules and Regulations of the University, Article 30, Sec. 30.1.1).**

It is evident from the referenced definition that in order to attain tenure, the individual must first comply with the probationary period requirement. This period is defined in **Article 46, Sec. 46.2** of the Rules and Regulations, which states that:

> Teaching staff tenure shall be awarded to those persons with a probationary appointment who teach a full load, hold regular positions within the University's functional budget or in any of its dependencies' or institutional units' functional budgets, and who, in the judgment of the competent authorities, has rendered five (5) years of satisfactory service, all of it in accordance with the provisions of the following paragraphs. **(Docket #164, Exhibit 4, Rules and Regulations of the University, Article 46, Sec. 46.2).**

After analyzing **Article 30, Sec. 30.1.1, 30.1.2, 30.1.8** and **Article 46, Sec. 46.2** of the Rules and Regulations of the University, the Court concludes that it is evident that a person with a probationary appointment cannot obtain a career and/or permanent position without first successfully completing a minimum five (5) year probationary period. (**Docket #164, Exhibit No. 4, Rules and Regulations of the University of Puerto Rico, Article 30, Sec. 30.1.1, 30.1.2, and 30.1.8; Article 46, Sec. 46.2, cited above in p. 17, 24 and 25).**

There is no controversy as to the fact that Plaintiff's professor contract at the time of termination was probationary. **(Docket #164, SUMF #12, #18 and #19).** There is also no controversy as to the fact that at the time of Plaintiff's termination she had been working at the University for approximately two (2) years. (**Docket #164, SUMF #12 and #70**).

The Court further does not read in the aforementioned two articles that the nominating authority must retain the person all five (5) years before making a decision. The Court refers to the provisions of Article 46, Sec. 46.6, wherein "the Chancellor . . . may terminate a probationary appointment without granting tenure when so justified, according to the evaluation or evaluations performed, notifying the affected person in writing." An otherwise interpretation would allow a professor to violate the norms of the institution for five (5) years while under probation, and the institution would be powerless to act within the probationary period. Thus, the Court finds that Plaintiff's position as Associate Professor was probationary in nature, and at the time of her

termination she was not tenured; she was on tenure-track, but on probation.

Even though the Court rejected Plaintiff's "Memorandum in Support of Plaintiff's Opposition of Motion for Summary Judgment" (**Docket #191**) it will nevertheless entertain Plaintiff's contention that since the Rules and Regulations of the University provide for certain justification prior to terminating a probationary appointment, she then possessed a due process right to a pre-termination hearing. The Court notes however, that Plaintiff did not provide any supporting evidence to create an issue of fact other than her own conclusions, that notwithstanding a probationary contract, she is entitled to a constitutionally protected due process right.[6]

Plaintiff bases her argument on Article 46, Sec. 46.6, which, *inter alia*, states that the Chancellor can terminate a probationary appointment "when so justified". Plaintiff argues that the requirement of a justification in the cited Rule afforded Plaintiff with an expectation of permanence and a due process right. However, the Court is not persuaded by this argument given that Article 46, Sec. 46.2, of the Rules and Regulations of the University are clear that permanence can only be attained after the candidate complies with the five (5) year minimum probationary

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[6] It is well settled that in order to oppose a motion for summary judgment "a party may not rest on conclusory allegations, improbable inferences or unsupported speculation." *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 95 (1st Cir 1996). *Caroline DeLia v. Verizon Communications, Inc.*, ___ F.3d ___ (1st Cir. 2011 (August 24, 2011)), 2011 WL 3688995; *Crespo v. Schering-Plough Del Caribe, Inc.*, 354 F.3d 34, 45 (1st. Cir. 2003).

period. Thus, Plaintiff could not have gained a legally cognizable expectation of permanence since she only worked for approximately two (2) years under this appointment.[7] The Court finds that the requirement of justification pursuant to Article 46, Sec. 46.6 fails to reach the threshold of a property interest.

The Court, however, finds that Plaintiff's same argument was rejected by the First Circuit Court of Appeals in *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419 (1st Cir. 1986). In *Lovelace*, 793 F.2d 419, the teaching contract of a non-tenured university professor was not renewed. Lovelace sued the university claiming that he was deprived of due process when his contract was not renewed without first affording him a pre non-renewal hearing. Lovelace claimed that even though he was not tenured, the rules of the university required just cause before deciding not to renew the contract. The Court reasoned that the just cause requirement failed to reach the threshold of a property interest. The continuous renewal merely served to facilitate the president of the teaching institution to exercise his judgment in reaching a decision by ensuring that he would have written opinions of relevant different persons in the university hierarchy before him when he was ready to act. *Lovelace*, 793 F.2d at 422.

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[7] Article 46, Sec. 46.6 indeed states, however, that the employer will justify, "when so justified," its determination to terminate the probationary period by notifying the affected person in writing. *See* discussion as to the valid non discriminatory reasons to terminate Alberti found in the analysis under Plaintiff's Title VII Claim *infra*.

Plaintiff is in a similar situation as she was holding a probationary contract, and Article 46, Sec. 46.4 of the Rules and Regulations of the University indicate that the Chancellor, as stated *infra*, can terminate the appointment "when so justified". **(Docket #164, Rules and Regulations of the University, Article 46, Sec. 46.6, cited above p. 24).** The Court finds that the requirement of justification and/or just cause is not tantamount to a property interest, it is evident that Plaintiff had no constitutional due process right to a pre-termination hearing, since her appointment was probationary. *Lovelace*, 793 F.2d at 422; *Colón v. Municipio de Ceiba*, 112 D.P.R. 720, 745-746 (1982), 12 P.R. Off. Trans. 932.

The Court notes that Plaintiff also argues that a property interest in her appointment was created because the probationary appointment contract did not have a specific expiration date. **(Docket #164, Exhibit 7).** However, the Court again is not persuaded by this argument because Article 46, Section 46.2, of the Rules and Regulations of the University clearly state that an individual cannot obtain tenure without first undergoing a probationary period of at least five (5) years. **(Docket #164, Exhibit 4, Article 46, Sec. 46.2, cited above in p. 24).** Thus, even though her probationary contract was for an indefinite period of time, but not more that five (5) years, she still had to fulfill the minimum time requirements established by Article 46, Section 46.2 of the Rules and Regulations prior to acquiring a cognizable property interest.

The Court, thus, cannot conclude that a probationary contract that does not contain an expiration date, but cannot be more than five (5) years

in probation under the General Regulations of the University of Puerto Rico, automatically creates a property interest, because such a conclusion would be in contravention of the Rules and Regulations of the University. In *Kauffman v. Puerto Rico Telephone Company*, 841 F.2d 1169 (1988), the First Circuit Court of Appeals held "that any property right associated with a career position is rendered null and void if a violation of the Personnel Act attends the filling of such a position." *Id.* at 1173. In reaching this conclusion the Court carefully analyzed Puerto Rico Supreme Court jurisprudence, specifically *Colón v. Mayor of Municipality of Ceiba*, 112 D.P.R. 740 (1982), 12 P.R. Off. Trans. 932. *Colón* stands for the proposition that when an employee is "freely selected he [she] could also be freely removed, sec. 5.10 of the Personnel Act, 3 L.P.R.A. § 1350." 12 P.R. Off. Trans. 932, p. 4. "The protection of the career position cannot be extended to he [she] who obtained the position on the basis of standards foreign to that category." *Colón*, *supra*. "Equal protection of the law does not imply equal protection to violate the law ... ." *Colón*, *supra*, citing *Del Rey v. J.A.C.L.*, 107 D.P.R. 348, 355 (1978), 7 P.R. Off. Trans. 383.

In *Colon*, *supra*, an individual was hired by the Municipality of Ceiba as a trust employee. However, his functions were not those of a trust employee as defined by state law. When he was terminated he claimed that even though his contract stated that he was a trust employee, since his functions were those of a career employee, he could not be terminated without first having charges raised against him and undergoing a pre-termination hearing as required by state law. The Supreme Court of Puerto Rico concluded that his

functions were those of a career employee. However, the Court determined that even though his functions were those of a career employee, he did not have the rights afforded to a career employee because before acquiring such rights, the law required that the individual compete against other eligible candidates; take a classification exam, and successfully approve **the legally required probationary period**. Since, like in the case of Alberti, the individual in *Colón v. Municipality of Ceiba*, did not comply with the aforementioned legal requirements, the Court concluded that he did not possess a property interest in his position. *Id.* at 745. The same conclusion was also reached by the First Circuit Court of Appeals in *Kauffman. Kauffman*, 841 F.2d at 1176.

The Court concludes that Plaintiff has not established that she reached the required state level of a property interest in any of the two positions at the University. On the contrary, the Rules and Regulations of the UPR, as cited above, clearly demonstrate that she did not enjoy a property interest in either of the two jobs. Even though the Court's finding turns moot the question of whether or not the individual Defendants are entitled to the qualified immunity defense as to damages, the Court explains that notwithstanding, all individual Defendants are entitled to qualified immunity.

C. **Qualified Immunity**.

Qualified Immunity is an affirmative defense against damages liability, which may be raised by state officials sued in their personal capacity. *Gómez v. Toledo*, 446 U.S. 635 (1980). This defense "shields federal and state officials from money damages unless

a plaintiff pleads facts showing: (1) that the official violated a statutory or constitutional right; and (2) that the right was "clearly established" at the time of the challenged conduct." *Ashcroft v. Al- Kidd*, ____ U.S. _____ (May 31, 2011), 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149; *Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *San Gerónimo Caribe Project v. Acevedo Vilá*, ____ F.3d ____, 2011 WL 2436607 (1st Cir. (Puerto Rico)(June 17, 2011)). The Supreme Court has also held that the Courts have discretion to decide which of the referenced "two-prongs of qualified immunity analysis to tackle first. *Pearson*, 555 U.S. at 236.

The doctrine of qualified immunity serves critical important purposes. In the absence of a broad and protective immunity shield, the threat of personal liability would create a costly "diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. The "fear of being sued" would also "dampen the ardor of all but the most resolute... [public officials] in the unflinching discharge of their duties." *Id*., (citation omitted). Moreover, the doctrine recognized the unfairness of holding public officials liable for conduct as to which the law was uncertain or undeveloped at the time of their actions. *Crawford-El v. Britton,* 523 U.S. 574 (1998).

Under the standard of objective reasonableness formulated in *Harlow*, officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established law of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. To overcome this barrier, it is not enough

for the plaintiff to assert an abstract right. "[T]he focus must be upon the particular conduct engaged in by (or attributed to) the defendants; immunity is forfeited only if a reasonable official would clearly understand that conduct to be a violation of the Constitution." *Rivera-Ramos v. Roman*, 156 F.3d 276, 280 (1st Cir. 1998). As the qualified immunity defense has evolved, the Supreme Court stated that "it provides ample protection to all but the plainly incompetent." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In the instant case the individual Co-Defendants are entitled to the qualified immunity defense because: (1) Plaintiff did not demonstrate that the officials violated a statutory or constitutional right; and (2) at the time Plaintiff was terminated it was not clear that she had a property right. *Ashcroft*, 131 S.Ct. at 2080.

