

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MARIA VELEZ,

Plaintiff,

v.

MARRIOTT PR MANAGEMENT, INC.,
et al.,

Defendants.

CIVIL NO. 05-2108 (RLA)

ORDER IN THE MATTER OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants SAN JUAN MARRIOTT RESORT AND STELLARIS CASINO and MARRIOTT P.R. MANAGEMENT CORP. ("MARRIOTT") have moved the court to enter summary judgment on their behalf and to dismiss plaintiff's complaint. The court having reviewed the memoranda filed by the parties as well as the documents submitted in support thereof hereby rules as follows.

I. BACKGROUND

Plaintiff instituted this action alleging sex discrimination and retaliation pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1). Additionally, plaintiff seeks relief under Puerto Rico Act No. 100 of June 30, 1959, P.R. Laws Ann. tit. 29, §§ 146 et seq. (2002) and Puerto Rico Act No. 69 of July 6, 1985, Laws of P.R. Ann. tit. 29, §§ 1321 et seq. (2002), two local discrimination statutes.

2
3 In essence, plaintiff claims that she was not selected for a
4 "Pit Boss" position at the MARRIOTT's Casino in March 2004 based on
5 sex discrimination. Plaintiff further avers that MARRIOTT
6 subsequently retaliated against her for having complained of the
7 aforementioned rejection for promotion.

8 We shall initially address two preliminary issues raised by the
9 defendants which bear upon the evidence which will be available to
10 plaintiff to prove her claims which are, her previous non-selection
11 to Pit Boss positions in 1996, 1997 and 1999 and plaintiff's pattern
12 or practice claim.

13 II. PREVIOUS NON-SELECTION TO PIT BOSS POSITIONS

14 Defendants contend that plaintiff's non-selection for the Pit
15 Boss positions during the years 1996, 1997 and 1999 constitute
16 alleged discrete acts of discrimination which are time-barred
17 inasmuch as she failed to timely exhaust the corresponding
18 administrative remedies as mandated by Title VII.

19 Plaintiff amended her complaint on April 3, 2006 (docket No. 23)
20 to include allegations of a systemic discriminatory practice.
21 Specifically, the amended pleading avers that "[p]laintiff, as well
22 as other female employees have not been promoted as part of a **de**
23 **facto** policy of denial of Pit Boss promotions to female employees."
24 Amended Complaint ¶ 15 (emphasis in original). Further, plaintiff
25 charges that "[d]efendant's general practice regarding the hiring and
26 promotion of employees from the *Pit Boss* position have been ongoing

2 and can be described as a systemic violation of Plaintiff's rights."
3 Amended Complaint ¶ 25 (*italics in original*).

4 Plaintiff concludes by alleging that "Defendant's *de facto*
5 policy denying Pit Boss promotions to female employees constitutes a
6 systemic and/or serial violation of Plaintiff's rights. An employer's
7 continued and consistent discrimination, coupled with his refusal to
8 correct a discriminatory practice, present a systemic violation which
9 has resulted in reiterated unlawful refusals to grant promotions."
10 Amended Complaint ¶ 30.

11 Prior to resorting to the courts for relief, plaintiffs must
12 present their discrimination claims under Title VII to the
13 appropriate agency. Jorge v. Rumsfeld, 404 F.3d 556, 564 (1st Cir.
14 2005); Noviello v. City of Boston, 398 F.3d 76, 85 (1st Cir. 2005);
15 Lebron-Rios v. U.S. Marshal Service, 341 F.3d 7, 13 (1st Cir. 2003);
16 Dressler v. Daniel, 315 F.3d 75, 78 (1st Cir. 2003); Clockedile v. New
17 Hampshire Dept. of Corrections, 245 F.3d 1, 3 (1st Cir. 2001).

18 "[A] claimant who seeks to recover for an asserted violation
19 of... Title VII, first must exhaust administrative remedies by filing
20 a charge with the EEOC, or alternatively, with an appropriate state
21 or local agency, within the prescribed time limits.... This omission,
22 if unexcused, bars the courthouse door, as courts long have
23 recognized that Title VII's charge-filing requirement is a
24 prerequisite to the commencement of suit." Bonilla v. Muebles J.J.
25 Alvarez, Inc., 194 F.3d 275, 278 (1st Cir. 1999).
26

2
3 The purpose behind the exhaustion requirement is to give the
4 employer timely notice of the events as well as provide an
5 opportunity for an early amicable resolution of the controversy.
6 "That purpose would be frustrated... if the employee were permitted
7 to allege one thing in the administrative charge and later allege
8 something entirely different in a subsequent civil action." Lattimore
9 v. Polaroid Corp., 99 F.3d 454, 464 (1st Cir. 1996).