Regarding Plaintiff's appointment as FNP Program Director, the Rules and Regulations of the UPR state that directorial appointments are of trust, and can be terminated at the will of the Chancellor. Further, any faculty member who also has administrative functions cannot attain permanence in those administrative functions. Further, the evidence shows that Alberti intervened in the formulation of academic policy. **(Docket #164, Exhibit 4, Rules and Regulations of the University, Article 66, Sec. 66.2.1 and Article 71, Sec. 71.3.1.2, cited above in p. 17 and 18; and SUMF #63**). In view of the foregoing this Court finds that Plaintiff has not been able to demonstrate that at the time of her removal it was clearly established that she possessed a property right as FNP Program Director. Much less that the individual Co-defendants,

violated a clearly established law of which a reasonable person would have known.

Similarly, in regard to Plaintiff's probationary appointment, the law and/or the Rules and Regulations are clear that in order to gain permanence and/or tenure in such position, one has to successfully comply with the five (5) year minimum regulatory requirement. (**Docket #164, Exhibit 4, Rules and Regulations of the University of Puerto Rico, Article 30, Sec. 30.1.1, 30.1.2, and 30.1.8; Article 46.2, Sec. 46.2).** Since Plaintiff only worked for approximately two (2) years, then it follows that a property right was not clearly established at the time of her termination.[8] **(Docket #164, SUMF #12 and #70).**

After considering the uncontested material facts, it is clear that the individual Co-Defendants should not be subjected to the risk of personal liability, or to the cost and inconvenience of a trial. Even if Plaintiff could prove all of the allegations in the *Third Amended Complaint* (**Docket #123**), Defendants' alleged conduct did not violate "clearly established" law, and no reasonable public official would have believed that such conduct would violate Plaintiff's rights. Further and

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[8] The Supreme Court of Puerto Rico in *Cassasús v. Escambron Beach Hotel*, 86 P.R.R. 356, 360 (1962), in cases of employees hired with an indefinite period of time subject to a probationary contract, that a termination within which his/services may be dispensed with [the probationary period] [is] "without his having a right of action." The Court emphasized that "[n]ot until th[e] permanency [was] obtained, the appellee could discharge him within the probationary period without obligation to pay him the compensation for the discharge fixed by law." *Id.* at p.p. 361-362.

most critical, even on the merits she never fulfilled the requirements of the Regulations to earn a property right which constitutes the sine qua non to activate the constitutional due process claims.

Therefore, Plaintiff's claim that she was deprived of her property without due process of the law in violation of the Fourth, Fifth and Fourteenth Amendment of the United States Constitution claimed under 42 U.S.C. § 1983 and §1985, is hereby **DISMISSED WITH PREJUDICE.**

IV. First Amendment

Plaintiff claims that her removal and termination were executed by the individual Defendants in violation of the First Amendment of United States Constitution because allegedly it was performed in retaliation for engaging in protected speech as to matters of public concern[9]. The expressions that Plaintiff claims are protected by the First Amendment are: (1)accusing a student, Co-Defendant Iris Ramos of violating the HIPAA (42 U.S.C. § 132d-2); (2) requesting the University to take disciplinary action against said student; (3) refusing to provide an academic grade to Iris Ramos' research proposal in another class, as Plaintiff was accusing the student for violation of HIPPA law; and (4) writing a letter to her superior, Carlo, complaining about internal issues as to the Nursing FNP Program. Plaintiff avers that these expressions constituted protected free speech regarding

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[9] This claim specifically **excludes Co-Defendant the University**. (**Docket #123, *Third Amended Complaint* p. 4, ¶ 2, and p.p. 36-37, ¶ 124-128**).

a matter of public concern[10]. (**Docket #164, SUMF #49- 52**)

The Supreme Court of the United States recognized that public employees do not surrender all their First Amendment rights by reason of their employment. Thus, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Pickering v. Board of Ed. of Township High School Dist. 205, Will City*, 391 U.S. 563 (1968); *see also Connick v. Myers*, 461 U.S. 138 (1983).

To establish an actionable claim of unconstitutional retaliation in a public employee's speech case, Alberti must meet three requirements. Plaintiff must first demonstrate that she was speaking as a citizen on a matter of public concern. If Alberti did not speak as a private citizen, then she has no First Amendment cause of action based on the government employer's reaction to the speech. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Díaz-Bigio v. Jorge Santini*, _____ F.3d _____, 2011 WL 2557003, p.6 (1st Cir.(Puerto Rico) (June 29, 2011)(Lynch, J.)). Second, the Plaintiff must

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[10] In the *Third Amended Complaint* Plaintiff makes claims that she wrote a letter to the Health Resource and Services Administration (HRSA) complaining about an alleged misuse of grant funds. (**Docket #123, Third Amended Complaint, p. 4, ¶ 2)** However, there is no evidence in the record to support her allegation. *Morales*, 246 F.3d at 33-35. The record only shows that on December 4, 2007, she wrote an official letter as Program Director to the then Chancellor, Carlo, raising several complaints about other members of the administration of the FNP program, and a student. (**Docket #164 and Docket #179, Exhibits #49 and #50**).

show that her interest in the speech outweighs the government's interest as an employer in avoiding disruption in the workplace. *Pickering*, 391 U.S. at 568. Third, Alberti must produce sufficient direct or circumstantial evidence from which a jury reasonably may infer that a constitutionally protected conduct was the substantial or motivating factor behind the adverse employment action. *Díaz-Bigio,* 2011 WL 2557003, at p. 6; *Acevedo-Díaz v. Aponte*, 1 F.3d 62, 67 (1st Cir. 1993). Moreover, even if Plaintiff were to succeed in establishing said causal relationship, the "employer can still defeat the claim 'by proving by a preponderance of the evidence that the governmental agency would have taken the same action against the employee "even in the absence of the protected conduct."'" *Díaz-Bigio,* 2011 WL 2557003, *at p. 6*, quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

The First Circuit recently held that "'the "but for" causation test' and 'the defendant-employer's "*Mt. Healthy* defense"' "___ ensure [ ] that a plaintiff-employee who would have been dismissed in any event on legitimate grounds is not placed in a better position merely by virtue of the exercise of a constitutional right irrelevant to the adverse employment action."" *Diaz-Bigio*, 2011 WL 2557003, at p. 6, citing *Acevedo-Díaz*, 1 F.3d at 66, and *Mt. Healthy*, 429 U.S. at 285.

Without a significant degree of control over its employee's words and actions, a government employer would have little chance to provide public service efficiency. *Pickering*, 391 U.S. at 568; *Garcetti*, 547 U.S. at 418. When citizens enter government service, the citizens by necessity must accept certain limitations of

their freedom. *Water v. Churchill*, 511 U.S. 661, 671 (1994). A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations. Thus, "while the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize the employee grievance". *Connick v. Myers*, 461 U.S. 138, 154 (1983).

The Supreme Court in the case of *Garcetti v. Ceballos,* 547 U.S. 410, made particularly pertinent the identifying whether Alberti has an actionable First Amendment claim. In *Garcetti*, *supra*, the plaintiff also raised a First Amendment claim because the employer, a government entity, took an adverse employment action in retaliation for plaintiff's speech. The Court held that when public employees articulate statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. (Emphasis ours). *Garcetti*, 547 U.S. at 421.

After analyzing the expressions made by Alberti, the Court concludes that the statements by Alberti were made pursuant to her duties as a University employee. First, Plaintiff clearly did not speak as a private citizen when she informed her superior, Carlo, that there were certain problems with the Program she directed. Second, Plaintiff did not speak as a citizen when she accused one of her students, Co-Defendant Ms. Iris Ramos of allegedly violating HIPPA Regulations. Third, Plaintiff was not acting as a citizen when she refused to sign Co-Defendant Ms. Iris Ramos'

research proposal as alleged retaliation for allegedly violating HIPPA in another class.

All of the prongs of the *Díaz-Bigio*'s test are met and supported by Plaintiff's letter of December 4, 2007 to Carlo. The Court finds that the December 4, 2007 letter was signed by Plaintiff as "FNP Program Director," Alberti's official capacity. (**Docket #164, Exhibit 25**). The heading of the letter also shows it is an official document --"University of Puerto Rico, Medical Science Campus, School of Nursing, FNP Program." Moreover, the letter pertains to issues regarding the administration of the FNP Program. As Director, Plaintiff was paid to, *inter alia*, assume the general direction of all the administrative and academic work of the FNP Program, and ensure that the funds were used according to the grant's terms and conditions. (**Docket #164, SUMF #15 and #16**).

It is pellucidly clear to the Court that Plaintiff acted as a government employee and not as a private citizen as [or], "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of the employer's control over what the employer itself has commissioned or created". (Emphasis ours). *Garcetti*, 547 U.S. at 421-422.

As in *Garcetti*, should Plaintiff's superiors in their discretion determine that her accusations and/or speech related actions were inflammatory or misguided, they had the authority to take corrective

action[11]. 547 U.S. at 423. The Supreme Court specifically rejected "**the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties**." *Id.* (Emphasis ours). "Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job." *Id*. at 426. Accordingly, the Court also rejects the notion that Plaintiff's expressions, made pursuant to her professional duties, are protected by the First Amendment.

Moreover, even though the Court determined that Plaintiff was not speaking as a citizen for First Amendment purposes, a conclusion which disposes of the matter, the Court also doubts that the actual expressions at issue regarded matters of public concern. To determine whether speech is of public or private concern the Court must independently examine the "content form, and context of the speech as revealed by the whole record. In considering content form, and context, no factor is dispositive, and it is necessary to evaluate all aspects of speech." *Snyder v. Phelps*, ____

[11] The Court notes that Carlo testified under oath in his deposition that he did not terminate Plaintiff as a result of her expressions. He testified that he terminated Alberti for legitimate reasons related to Plaintiff's performance as an administrator and as a professor. (**Docket #164, Exhibit #3, Transcript of Dr. Carlo's Deposition, p. 168 L 18-19 and p. 170, L 14-25**). Moreover, the evidence on the record clearly supports Carlo's testimony given that there is extensive admissible and uncontested documentary evidence that reflect Plaintiff's extensive performance problems. (**Docket #164, SUMF #21-55, 59 and 64-70**).

U.S._____, (March 2, 2011), 131 S.Ct. 1207, 1211, 179 L.Ed.2d 172 (2011).

In the case at bar, the "content" of the expression were issues directly related to Plaintiff's functions as FNP Program Director and Associate Professor; to wit: issues with the administration of the FNP Program, and the grading of student Co-Defendant Iris Ramos. **(Docket #164, SUMF #49-52)**.

In the analysis of the "context" of the speech, the record shows that her expressions were via official letters sent to her superior, the then Chancellor Carlo. The Court finds that based on content and context of the speech as shown by the record, the same does not reflect matters of public concern. Consequently, Plaintiff failed to demonstrate that she was speaking as a citizen about matter of public concern. *Garcetti*, 547 U.S. at 418; *Diaz-Bigio*, 2011 WL 2557003, at p. 6, citing *Acevedo-Díaz*, 1 F.3d at 67.

Even though this finding disposes of Plaintiff's First Amendment cause of action, the Court also notes that Plaintiff failed to meet the other two (2) requirements in a First Amendment claim as established in *Díaz-Bigio v. Jorge Santini,* 2011 WL 2557003. Specifically, Plaintiff failed to demonstrate that her interest in the speech outweighs the government's interest as an employer in avoiding disruption in the workplace. The record is devoid of any evidence to support such a finding.

Further, Plaintiff also failed to demonstrate that constitutionally protected speech was the substantial or motivating factor behind the adverse employment action. The uncontested material facts clearly

demonstrate that the University had ample legitimate justifications to remove Alberti from the trust position as FNP Program Director, as well as Plaintiff's probationary appointment as Associate Professor. The Court finds that Plaintiff has proffered no evidence to show that her speech was the motivating factor behind the adverse employment action, consequently Plaintiff's First Amendment claim fails in this regard as well. *Díaz-Bigio,* 2011 WL 255703, at p. 6.

Moreover, even though Plaintiff did not present any evidence to support an allegation of "academic freedom", since this case takes place within the purview of administrative matters of the University as opposed to academic freedom expressions, the Court finds it prudent to briefly discuss the Supreme Court's statement in *Garcetti* that in a case involving academic freedom, there could be additional constitutional interest that might have to be considered. 547 U.S. at 425.

When addressing academic freedom, the Court has recurrently described said protected matter in terms of the liberty of open classroom discussion and inquiry of who, what and how it shall be taught. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). Academic freedom is a special concern of the First Amendment, which "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyshian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967) "To the extent that the Constitution recognizes any right of "academic freedom" above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in

individual professors." *Johnson-Kurek v. Abu-Absi*, 423 F. 3d 590, 593 (6th Cir. 2005).

The case of *Lovelace*, 793 F.2d 419, again offers substantial guidance in disposing of this matter. As in the present case, Lovelace alleged that the real reason his teaching contract was not renewed was because he refused to inflate his grades or lower his academic expectations and teaching standards. He also contended that in response to student complaints that homework assignment were too time consuming and that his courses were excessively hard, the University first threatened not to renew his contract unless he appeased the students, and then carried out the threat when he refused to lower his standards. Plaintiff claimed that those actions by the University interfered with his academic freedom and violated his First Amendment rights. *Lovelace*, 793 F.2d at 425.

The First Circuit rejected Lovelace's argument stating that "to accept plaintiff's contention that an untenured teacher's grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission." *Lovelace*, 793 F.2d at 426. **"The First Amendment does not require that each non-tenured professor be made a sovereign unto himself**." (Citations omitted) (Emphasis ours), *Id.*; *Palmer v. Board of Education*, 603 F.2d 1271 (7th Cir. 1979) (First Amendment rights of probationary teacher were not infringed by discharging her for refusing to teach patriotic subjects; a public school teacher is not free to disregard the prescribed curriculum concerning patriotic matter); *see also Clark*

v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972) (a university teacher does not have a First Amendment right to disregard established curriculum content); *Hetrick v. Martin*, 480 F.2d 705 (6th Cir.1973); *Johnson-Kurek v. Abu-Absi,* 423 F. 3d at 594. "**First Amendment does not prevent a university from terminating untenured teacher whose pedagogical style and philosophy did not conform with those of the school's administration**." *Lovelace*, 793 F.2d at 426, citing *Hetrick v. Martin*, 480 F.2d 705. (Emphasis ours).

The record shows that the expressions that Alberti alleges were protected by the First Amendment were not related to academic freedom. To the contrary, the expressions at issue were directly related to Alberti's duties and responsibilities as Director of the FNP. Consequently the concerns raised by the Supreme Court in *Garcetti*, 547 U.S. 410, are not applicable to the instant case.

The Court reiterates the standard as to qualified immunity, *see infra*, and notes that Plaintiff's First Amendment claim is only raised against the officials of the University in their individual capacity. Consequently, the Court finds it prudent to explain why it finds that these individuals are protected by qualified immunity.

The Supreme Court held in *Garcetti*, 547 U.S. 410 that restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. *Id*. at 421-422. Thus, it follows that the individual Defendants could have reasonably believed that those expressions were not protected

because they were made in the University regarding internal administrative issues of the FNP Program.

Further, "even when the general rules has long been clearly established (for instance, the First Amendment bars retaliation for protected speech), the official enjoys immunity if there is "doubt as to the illegality of the defendant's particular conduct (for instance whether a plaintiff's speech was on a matter of public concern)". *Crawford-El v. Britton,* 523 U.S. 574, 593 (1998). Thus, even if the Court determined that Plaintiff's speech was protected, it was not reasonable for Defendants to prognosticate that their actions were prohibited. Consequently, it was not clear at the time of the acts at issue that Defendants' actions were prohibited; hence qualified immunity protects Defendants from damages in the case at bar.

Moreover, after the precedent set forth and made public by the Supreme Court in *Garcetti*, 547 U.S. 410, it was not unreasonable for Defendants to have concluded that it was objectively reasonable for them to believe that their acts did not violate the Constitution. Particularly, because the alleged protected "expressions" made by Plaintiff were made during the employment, in Alberti's capacity as Program Director and/or as an non-tenured professor and furthermore were directly related to her employment responsibilities.

Based on the record the Court finds that in the instant case, as in *Garcetti*, 547 U.S. 410, Plaintiff's alleged statements and actions were made pursuant to her official capacity as FNP Program Director, and Associate Professor. The Court further finds that Plaintiff did not demonstrate that her interest in the

speech outweighed the government's interest as an employer in avoiding disruption in the workplace, and did not show that her expressions were a substantial and/or motivating factor behind the adverse employment actions, as the employer has articulated valid non discriminatory reasons for terminating Alberti. Hence, Plaintiff has failed to comply with the evidentiary requirements set forth in *Díaz-Bigio,* 2011 WL 2557003, at p. 6. Consequently, it is evident that Plaintiff's alleged expressions are not protected by the First Amendment. Thus, Alberti's First Amendment claim is **DISMISSED WITH PREJUDICE.**

V. Title VII Claim

In the case of caption, Plaintiff claims that she was mistreated, harassed, and terminated as FNP Program Director and Associate Professor because she was born and raised in the United States. (**Docket #123, Third Amended Complaint p. 37-38**). Title VII makes it unlawful to discriminate against any individual, *inter alia*, due to their national origin. 42 U.S.C. § 2000e-2.[12]

Since Plaintiff has not produced any direct evidence of national origin discrimination, the Court will analyze Plaintiff's case under the three-part burden-shifting framework, also referred to as the *McDonnell Douglas* burden shifting model. *McDonnell Douglas*

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[12] Title VII and Law 100 claims **refer exclusively to the University, and specifically exclude the rest of the Co-Defendants**. (**Docket 123, Third Amended Complaint, p.p. 4-5, ¶ 3, and 9, and p.p. 37-38, ¶¶ 129-137**) **37-38, ¶¶ 129- 137**). There is no liability as to individual employee defendants under Title VII. *Fantini v. Salem State College*, 557 F.3d 22, 30-31, (1st Cir 2009).

Corp. v. Green, 411 U.S. 792, 802 (1973); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993).

Under the McDonnell Douglas framework, the plaintiff shoulders the initial burden of adducing a prima facie case of unlawful discrimination. This includes a showing that: (1) plaintiff is a member of the protected class; (2) plaintiff's employer took an adverse employment action against her; (3) plaintiff was qualified for the employment she held; (4) plaintiff's position remained open or was filled by a person whose qualifications were similar to his. *Rodríguez-Cuervos v. Wal-mart Stores, Inc.*, 181 F.3d 15, 19 (1st Cir. 1999). Establishing a prima facie case of discrimination creates a rebuttable presumption of unlawful discrimination. *St. Mary's Honor Center*, 509 U.S. at 506; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). However, Plaintiff must carry the burden throughout the entire McDonnell Douglas burden shifting procedure. *Rodríguez-Cuervo*, 181 F.3d at 19, n. 1; *Burdine*, 450 U.S. at 253.

The uncontested material facts in this case demonstrate that Plaintiff meets the prima facie initial burden. Plaintiff: (1) is a member of the protected class, she was born in the United States **(Docket #164, Exhibit 2 and; Docket #179, Exhibit 2**)[13]; (2) suffered an adverse employment action by being removed from the position of FNP Program Director and terminated from the probationary position of

[13] The Court notes that Plaintiff testified she considers herself Puerto Rican and Puerto Rican American. Also, Plaintiff's family from her mother's side is from Ponce, Puerto Rico. (**Docket #164, Exhibit 2**).

Associate Professor (**Docket #164, Exhibit 59**); (3) was qualified for the employment she held (**Docket #164, Exhibit 1 and Docket #179, Exhibit 1)**; and (4) was replaced by a person whose qualifications were similar to hers, Dr. Carmen López[14]. (**Docket #164, Exhibits 56 and 59**).

Once the Plaintiff satisfies her burden, the employer must articulate a legitimate, nondiscriminatory reason for its employment decision. However, the required burden is one of production and not of persuasion. Should the employer provide such reason, the burden shifts back to the plaintiff to proffer evidence that the articulated reason was a sham, and that she suffered the adverse employment action due to her national origin. *St. Mary's Honor Center*, 509 U.S. at 508; *Rodríguez-Cuervos*, 181 F.3d at 19 (the plaintiff must prove a "sham" reason produced by the employer, and that the employer "true reason was plaintiff's . . . national origin").

Defendants articulated that Plaintiff was terminated because, *inter alia*, she did not attend faculty meetings; was not complying with her administrative duties as a professor by refusing to present the weekly "Work Plan"; refused to sign the "Teletrabajo" contract; created a divisive environment in her classes, resulting in multiple student complaints; inappropriately refused to sign the

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[14] The Court notes that the record only shows that Alberti was replaced by Dr. Carmen López in the position of FNP Program Director. There is no evidence in the record that shows that Plaintiff was also replaced in the probationary position as Associate Professor.

research investigation of a student; accused a student of violating the HIPPA law without first following the proper channels instituted by SON; insulted students in officially addressed e-mails; harassed students; refused to meet with the administration in order to assist in problems that the FNP Program encountered while Plaintiff acted as the Program Director; refused to meet with certain administrative members, including her supervisor, merely indicating that Plaintiff did not trust them; failed to follow the proper institutional procedure in the process of evaluating her course; failed to program the clinical rotations of assigned students, and to assign their preceptors; failed to register her courses following institutional procedures correctly; and, finally did not follow established institutional procedure in requesting academic grades changes. (**Docket #164, Exhibits 21-55, 59, 64, 65, 66, 67, 68, 69 and 70**).

The Court finds that the explanations articulated by Defendants constitute legitimate non-discriminatory reasons for the adverse employment actions. The burden then shifts pursuant to the *McDonnell Douglas* procedure back to Alberti, who is required to demonstrate that the employer's reasons were but mere pretexts for national origin discrimination. *Rodríguez-Cuervos*, 181 F.3d at 19. To meet this burden, the Plaintiff must prove not only that the reasons articulated by the employer were a sham, but also that its "true reason behind the adverse action was plaintiff's . . . national origin." *Id.* at 19. Expressed in alternate fashion, in the case at bar, Alberti cannot advert summary judgment if the record is devoid of adequate direct or circumstantial evidence of showing pretext or a sham together with a showing of an action

taken by the employer was motivated by national origin discrimination.

After carefully reviewing the record the Court finds that the same is devoid of any evidence which contradicts the University's reasons behind removing Alberti from the FNP Program Director position and terminating her probationary appointment as an Associate Professor. Nowhere in Alberti's Opposing Statement of Facts (**Docket #179**), is there any supporting evidence presented by Plaintiff which may create a controversy of fact as to the non-reasons produced by the University to justify the referenced adverse employment actions. Plaintiff's evidence consists of blanket denials, speculation and conclusory allegations which are insufficient to defeat summary judgment. *Gutiérrez-Lines*, 751 F.Supp. at 334. Plaintiff falls short of providing not only the reason articulated by the employer was a "sham" or a pretext fro discrimination, but also that its true reason was Plaintiff's national origin. *Rodríguez Cuervos*, 181 F.3d at 19, citing *Shorette v. Rite Aid*, 155 F.3d 8, 12 (1st Cir. 1978).

The record has extensive documentary and testimonial evidence in support of the reasons provided by the UPR to terminate Alberti. **Docket #164, Exhibits 15, 17, 23, 24, 30, 36 and 38.** The record reflects that Plaintiff was removed because of performance issues and terminated due to performance differences related to both her administrative duties as FNP Program Director, as well as her teaching deficiencies as an Associate probationary Professor. Since Plaintiff did not fulfill the requirement of refuting the reasons, provided by the University

constituted "a sham" and also that the UPR's true reason was Plaintiff's national origin, the Court concludes that Plaintiff failed to meet her ultimate burden, under *McDonnell Douglas* that she was a victim of national origin discrimination. *Rodríguez-Cuervos*, 181 F.3d at 19.

The record reflects that Plaintiff's evidence of discrimination consists of stray remarks and conduct unrelated to the protected status under Title VII. According to her, the UPR discriminated against her because two students, Co-defendants Judyth Miranda and Iris Ramos, as well as a member of the administration Co-defendant Angélica Matos, the then Director of the Department of Graduate Studies of the SON[15], on certain occasions referred to her as "Americana" and "gringa". (**Docket #179, Exhibit 25; and Docket #163, p.p. 28-37**).

Regarding the alleged discriminatory statements, the Court is mindful that most of the remarks were uttered by students thus, significantly diminishing their probative value in this case. Moreover, these comments constitute mere "stray remarks" incapable of acting as "direct evidence" or to prove pretext in the context of the burden shifting framework.

It is hornbook law in the First Circuit that "stray remarks" do not demonstrate discriminatory animus, especially if the remark was uttered by a non-decision maker. *Santiago v. Canon USA, Inc.*, 138 F.3d 1, 6, n.8

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[15] The Court notes that the record reflects that both Miranda and Matos were born in the continental United States. (**Docket #164, Exhibits 32 and 82**).

(1st Cir. 1998); *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431 (1st Cir. 1998) (citing *Geier v. Medtronic, Inc.*, 99 F.3d 238, 241 (1st Cir. 1996)); *Valtchez v. The City of New York*, 2009 WL 2850689 (S.D.N.Y. 2009). (In a discrimination claim under national origin, a professor born in Eastern Europe claimed that students painted a negative picture of him by calling him "Russian spy" and "KGB man," wherein the Court ultimately considered said stray-remarks short of showing the threshold of national origin discrimination).

The First Circuit has reiterated and consistently rejected the probative value of stray remarks. "To be probative of discrimination, isolated comments must be contemporaneous with the discharge or casually related to the discharge decision making process." *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431 (1st Cir. 1998) (citing *Geier v. Medtronic, Inc.*, 99 F.3d 238, 241 (1st Cir. 1996)); see also *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-1439 (9th Cir. 1990) (holding that certain statements unconnected to the employment decision-making process are simply stray remarks that do not demonstrate discriminatory intent).

Moreover, the Court is convinced that in the context of this case, to call a person in Puerto Rico, who was born in the continental United States "Americana" and "gringa," falls short of constituting evidence of discrimination. Reference to protected status without reflecting bias is not evidence of discrimination. *Elam v. Regions Financial Corp.*, 601 F.3d 873, 878 (8th Cir. 2010) (a supervisor calling a pregnant employee "pregnant" and "pregnant teller" fails to be evidence of

discrimination since it is a mere reference to her protected status).

Further, Plaintiff also alleges that during a meeting ("conversatorio") between the administration and the FNP students, certain students were complaining about Alberti, while others were defending her. Alberti alleges that on one occasion, the then Dean of the SON, Sánchez allegedly raised her voice and told a student who allegedly was supporting Alberti to shut up. (**Docket #179, Exhibit 25**). After the meeting, a student claims that she saw Sánchez pointing at Alberti and telling her that there were many complaints against her[16]. (**Docket #179, Exhibit 81**).

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[16] Alberti also contends that during the first time she worked for the University in the years 2001 and 2002, certain members of the administration allegedly made fun of her Spanish and called her "gringa". Further, Alberti alleged that during that time, a fellow teacher criticized the United States in the wake of 9/11. However, the Court will not consider these alleged incidents because they are not contemporaneous to the date of the adverse action. *See Alvarado-Santos v. Dept. of Health of the Commonwealth of Puerto Rico*, 619 F.3d 126 (1st Cir. 2010); *Domínguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424 (1st Cir. 2000). Further, an individual who intends to present an action under Title VII must file a charge within three hundred (300) days after the alleged discriminatory act occurred. *Fontánez Nuñez v. Jansen Ortho LLC*, 447 F.3d 50, 55 (1st Cir. 2006). (**Docket #163, p. 28-35**). Hence, "if the incident on which the alleged violations are based occurred more than three hundred (300) days prior to the filing of the charge at the administrative agency, the claim is time-barred." *Castro Alvarez v. Delta Airlines, Inc.*, 319 F. Supp. 2d 240, 246 (D.P.R. 2004) (citing *Rivera Cordero v. Autonomous Municipality of Ponce,* 182 F. Supp.2d 221 (D.P.R. 2002).

If Plaintiff did not allege that the discrimination was one continuing action, any discrete acts of discrimination occurring

As to this proffer, the Court concludes that even though telling a student by a decision maker as to Alberti to shut-up and pointing a finger at a person may be objectionable conduct, these incidents do not reflect a discriminatory animus behind the decision to terminate Plaintiff. Further, the Court cannot overlook the fact that Sánchez was the person who recommended Alberti's recruitment during Plaintiff's second term at the University. Further, the Court notes that Plaintiff admitted that Sánchez never insulted Alberti, and that Alberti never witnessed Sánchez harassing any person who supported Plaintiff. (**Docket #164, Exhibits 80 and 81**). Since the above stated proffer constitutes all the evidence of discrimination in an attempt to offset the legitimate non-discriminatory reasons provided by the University, the Court must conclude that Plaintiff failed to meet her burden of demonstrating that the cause of her termination was "a sham" and that the "true reason" was her national origin. *Rodríguez-Cuervos*, 181 F.3d at 19.

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outside the three hundred (300) days of the date that she filed her charge with the EEOC cannot be considered. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002). In the case at bar, Plaintiff did not allege that the discrimination was one continuing action.

After considering this legal frame work, it is clear that Plaintiff is time barred from claiming that the alleged discriminatory events of her first term of employment with the University (2001 and 2002), constitute evidence of national origin discrimination for her removal as FNP Program Director and Associate Professor in 2008. Plaintiff had three hundred (300) days after the last incident occurred, but she took approximately seven (7) years to file the charge with the EEOC. Thus, said allegations of discrimination are clearly time barred.

For the aforementioned reasons the Court finds that Alberti failed to present sufficient evidence to establish that the reasons for her termination was pretext for discrimination. As a result, Plaintiff's Title VII claim is hereby **DISMISSED WITH PREJUDICE**.

VI. 42 U.S.C. § 1985(3).

Plaintiff has brought forth claims of conspiracy under 42 U.S.C. § 1985[17]. To state a claim under 1985(3) Plaintiff must show the existence of: "(1) a conspiracy, (2) conspiratorial purposes to deprive a person or class of persons, directly or indirectly, of the equal protection of the laws or equal privileges and immunities under the law, (3) an overt act in furtherance of the conspiracy, and (4) either (a) an injury to person or property, or (b) a deprivation of a constitutionally protected right or privilege." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). Thus, in order to prevail, a plaintiff must present "(1) some class based animus (usually racial) lay behind the conspirator's action, and (2) that the conspiracy was aimed at interfering with protected rights." *Burns v.*

[17] The statute in its most pertinent portion describes conspiracy as follows: "[I]f two or more persons in any State or Territory conspire … for the purpose of depriving, either directly, or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... whereby another is injured in his person or property, … the party so injured or deprived may have an action for the recovery of damages…"42 U.S.C. § 1985(3).

State Police Ass'n of Mass., 230 F.3d 8, 12 (1st Cir. 2000).[18]

This means that, *inter alia*, in order for Plaintiff to have an actionable claim under this section, she has to demonstrate that she was "deprived of a constitutionally protected right." However, the Court has already concluded that Plaintiff's constitutional rights have not been violated by the Defendants. This finding alone disposes of Plaintiff's conspiracy claim.

Moreover, Plaintiff also has the burden of demonstrating that a racial animus was the motivating factor behind the conspiracy. However, the record is devoid of any evidence which suggest that Defendants acts were motivated by Plaintiff's race. To the contrary, the only evidence of discrimination presented by Plaintiff is allegedly regarding her national origin, but not her race. Even assuming that national origin is within the confines of coverage as an actionable claim under § 1985(3) the Court has determined that the instant case does not reach the required threshold under the *McDonnell Douglas* burden shifting requirements. The Court determined that there was no evidence to support a finding that Defendants actions were motivated by her national origin. Thus, the Court

[18] The Supreme Court has found that the language requiring the intent to "deprive of equal protection or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); see also, *Kush v. Rutledge*, 460 U.S. 719 (1983); *Santana v. Calderón*, 188 F. Supp.2d 160 (D.P.R. 2002); *Vega Marrero v. Consorcio Dorado-Manati*, 552 F.Supp. 2d 157, 164 (D.P.R. 2007).

is forced to conclude that Plaintiff has failed to comply with the evidentiary burden for a 1985(3) claim. *Burns*, 230 F.3d at 12.

For the reasons set forth above, the Court finds that Alberti failed to present sufficient evidence to show that she possesses an actionable § 1985(3) claim. As a result, Plaintiff's § 1985(3) claim is hereby **DISMISSED WITH PREJUDICE**.

VII. Cause of Action Under Puerto Rico Law

In addition to the aforementioned federal statutes, Plaintiff also seeks redress pursuant to the local statutes Law 100 and Law 115.

Plaintiff has failed to raise a single actionable federal claim. Consequently, the Court will abstain from considering, via supplemental jurisdiction, any and all local law claims raised in the Third Amended Complaint. "As a general principle, the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit, well before the commencement of trial, will trigger the dismissal without prejudice of any supplemental state-law claims". *Rodríguez v. Doral Mortgage Corp.,* 57 F.3d 1168, 1177 (1st Cir. 1995).

Further, the Court specifically dismisses with prejudice, any and all claims pursuant to Law 100, because Defendants, the University and the employees or agents of a nonprofit government instrumentality, are not under the scope of Law No.100. *Huertas-Gonzalez v. University of Puerto Rico*, 520 F.Supp. 2d 304, 314 (2007). The legislative history of Law No.100 is clear that its main objective is to protect employees in the private industry from all types of discrimination. "[S]ince the U.P.R. is considered to be a non-profit

government instrumentality, Law 100 does not apply in this case, against any of the Defendants," including the arms of the state and/or individual defendants working therein. *Huertas-González,* supra*,* at 314. Consequently, Dr. Alberti's cause of action under Law 100 is hereby **DISMISSED WITH PREJUDICE**.

Conclusion

For the reasons set forth above, the Defendants' Motion for Summary Judgment, **Docket # 161**, is **GRANTED.** Plaintiff's First, Fourth and Fourteenth Amendments, 42 U.S.C. §§ 1983 and 1985, Title VII, as well as Law 100 claims, are **DISMISSED WITH PREJUDICE.** Plaintiff's Law 115 claim is **DISMISSED WITHOUT PREJUDICE.**

Judgment will be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 13th day of October, 2011.

s/Daniel R. Domínguez
DANIEL R. DOMINGUEZ
U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 08-1484 (DRD)

[Filed September 30, 2011]

DR. REBECCA ALBERTI, FNP, ND	)
	)
Plaintiff	)
	)
vs.	)
	)
UNIVERSITY OF PUERTO RICO; DR. JOSE R. CARLO IZQUIERDO; DR. SUANE E. SÁNCHEZ COLON; DR. GLORIA E. ORTIZ BLANCO; DR. ANGELICA MATOS RIOS; CARMEN T. LOPEZ RODRIGUEZ; LEYRA FIGUEROA HERNANDEZ; DR. MARIA C. DECLET BRAÑA; IRIS RAMOS; IRIS RIVERA COLON; AND JUDITH MIRANDA	)
	)
Defendants	)

JUDGMENT

For the reasons stated in the *Opinion and Order* of this date, Docket No. 214, the Defendants' *Motion for Summary Judgment*, **Docket # 161**, is **GRANTED.** Plaintiff's First, Fourth and Fourteenth Amendments, 42 U.S.C. §§ 1983 and 1985, Title VII, as well as Law 100 claims, are **DISMISSED WITH PREJUDICE.**

Plaintiff's Law 115 claim is **DISMISSED WITHOUT PREJUDICE.**

This case is now closed for all administrative and statistical purposes.

IT IS SO ORDERED, ADJUDGED AND DECREED.

In San Juan, Puerto Rico, this 30th day of September, 2011.

s/Daniel R. Dominguez
DANIEL R. DOMINGUEZ
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 08-1484 (DRD)

[Filed June 21, 2012]

DR. REBECCA ALBERTI,

Plaintiff(s),

UNIVERSITY OF PUERTO RICO, et al.,

Defendant(s).

ORDER

Pending before the Court are the following motions, to wit: (a) *Plaintiff's Motion for Reconsideration under Rule 59(e),* Docket No. 217; (b) *Opposition to Plaintiff's "Motion for Reconsideration,"* Docket No. 219; and (c) *Plaintiff's Motion for Vacatur of Judgment and for Oral Argument*, Docket No. 225. For the reasons set forth below, plaintiff's requests for reconsideration and for oral argument, are denied.

The motion for reconsideration standard

Motions for reconsideration are generally considered either under Rules 59 or 60 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), depending on the time such motion is served. *Pérez-Pérez v. Popular Leasing Rental, Inc.*, 993 F.2d 281, 284 (1st Cir. 1993). It is settled that "[a] motion for reconsideration 'does

not provide a vehicle for a party to undo its own procedural failures and it certainly does not allow a party to introduce new evidence **or advance arguments that could or should have been presented to the district court prior to the judgment**.'" (Emphasis ours). *Marks 3-Zet-Ernst Marks GmBh & Co. KG v. Presstek, Inc.*, 455 F.3d 7, 15-16 (1st Cir. 2006). Thus, a motion for reconsideration cannot be used as a vehicle to re-litigate matters already litigated and decided by the Court. *Standard Química de Venezuela v. Central Hispano International, Inc.*, 189 F.R.D.202, n.4 (D.P.R. 1999). In sum, "[a] party cannot use a Rule 59(e) motion to rehash arguments previously rejected or to raise ones that 'could, and should, have been made before judgment issued.'" *See Soto-Padró v. Public Buildings Authority, et al.*, 675 F.3d 1, *9 (1st Cir.2012) (citations omitted). The Court should also renew and reconsider whether it "patently misunderstood a party . . . or has made an error not of reasoning by apprehension." *Ruiz Rivera v. Pfizer Pharmaceuticals, LLC*, 521 F.3d 76, 82 (1st Cir.2008) (quoting *Sandoval Díaz v. Sandoval Orozco*, No. 01-1022, 2005 WL 1501672 at *2 (D.P.R. June 24, 2005) (quoting *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir.1990)). *See also Mulero-Abreu, et al. v. Puerto Rico Police Department, et al.*, 675 F.3d 88, 94-95 (1st Cir.2012), authorizing reconsideration in cases of "manifest error of law."

The Federal Rules of Civil Procedure do not specifically provide for the filing of motions for reconsideration. *Sierra Club v. Tri-State Generation and Transmission Assoc., Inc.*, 173 F.R.D 275, 287 (D.C. Col. 1997); *Hatfield v. Board of County Comm'rs*

for Converse County, 52 F.3d 858, 861 (10th Cir. 1995). Notwithstanding, any motion seeking the reconsideration of a judgment or order is considered as a motion to alter or amend a judgment under Fed.R.Civ.P. 59(e), if it seeks to change the order or judgment issued. *Id.* **Hence, "motions for reconsideration are 'extraordinarily remedies which should be used sparingly.'"** *Trabal Hernandez v. Sealand Services, Inc.*, 230 F.Supp.2d 258 (D.P.R.2002); *Nat'l Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir.1990). "**In practice, because of the narrow purposes for which they are intended, Rule 59(e) motions typically are denied**." (Emphasis ours). 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 2810.1 (2d ed.) (2012).

Legal Analysis

A. ***Plaintiff's Objections***.

The core of Dr. Rebecca Alberti's (collectively "plaintiff" or "Ms. Alberti") reconsideration is her disagreement with the Court's ruling granting summary judgment for the defendants. *See Amended Opinion and Order Nunc Pro Tunc*, Docket No. 216, and *Judgment*, Docket No. 215. The Court notes that plaintiff's reconsideration request is cluttered with general conclusory allegations and accusations, which lack specificity as to anything, particularly as to the lack of "apprehension" and/or "manifest error of law" of the Court. Plaintiff specifically fails to specify the fact(s) and/or conclusion(s) of law that constitutes a manifest error of law. For example:

a. Plaintiff alleges that after reviewing the Court's *Amended Opinion and Order*, Docket No. 216, "it is evident that the Court engaged in a manifest abuse of discretion and errors of laws, patently misunderstood the plaintiff and made errors of apprehension." *See* Docket No. 217, page 1.

b. Plaintiff alleges that "[m]ore than three (3) years after filing this case and Plaintiff spending approximately $100,000 in litigation related costs, this Court granted defendant's [sic] motion for summary judgment making findings that are in conflict with the record and unfairly punished the Plaintiff for technical problems were [sic] out of her control." *See* Docket No. 217, page 2.

c. "The Court also punished the Plaintiff for failure to produce translated documents after denying her a motion for extension of time to file them." *See* Docket No. 217, page 2. "In contrast, the Court granted the defendants multiple extensions to file their translated documents."

Id.[1]

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[1] The Court makes reference to *Note* 1, of the defendants' *Opposition to Plaintiff's "Motion for Reconsideration,"* Docket No. 219, page 5, which reads as follows:

> It is important to note that in the Amended Opinion and Order the Honorable Court indicated that it would not consider Plaintiff's Memorandum because it was untimely. However, the Court clarified that "even if it would have considered Plaintiff's Memorandum, its decision to dismiss this case would not have changed, because Plaintiff has not met the burden of producing specific facts sufficient to

d. "Another factor that greatly concerns the Plaintiff is the O & O's fractioning and compartmentalizing the uncontested facts of the case, instead of considering the totality of them *in toto*." *Id.*

e. "Of greater concern, however, is that the Court's O & O reasoning has created the impression that preventing the case from becoming "reportable" was more important than considering the merits of the case by going to trial." *Id.*

f. "The record shows signs that the Court has decided against celebrating a trial prior to adjudicating defendant's the motion [sic] for summary judgment when, for example, denied Plaintiff's motion for an extension of time to file her translated documents, and when the judgment was entered precisely of [sic] the date the case could become "reportable." *Id.*

g. Plaintiff further alleges that he had disagreed as to the content of the *Minutes* of July 7, 2011, Docket No. 181, simply because "it was impossible for the Plaintiff to comply with this alleged next day midday deadline of conventionally filing the exhibits, and the undersigned attorney so informed the Court that night." *See* Docket No. 217, page 3. On this matter, plaintiff allege that *Plaintiff's Motion for Amendment / Correction of the Minutes of July 7, 2011*, Docket No. 185, was never "adjudicated" by the Court. But *see* defendants' *Motion to Strike*, Docket No. 186; *Order* of July 12, 2011, Docket No. 187; defendants' *Motion in Opposition to Plaintiff's Motion for*

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defeat the swing of the summary judgment scythe." (Docket 216, p. 2).

Amendment / Correction of the Minutes of July 7, 2011, Docket No. 188; *Minutes* of August 9, 2011, Docket No. 200; *Plaintiff's Urgent Concerns Regarding the Court's August 9, 2011 Telephone Conference and for Reconsideration*, Docket No. 201, and *Order* of August 12, 2011, Docket No. 202.

h. Plaintiff disagreed with the Court's finding related to plaintiff's failure to comply with the Anti-Ferret rule, as the "**majority** of the exhibits were identified by label, exhibit number and/or a description by contexts and/or date and the Index filed on July 21, 2001 [sic] (D.E. # 193-1)." (Emphasis ours). *Id.* "The Court's finding that Plaintiff failed to provide particularized citations to the record is in direct conflict with the record, and constitutes reversible error." *Id.*

The Court makes reference to two specific motions wherein the plaintiff clearly violated the Anti-Ferret Rule by not referring to the **specific portions [references] of the record**. The exhibits filed with *Plaintiff's Opposing Statement of Material Facts*, Docket No. 179 were filed in the Spanish language, and the corresponding certified English translations were filed on November 2 and 23, 2011, *see* Docket entries No. 218, 222, and the *Order* of November 23, 2011, Docket No. 224, wherein plaintiff's motions filing the certified English translations were stricken from record, as being almost two months tardy. Plaintiff filed the certified English translations on November 2 and 23, 2011, that is, more than four months after the filing of the exhibits in the Spanish language on July 6 and 8, 2011, and almost two months after the Court's *Opinion and Order*. *See* Docket entries No. 179 and 184.

- *Plaintiff's Opposing Statement of Material Facts*, Docket No. 179.[2]

  SUMF No. 5 at pages 7-8 (the exhibit number was left in blank, *i.e.*, "exhibit ____.")

  SUMF No. 6 at page 8 (the exhibit number was left in blank, *i.e.*, "exhibit ____").

  SUMF No. 7 at pages 9-11 ("exhibit ____," as well as multiple exhibits references were left in blank).

  SUMF No. 10 at page 12 ("see pages _____, lines _____").

  SUMF No. 12 at pages 14-15 ("show cause hearing of _____, ... dated _____").

  SUMF No. 13 at page 16 ("HRSA proposal of _____, page _____, and _____").

  SUMF No. 15 at pages 17-18 ("exhibit _____, ... pages 9-12. _____").

  SUMF No. 16 at page 19 ("exhibit _____, pages _____. At page ____").

  SUMF No. 17 at pages 20-22 ("exhibit _____," as well as multiple (8 times) exhibits references were left in blank).

  SUMF No. 18 at page 23 ("defendants' statements numbers 8, ____, ____").

[2] Statement of Uncontested Material Facts ("SUMF").

SUMF No. 19 at page 24 ("deposition dated ____, pages ____, show cause hearing dated _____, pages _____").

SUMF No. 20 at page 25 ("statement number ____ and ____ ... exhibit _____").

SUMF No. 21 at page 26 ("e-mail communication dated ____").

SUMF No. 22 at page 26 ("page _____, exhibit _____").

SUMF No. 23 at page 27 ("page _____, identified as exhibit _____").

SUMF No. 26 at page 36 ("See exhibit _____").

- *Opposition to Plaintiff's "Opposing Statement of Material Facts,"* as being unsupported by the record and/or a record reference, *see* Docket No. 194.

¶ 4 at pages 11-14.

¶ 5 at pages 14-15.

¶ 6 at page 15.

¶ 8 at page 16.

¶ 9 at pages 16-17.

¶ 10 at pages 17.

¶ 12 at pages 18-19.

¶ 13 at page 19.

¶ 15 at page 19.

¶ 16 at pages 19-20.

It is patently clear that plaintiff's counsel indeed disagrees with the Court's ruling in all or almost every finding of fact and conclusion of law made by the Court. However, the answer is simple, the Court record illustrated above speaks by itself.

- The record shows that the Court held three (3) hearings to show cause, Docket entries No. 35, 36, 37, which were interrupted by *Plaintiff's Urgent Motion for Conversion of Show Cause Hearing Scheduled for November 3, 2008 to a Status Conference*, Docket No. 48. Thereafter, the Court held thirteen (13) conferences in Chambers, *see* Docket entries No. 50, 55, 57, 81, 83, 102, 108, 113, 120, 154, 181, 200, 210.

- The Court further notes that the parties filed a total of twenty-seven (27) motions requesting extension of time *albeit* for several reasons, two (2) were joint motions; ten (10) motions filed by the plaintiff, and fifteen (15) motions filed by the defendants. For a total of twenty-seven (27) motions requesting extensions of time on several grounds followed by twenty-seven (27) orders entered. However, the Court wishes to clarify that amongst the numerous motions for extension of time filed by the parties, the defendants filed three (3) motions requesting time to file the certified English translations of voluminous official records of the University of Puerto Rico, *see* Docket entries No. 38, 42, 189, and *Orders*, Docket entries No. 39, 43, 190. But *see also* the defendants' motions submitting the certified English translations, Docket No. 44 (47 pages of translated documents); Docket No. 46

(25 pages of translated documents); and, Docket No. 197 (465 pages of translated documents).

- Plaintiff, however, filed two motions requesting extensions of time to file certified translations, *see* Docket No. 129, and *Order*, Docket No. 131, and *Motion for Leave to File Exhibits in Spanish Pending Translation to English Pursuant to Loc. R. 10(b)*, wherein plaintiff requested until August 29, 2011 to file the certified translations, **knowing that trial was set for August 15, 2011**, and the defendants' motion for summary judgment was pending before the Court, due to plaintiff's failure in submitting the translated documents, *see* Docket No. 195, and *Order*, Docket No. 196. *See also Minutes* of July 7, 2011, Docket No. 181. (Emphasis ours).

- The Court is cognizant that, on July 6, 2011, Ms. Alberti filed *Plaintiff's Opposing Statement of Material Facts*, Docket No. 179, which includes 106 exhibits, most of them in the Spanish language. Plaintiff failed to file a motion requesting leave to file exhibits in the Spanish language, as well as an extension of time to file the certified English translations, as required by Local Civil Rules 5(g) and 43.

- On July 7, 2011, the Court held a Pretrial/Settlement Conference, *see Minutes* of July 7, 2011, Docket No. 181. The *Minutes* reflect that plaintiff had informed the Court that "[she] still have [sic] (has) 180 exhibits and the motion opposing the defendants' motion for summary judgment, which he has been unable to file electronically due to the volume of the

documents." Docket No. 181. "The Court inquired whether some of the documents pending to be filed were part of the record." *Id.* "If so, then counsel should make a cross-reference to those exhibits, instead of filing the same documents again." *Id.* The Court further ordered "[t]he Clerk of the Court [to] accept a copy of plaintiff's 180 exhibits in hard copy, as it appears that plaintiff's counsel is having technical difficulties filing them electronically." *Id.* "Plaintiff is authorized to file the exhibits **only**." *Id.* at page 2 (emphasis on the original). The Court further ordered the defendants to review the 180 exhibits to be filed by the plaintiff, and inform the Court "whether any of the exhibits amend in any way plaintiff's opposition to the statement of uncontested facts." *Id.* "The Court specifically admonished plaintiff's counsel that no amendments will be allowed at this stage of the proceedings, and no further extensions of time will be allowed to file any other pleading and/or the exhibits." *Id.* The *Minutes* further reflect that the Court "notes that plaintiff has failed to comply with the filing dates, hours, and deadlines ordered by the Court." *Id.* "Moreover, the record shows that the pleadings filed by plaintiff exceed the page limitation allowed by the Court, and the same have been filed without prior leave of Court." *Id.* Lastly, the Court reminded the parties that the jury trial was set for August 15, 2011. Docket No. 181.

- The Court record clearly shows that plaintiff's certified English translations were filed almost

two months after the *Judgment* was entered, that is, on November 23, 2011, and after plaintiff's motion for reconsideration was filed. *See* Docket entries No. 215, 217, 218, 220, 222, 224.[3]

- Lastly, the Court notes that the exhibits filed by plaintiff on July 8, 2011, were in the Spanish language, *see* Docket entries No. 184, 195, and the *Order* of July 28, 2011, Docket No. 196. Hence, the exhibits filed by plaintiff barely three (3) weeks prior to the scheduled trial, and after almost three (3) years of litigation, were filed in Spanish. Indeed, the Court and the defendants had to wait until November 2, 2011, to receive the first set of the translated exhibits, and until November 23, 2011 when the second set for

[3] The Court refers to plaintiff's language in *Plaintiff's First Submission of Certified Translations of Her Exhibits*, Docket No. 218:

> On the 28th of octuber [sic], 2011, Plaintiff filed a Motion for Reconsideration (D.E. # 217). In this motion, plaintiff moves for, *inter alia*, leave to file the translations for her exhibits that establish contested facts that would defeat defendant's [sic] motion for summary judgment.
>
> **After spending approximately $20,000.00 in these translations**, and in excess of caution because of time constrains and the probability that this case will be appealed, Plaintiff will comply with her legal duty and file for the record all of the translated exhibits that support her statement that creates issued of material facts.
>
> The filing of these translated exhibits will be done in groups of ten (10) due to the megabytes limitations of the ECF system. (Emphasis ours).

translated exhibits were filed, *see* Docket entries No. 218 and 222. Thus, the Court considered plaintiff's "effort too little and too late." *See Order* of November 23, 2011, Docket No. 224.

i. Plaintiff further alleges that "[t]he Court failed to take into consideration an event that was subject to judicial notice: that Plaintiff had been dismissed after she filed the case at bar." *See* Docket No. 217, page 6. The Court record shows that plaintiff filed an *Amended Complaint* on July 15, 2008, Docket No. 8, page 3, wherein plaintiff made reference to the dismissal letter of June 12, 2008 sent to her by the Chancellor José Carlo-Izquierdo. The record also shows that the show cause hearings were held on August 19, 21-22, 2008, *see* Docket entries No. 35, 36, 37. Hence, the Court has been premised since the early stages of the instant case as to the fact that plaintiff was terminated after the filing of this proceeding. Consequently, plaintiff's argument as to the Court's alleged failure to consider the fact that Ms. Alberti was terminated after the filing of the instant case is misleading at best and it is devoid of veracity, and certainly does not constitute new evidence under Fed.R.Civ.P. 59(e). Again, the Court record is clear and speaks by itself.

j. As to the analysis made by the Court of the defendants' motion for summary judgment, plaintiff allege that "the Court engaged in reversible error by regarding Defendant's [sic] statements as uncontested because Plaintiff complied with L.Cv.R. 56(c)." *See* Docket No. 217, page 4. Plaintiff's conclusory statement lacks specificity as to what exactly constitutes reversible error.

k. Plaintiff further alleges that, "[o]n July 27, 2011, plaintiff filed a motion for extension of time to file the translated exhibits. (D.E. # 195)." *Id.* However, the Court record shows otherwise, *see Motion for Leave to File Exhibits in Spanish Pending Translation to English Pursuant Loc. R. 10(b)*, Docket No. 195. What plaintiff was indeed requesting was another extension of time until August 29, 2011 to file the English translations of the additional exhibits that were filed on July 8, 2011. The Court record shows that counsel knew since at least May 3, 2011 that the jury trial was set for August 15-September 9, 2011, *see Minutes* of May 3, 2011, Docket No. 154. Hence, plaintiff's request for an extension of time until August 29, 2011 to file certified English translations is tardy, not to mention ludicrous, and "too little and too late." *See Rodríguez v. Municipality of San Juan, et al.*, 659 F.3d 168, 175 (1st Cir.2011); *Dávila v. Corporación de Puerto Rico para la Difusión Pública*, 498 F.3d 9, 12-14 ("Because the untranslated documents had no potential to affect the disposition of the case at the summary judgment stage, we conclude that the mere presence of the of the untranslated documents in the district court record cannot support a claim of reversible error." (Citation omitted)).

l. Plaintiff argues that "there is ample evidence showing circumstancial [sic] evidence of discriminatory national origin *animus*." *See* Docket No. 217, page 5. "Trivializing as 'stray remarks' the uncontested event that student defendants referred to Plaintiff Alberti as 'gringa' and 'americana' during a student meeting presided by Dean Sanchez is tantamount to labeling the use of the pejorative word "nigger" in a racial discrimination case filed by an afro american plaintiff."

Id. Moreover, plaintiff also alleges that in her *Memorandum of Law in Opposition to Defendant's* [sic] *Motion for Summary Judgment*, Docket No. 191, plaintiff "shows the existence of a common law conspiracy," and the "reasoning of the O & O reflects failure to consider the totality of the circumstances, precisely, because the Court discarded and did not consider Plaintiff's evidence, documents and sworn statements that contested defendants statement of facts." *See* Docket No. 217, page 6.

m. Plaintiff claims that the Court also failed to take into consideration that plaintiff "had been dismissed after she filed the case at bar." *Id.*

n. Plaintiff also alleges that "[t]he dismissal of Plaintiff's of [sic] her First Amendment claim is extremely troubling because the O & O's contradictory logic." *Id.* "At one time, the Court argues that the Plaintiff has no retaliatory cause of action because her complaints and actions against students Iris Ramos, et al were made during the course of her academic duties and responsibilities, and then, argues that she is not entitled to the academic freedom exception of *Garcetti* because she did not engage in actions protected by academic freedom." *See* Docket No. 217, pages 6-7.

o. "Also, the fact is that Dean Suane Sanchez's condoned defendant students use of the pejorative words 'gringa' and 'americana' when she had a duty of stopping and dissasociating [sic] herself from these statements." *See* Docket No. 217, page 7. "Her failure to do so made those statements hers, considering that they were made during the course of the conspiracy." *Id.*

The Court finds that plaintiff's arguments are merely conclusory allegations, which fail to meet the test of Fed.R.Civ.P. 59(e), that is, the Court's abuse of discretion; newly discovered evidence; and, a manifest error of law. Furthermore, the Court also finds that plaintiff's arguments are not new, and constitute a mere rehashing of the same arguments made by plaintiff throughout the course of this proceeding, which have been ruled upon by the Court, and plaintiff simply refuse to accept. The Court invites the plaintiff to review the orders entered by the Court in the thirteen (13) *Minutes* held during the course of this proceeding, *see* Docket entries No. 50, 55, 57, 81, 83, 102, 108, 113, 120, 154, 181, 200, 210, as well as all the separate orders entered in the instant case regarding the First and Eleventh Amendments issues; discovery issues, amongst others.

Plaintiff also questions the Court's finding regarding the "pejorative words of gringa and americana" as stray remarks, and the Court's determination to dismiss the allegation of the common law conspiracy. As to plaintiff's arguments regarding the use of "pejorative words of gringa and americana," the Court suggests the reading of *Morales-Cruz v. University of Puerto Rico, et al.*, 676 F.3d at 225-226. In *Morales-Cruz*, the Court held that "Title VII does not prohibit ... simple teasing, offhand comments, and isolated incidents (unless extremely serious)." 676 F.3d at 225-226, citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ... "*see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (noting that Title VII requires courts 'to separate significant from trivial harms')." 676 F.3d at 226. The Court reiterates that, in the instant case, the remarks allegedly made to

Ms. Alberti by students were isolated and stray remarks, none decision makers, as opposed to a consistent pattern by the defendants with the intent to cause harm to the plaintiff.[4] The record is devoid of evidence showing otherwise.

B. ***Plaintiff's "New" Argument***.

It is well settled that "[a] party cannot use a Rule 59(e) motion to rehash arguments previously rejected **or to raise ones that 'could, and should, have been made before judgment issued**.'" (Emphasis ours). *See Soto-Padró v. Public Buildings Authority, et al.*, 675 F.3d at *9 (citations omitted). **Nor "a vehicle for a party to undo its procedural failures** ...." (Emphasis ours). *Marks 3-Zet-Ernst Marks GmBh & Co. KG v. Presstek, Inc.*, 455 F.3d at 15-16. "[N]or to repeat old arguments previously considered and rejected." *Trabal Hernández*, 230 F.Supp.2d at 259.

In the instant case, plaintiff is now raising for the first time a violation under Title VII for hostile work environment, *see* Docket No. 217, page 6. The Court has reviewed the four (4) complaints filed by plaintiff. The Court found that the alleged violation for hostile work environment was not included in the *Complaint* or any of the three (3) amended complaints, or constituted merely conclusory allegations without a factual skeleton to buttress the argument, *see* Docket entries No. 1, 8, 56, 123. Hence, plaintiff is simply

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[4] Generally, the record shows that plaintiff Alberti was never told directly that she was "too American," "gringa," or "Americana." The references made by plaintiff Alberti are hearsay or personal conclusions reached by plaintiff based on comments and/or opinions of third parties.

barred from raising this new argument after a *Judgment* has been entered. Plaintiff's new argument is completely out of bounds, and it is impermissible at this stage of the proceedings. The argument merely constitutes just another desperate effort by plaintiff to "amend" the complaint after *Judgment* has been entered. Plaintiff's effort, however, is too late, and procedurally unacceptable. The Court briefly explains.

The Court has reviewed all the pleadings and supporting documents included in the record. There is simply not one *scintilla* of supporting allegation, other than purely conclusory in nature, in the record that shows that plaintiff has any intention of pursuing a claim for hostile work environment under Title VII, at any stage of the proceedings. In her motion for reconsideration, plaintiff Alberti tried to introduce a new cause of action, as an alleged violation under Title VII for "hostile work environment," as a last intent to grasp the last straw. However, plaintiff's general use of the word "harass" and/or "harassment" does not automatically translate a discriminatory claim for national origin into a claim for hostile work environment. The record clearly shows otherwise. Again, the allegations are purely conclusory in nature. *See Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

In the *Complaint* and the *Amended Complaint*, Docket entries No. 1 and 8, plaintiff did not use the word "harass" or made any reference to any type of harassment due to a hostile work environment.

In the *Second Amended Complaint*, Docket No. 56, plaintiff alleges: "Defendants' discriminatory behavior was part of a conspiracy, custom, pattern and practice of unlawful harassment and discrimination of the

Plaintiff born and raised in the continental United States." *See* Docket No. 56, ¶ 135, page 37. Once again, plaintiff's allegations are purely conclusory. At the end of the *Second Amended Complaint*, plaintiff pled: "Enjoin Defendants, their officers, agents, employees and anyone acting in concert with them, from discriminating, harassing and retaliating against Plaintiff." *See* Docket No. 56, page 39. Plaintiff attached to the *Second Amended Complaint* a copy of the unsigned and undated Charge of Discrimination together with a letter of September 11, 2008 from the U.S. Equal Employment Opportunity Commission, San Juan Local Office, wherein plaintiff clearly based her discrimination claim on "national origin" and "retaliation." *See* Docket No. 56-2. Plaintiff alleges that, "[d]uring my tenure at Respondent's I was subjected to **discriminatory comments and conduct based on my national origin (U.S.A.-mainland)** and because I was perceived as "**too American**" in my personal conduct and management style." *Id.* "For this reason a group of employees (professors and administrative staff) harassed me and conducted a campaign against me to discredit me as a professional, and which resulted in the termination from my three positions." *Id.* "I believe **I was discriminated against because my national origin, in violation of Title VII** of the Civil Rights Act of 1964, as amended." *Id.* (Emphasis ours). Again, a purely conclusory pattern of facts. The EEOC issued the Notice of Right to Sue within 90 Days on November 19, 2008. *See* Docket No. 56-3.

In the *Third Amended Complaint*, Docket No. 123, plaintiff alleges: "Defendant U.P.R. discriminatory behavior was part of a conspiracy, custom, pattern and practice of unlawful harassment and discrimination of

the Plaintiff born and raised in the continental United Staes [sic]." *See* Docket No. 123, ¶ 135, page 38. In that same document, in the prayer for relief, plaintiff pled: "Enjoin Defendants, their officers, agents, employees and anyone acting in concert with them, from discriminating, harassing and retaliating against Plaintiff." *See* Docket No. 123, page 39.

The record also reflects that during the show cause hearings, when plaintiff was asked what brought her to Puerto Rico, Ms. Alberti answered: "Well, my family background, my mother was born in Ponce, Puerto Rico, so I have a – I also consider myself Puerto Rican, I consider myself Puerto Rican American." *See* Transcript of Order to Show Cause Hearing of August 19, 2008, Docket No. 164-1, page 26.

At this point, the Court reminds counsel that plaintiff was originally hired by the defendant from August 2001 to December 2002, when she resigned voluntarily. *See* Transcript of Order to Show Cause Hearing of August 19, 2008, Docket No. 164-1, pages 34-35. However, when plaintiff was asked as to her first employment with the U.P.R., plaintiff answered: "Well, at the time, I was also nine months pregnant, eight, nine months pregnant, I was pretty close to delivering, I knew that the new dean was going to be Suane Sanchez, and I knew they didn't like me and they were going to get rid of me, so I resigned. I sent a letter of resignation."[5] *Id*. Hence, when plaintiff

[5] However, the record shows otherwise. On December 9, 2002, Chancellor José R. Carlo-Izquierdo wrote a letter to plaintiff Alberti informing her the cancellation of her appointment as Director of the Family Nurse Practitioner Proposal Program and

accepted to work again with the defendant in the year 2005, plaintiff had a purely subjective conclusion as to her environment. She claims not being wanted but her letter of termination revealed otherwise, *see Infra n.*5, when she "resigned." In sum, plaintiff Alberti accepted her new job offer in the year 2005 well aware that her subjective feelings were as to what she concluded her environment was.

At the deposition of plaintiff Alberti taken on May 25, 2010, Ms. Alberti was asked:

> Q. The first time you ever witnessed a comment that reflected national origin discrimination was when?
>
> A. Well, not that I was . . ., okay, there are some where I was witness to it, but there were some that before I even met them, before I even got there, I heard from them, from Dra. Rosa and from Crouch, that they were saying, you know, that they didn't want me there. They didn't want me there because I was American.
>
> . . .
>
> Q. Okay, so Dr. Suane Sánchez made comments in front of Evelyn Crouch which reflected

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Project, a trust position, due to the fact that "[t]he academic proposal for that project has not been approved by the appropriate academic forums and the funds assigned by HRSA have been withdrawn." *See* Docket No. 164-6, and the certified English translation at Docket No. 197-2. Plaintiff never proved that the alluded economic business reasons were a sham.

national origin discrimination against you; is that your testimony?

A. Yes.

Q. And that was before you first worked for the University of Puerto Rico; correct?

A. Yes, they hadn't even met me yet.

Q. They hadn't even met you yet?

A. And they didn't want me.

Q. And they didn't want you?

A. Uh-huh.

Q. And who else, aside from Dr. Suane Sánchez, made comments reflecting national origin discrimination?

A. At this time, that I could recall, that is it right now that [sic] I can recall. . . .

Q. So when Gladys Vélez told you, in private, that you're a "gringa" and "americana", and you don't understand how things should be, what did you do?

A. I just ignored her and controlled myself, like I was doing since I got there, but obviously, that was part of the reason why I didn't want to go back the second time and they had to convince me; when Suane said "that's not going to happen again, everyone's going to treat you differently", you know, "things are not going to happen like they did the first time".

See Docket No. 164-2, Transcript of plaintiff Alberti's Deposition taken on May 25, 2010, pages 6, 7, 104, 119.

At the deposition of June 18, 2010, plaintiff Alberti was asked:

Q. And when you say that you met the qualifications, but Assistant Dean Suane Sánchez didn't want you there because you were American, how did you arrive to this conclusion specifically?

A. Dr. Crouch and Dr. María Rosa told me.

Q. Okay. So you arrived at this conclusion because two other people told you?

A. Yes.

. . .

Q. So if I understand you correctly, it wasn't . . .

A. I don't think she wanted me there because I was American.

Q. Okay, and that's what we want to get to the bottom of this.

A. And from the comments that I had heard from Dr. Crouch and Dr. Rosa and from her; she just didn't treat me, in general, the same way she would treat other people.

Q. But did she ever insult you?

A. No, no, just non verbal.

Q. Non verbal?

A. Non verbal.

See Docket No. 164-18, Transcript of plaintiff Alberti's Deposition taken on June 18, 2010, pages 21, 22, 25.

See also the following testimony by plaintiff Alberti:

Q. ... Now, in this Item 8 of Exhibit 3, you state that López begins having meetings with Dr. Matos and other SON administrators plotting how to get Dr. Alberti to resign. How do you know that this happened?

A. Well, my secretary communicated with other secretaries there and they were saying that Carmen López was meeting with Angélica Matos. She was not coming to Belaval to present herself to work. She would only go to give her class and that's it. And she was meeting with Angélica Matos.

Q. Were you present in these meetings?

A. No, I was not. I was not made aware of them at all.

Q. So you were not there, so how do you know then what was going on in those meetings?

A. Well, by the administrative harassment of what I believe that they were doing was that they were trying to create an administrative record or documentation claiming, I believe it untrue, but they're trying to claim basically that [sic] was an incompetent director and an incompetent professor and incompetent person so that they could justify then having me fired.

Q. But the fact is that you were not in those meetings?

A. I was not.

. . .

Q. So, this description of American community is a description that you're making; she just said "Palmas del Mar" or she said "Palmas del Mar, an American community"?

A. I added the fact, you know, she said "lives in Palmas del Mar", and then "is married to a doctor". That's what she said. The "American community is what I ...

Q. "American community" was an addition that you included?

A. Yeah, yeah.

Q. You didn't hear that comment coming from her?

A. No, no, no, no.

See Docket No. 164-18, Transcript of plaintiff Alberti's Deposition taken on June 18, 2010, pages 45, 46, 52.

In *Ayala-Sepúlveda v. Mun. of San Germán*, 671 F.3d 24, 30-31 (1st Cir.2012), Torruella, J., the plaintiff claimed that "the 'unlawful employment practice' here was the creation of a hostile work environment." The Court held:

> When determining whether a work environment is hostile, the court considers "'all the circumstances,' included 'the frequency of the

> discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *National R.R. Passenger Corp. v. Morgan (AMTRAK)*, 536 U.S. 101, 116 (2002) (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993)). None of these factors is individually determinative of the inquiry. *Bhatti v. Trs. of Boston Univ.*, 659 F.3d 64, 73-74 (1st Cir.2011).
>
> Looking at "all the circumstances," we agree with the district court that the discriminatory acts alleged did not rise to the level of a hostile work environment. While Ayala [plaintiff] claims that he was ridiculed by his co-workers at OMME, he cites to no evidence regarding the severity or pervasiveness of the ridicule. . . .

In the instant case, the record shows that four (4) complaints were filed, and that all of them are devoid of any specific violation under Title VII for hostile work environment. The record, however, is full of hearsay references made by plaintiff Alberti during her testimony, such as, self-serving conclusory statements made by plaintiff, which are based on hearsay information attributed to Ms. Alberti through third parties. There is not one single discriminatory act that may be construed to infer that the claims reached the level of a hostile work environment. It appears that plaintiff Alberti reached to her own conclusions based on what third parties told her, hence, the plaintiff has failed to show to the Court that indeed the alleged discriminatory conduct based on national origin

reached a level pervasive enough of a hostile work environment. It is just not in the record before the Court.

Furthermore, plaintiff Alberti accepted to work for the defendant in the year 2001 knowing that she subjectively perceived that "they didn't want me." *See* Docket No. 164-2, Transcript of plaintiff Alberti's Deposition taken on May 25, 2010, page104. But Ms. Alberti never attempted to show that defendants' economic reasons constituted a sham. *See Infra n*.5. Notwithstanding, plaintiff Alberti returned to work for the defendant a second time around again with many subjective circumstances of the work environment, ignoring the valid business reasons provided to her.

The Court further notes that plaintiff Alberti holds a doctorate degree, hence, it is reasonable to conclude that she accepted her new employment contract after a careful negotiation and thorough reading of the contract. Thus, it is also reasonable to conclude that plaintiff must have understood perfectly that her employment was on a probationary status at the bare minimum for the five years required under the administrative rules and regulations of the University of Puerto Rico. *See* Section 46.4.5 of the Rules and Regulations of the University of Puerto Rico, Docket No. 197-1, pages 9-10.[6] *See also the Amended Opinion*

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[6] Section 46.4.5 provides:

> The administrative board, at the proposal of the Chancellor with the approval of the University Chancellor may grant tenure after a probationary period of less that five (5) years, or without the probationary period requirement, to distinguished professors that are recruited

and Order, Docket No. 216, and the discussion on pages 14-31. Lastly, when an employee is classified under a probationary status, the Chancellor may terminate the probationary appointments at any time without granting tenure. *See* Section 46.6 of the Rules and Regulations of the University of Puerto Rico, Docket No. 197-1, page 10.[7] In the instant case, the record shows that plaintiff Alberti's probationary appointment was terminated on June 12, 2008, based on "unsatisfactory evaluation[s] during the probationary appointment period," and the recommendation by the Dean of the School of Nursing. *See* Letter of June 12, 2008 by Chancellor José R. Carlo-Izquierdo, MD, addressed to Dr. Rebeca Alberti,

from recognized universities where they already have tenure. Likewise, it may grant tenure after a probationary period of less than five (5) years to: (1) persons with exceptional merits who have distinguished themselves in the practice of their profession; providing, however, that in these cases a probationary period of at least one (1) year will be required; and (2) institution personnel that has performed satisfactorily during, at least four (4) years of service in some of the teaching categories listed in Article 41, and serves in a satisfactory manner during at least one (1) year in a teaching category other than the one in which he or she seeks to get tenure.

[7] Section 46.4 provides:

> The Chancellor, or the President when the personnel is under his or her administrative jurisdiction, may terminate a probationary appointment without granting tenure when so justified, according to the evaluation or evaluations performed, notifying the affected person in writing.

Docket No.15-2, Docket No. 164-41, and the certified English translation at Docket No. 197-23.

Plaintiff has not been able to reach the threshold other than by hearsay statements, conjectures and/or conclusory statements to prove that plaintiff's first resignation was not motivated by the fact that the program that Ms. Alberti was assigned to work was terminated, as "the funds assigned by HRSA have been withdrawn," and the proposal was not approved by the corresponding academic forums of the University of Puerto Rico. *See Infra n.*5. Plaintiff also failed to meet the threshold on her termination on June 12, 2008 for "unsatisfactory [performance] evaluation during the probationary appointment period,"[8] other than plaintiff's unsupported hearsay, conclusory and self-serving statements as to the alleged discrimination for national origin. There is not one single reference in the record, developed or undeveloped by plaintiff, as to the alleged Title VII violation for hostile work environment and/or that her termination was due to a sham or pretext. Plaintiff opted instead not to contest her

[8] *See* Docket No. 197-23, the Letter of June 12, 2008 sent by the Chancellor José R. Carlo- Izquierdo, MD, to plaintiff Alberti, "Re: Termination of Probationary Appointment." The Court further notes, that plaintiff Alberti was terminated in the year 2008, hence, she had not yet complied with the five-year probationary period. Moreover, the Rules and Regulations of the University of Puerto Rico are clear and unambiguous: (a) the fact that the employee has complied with the five-year probationary period does not translate into a property right to acquired a permanent status; and (b) while in the probationary period, the Chancellor "may terminate a probationary appointment without granting tenure when so justified, according to the evaluation or evaluations performed." *See* Section 46.6 cited above.

termination in the year 2008, and proceeded to file the instant action on the grounds of discrimination for national origin, due process violation, amongst others.

In sum, plaintiff Alberti failed to show that the employer articulated reasons constituted a sham or a pretext to camouflage a possible discrimination. *See Dávila v. Corporación de Puerto Rico para la Difusión Pública*, 498 F.3d 9, 16 (1st Cir.2007), and *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). In *Dávila*, the Court held that the burden is on the "plaintiff, who must show that the 'reason given by the employer for the discharge is pretextual ... .'" 498 F.3d at 16.

However, more importantly for reconsideration purposes is whether or not a plaintiff can raise a new argument at the reconsideration stage, when that argument could have been raised earlier in the proceedings. In *Dávila*, the Court held:

> This is an interesting argument [after the probationary period established by the employer, "the employee shall acquire all the rights of an employee"], but it comes as an afterthought. **The appellant did not present it to the district court. The argument is, therefore, forfeited**. *Fn.*2. *See United States v. Leahy*, 473 F.3d 401, 409-10 (1st Cir.2007). We review forfeited issues for plain error. *See id.* at 410. Plain error review is not appellant-friendly; we will resuscitate a forfeited argument only if the appellant demonstrates that "(1) an error occurred (2) which was clear or obvious and which not only (3) affected the [appellant's] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of the

> judicial proceedings." *United States v. Duarte*, 246 F.3d 56, 60 (1st Cir.2001). As we explain below, the appellant in this case cannot satisfy this exacting standard.
>
> *Fn*.2. The Station argues that the appellant waived this argument by not raising it before the district court. We do not agree. **A party waives a right only if he intentionally relinquishes or abandons it; he forfeits a right by failing to assert it in a timely manner**. *See United States v. Olano*, 507 U.S. 725, 733 (1993); *United States v. Rodriguez*, 311 F.3d 435, 437 (1st Cir.2002). Because the argument in question was not identified in any form or fashion below, the appellant could not be said, on this record, to have intentionally abandoned it. (Emphasis ours).

498 F.3d at 14-15. *See also United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (explaining that legal points alluded to in a perfunctory manner, but unaccompanied by developed argumentation, are deemed abandoned).

In the instant case, the Court finds that plaintiff had over three years to raise this new argument. Simply by using the words "harass" or "harassment" sparingly does not by itself translate into a violation of Title VII for hostile work environment. The Court does not have a developed or undeveloped argument of hostile work environment. Hence, the Court finds that plaintiff Alberti waived her right "by failing to assert it in a timely manner." *Dávila*, 498 F.3d at 14-15.

Based on the court record, the Court concludes that plaintiff's new argument of a Title VII violation for hostile work environment is late and unsupported by the record.

Plaintiff "cannot expect a trial court to do [her] homework for [her]." *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 22 (1st Cir.1991). "Rather, parties have an affirmative responsibility to put their best foot forward in an effort to present a legal theory that will support their claim." *McCoy*, 950 F.2d at 23. The Court reminds the parties that "[w]hile Title VII shields an employee who opposes conduct that may not actually prove to be discriminatory, the employee must at the very least have a 'good faith, reasonable belief that the underlying challenged actions of the employer violated the law.'" *Morales-Cruz*, 676 F.3d at 226, citing *Fantini v. Salem State College*, 557 F.3d 22, 32 (1st Cir.2009). Moreover, "Title VII is 'not intended to function as a panacea for every work-related experience that is in some respect unjust, unfair, or unpleasant.'" *Morales-Cruz*, 676 F.3d at 227, citing *Ahern v. Shinseki*, 629 F.3d 49, 59 (1st Cir.2010).

C. ***A Final Note.***

In the instant case, the record is clear as to the Court's availability to assist the parties at all times. However, it is not always possible to please a party, particularly when the law is not on the party's side. Lastly, all cases must come to an end. After three years of intense litigation and challenging advocacy by counsel, this case must come to an end. "Justice demands that cases must come to an end." *United States v. Walker*, 899 F. Supp.2d 14, 17 (D.Mass.1995).

Conclusion

In view of the foregoing, *Plaintiff's Motion for Reconsideration under Rule 59(e),* Docket No. 217, is hereby denied, and *Plaintiff's Motion for Vacatur of Judgment and for Oral Argument*, Docket No. 225, is hereby denied.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 21st day of June, 2012.

s/Daniel R. Dominguez
DANIEL R. DOMINGUEZ
U.S. District Judge

Respectfully submitted on this 1st day of May, 2014.

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