10 In Puerto Rico an aggrieved employee has 300 days from the
11 occurrence of the employment action complained of to file an
12 administrative charge in instances where the local Department of
13 Labor is empowered to provide relief, i.e., in instances of
14 "deferral" jurisdiction. Lebron-Rios, 341 F.3d at 11 n.5; Bonilla,
15 194 F.3d at 278 n.4. Otherwise, the applicable period is 180 days.
16 See, 42 U.S.C. § 2000e-5(e)(1).¹

17
18 ¹ In pertinent part, § 2000e-5(e)(1) reads:

19 A charge under this section shall be filed
20 within **one hundred and eighty days** after the
21 alleged unlawful employment practice occurred...
22 except that in a case of an unlawful employment
23 practice with respect to which the person
24 aggrieved has initially instituted proceedings
25 with a state or local agency with authority to
26 grant or seek relief from such practice or to
institute criminal proceedings with respect
thereto... such charge shall be filed by or on
behalf of the person aggrieved within **three
hundred days** after the alleged unlawful
employment practice occurred.

(Emphasis ours).

2
3 In Nat'l R.R. Passenger Corp. v Morgan, 536 U.S. 101, 122 S.Ct.
4 2061, 153 L.Ed.2d 106 (2002) the Supreme Court redefined the factors
5 to be used by the courts in examining allegations of continuing
6 violations in suits brought by individual claimants and did away with
7 the "systemic" or "serial" dichotomy previously used for extending
8 the limitations period.² "Morgan eliminates the need for juries to
9 determine whether there was a systemic or serial violation in order
10 to invoke the continuing violations doctrine". Crowley v. L.L. Bean,
11 Inc., 303 F.3d 387, 410 (1st Cir. 2002). The Supreme Court
12 distinguished instead between "discrete discriminatory acts" and
13 "hostile work environment claims" for purposes of determining the
14 timeliness of Title VII actions brought by individual plaintiffs.

15 According to the Supreme Court, "discrete discriminatory acts
16 are not actionable if time barred, even when they are related to acts
17 alleged in timely filed charges. Each discrete discriminatory act
18 starts a new clock for filing charges alleging that act." Morgan, 536
19 U.S. at 112. The Supreme Court went on to list specific events which
20 it concluded constituted distinctive actionable claims which marked
21 the term for the limitations period to run.

22 Discrete acts such as **termination, failure to promote,**
23 **denial of transfer, or refusal to hire** are easy to

24 ² Morgan did not extend its ruling to pattern-or-practice
25 claims. In this regard, the Supreme Court specifically indicated that
26 "[w]e have no occasion here to consider the timely filing question
with respect to 'pattern-or-practice' claims brought by private
litigants as none are at issue here." Morgan, 536 U.S. at 115 n.9.

2
3 identify. Each incident of discrimination and each
4 retaliatory adverse employment decision constitutes a
5 separate actionable "unlawful employment practice."

6 *Id.* at 114 (emphasis ours).

7 On the other hand, "[h]ostile environmental claims are different
8 in kind from discrete acts. Their very nature involves repeated
9 conduct... The 'unlawful employment practice' therefore cannot be
10 said to occur on any particular day. It occurs over a series of days
11 or perhaps years and, in direct contrast to discrete acts, a single
12 act of harassment may not be actionable on its own." *Id.* at 115. "As
13 long as the employer has engaged in enough activity to make out an
14 actionable hostile environment claim, an unlawful employment practice
15 has 'occurred,' even if it is still occurring. Subsequent events,
16 however, may still be part of the one hostile work environment claim
17 and a charge may be filed at a later date and still encompass the
18 whole." *Id.* at 117.

19 Illustrating the underlying difference between hostile work
20 environment claims and other discrimination claims, the Court of
21 Appeals in Campbell v. Bankboston, N.A., 327 F.3d 1, 11 (1st Cir.
22 2003) stated that the limitations period for an alleged
23 discriminatory change in retirement benefits plan began to run upon
24 plaintiff being advised of the decision. Likewise, following the
25 Morgan precedent in Rosario-Rivera v. P.R. Aqueduct and Sewers Auth.,
26 331 F.3d. 183 (1st Cir. 2003), the court rejected plaintiff's notion

2
3 that two employment transfers were part of a continuing violation for
4 purposes of the [Title VII] limitations period under a hostile work
5 environment scheme. Rather, the court specifically determined that
6 each such transfer constituted "'a separate and actionable unlawful
7 employment practice.'" *Id.* at 188-89 (citing Morgan, 536 U.S. at
8 114). See also, Dressler v. Daniel, 315 F.3d 75 (1st Cir. 2003) (two
9 separate claims with individual limitations period accruing from the
10 denial of prospective employment and termination from employment);
11 Miller v. New Hampshire Dept. of Corrections, 296 F.3d 18, 22
12 (1st Cir. 2002) (distinguishing "a discrete act of discrimination -
13 as opposed to a pattern of harassing conduct that, taken as a whole,
14 constitutes a hostile work environment [and falls within the
15 continuing violations exception to the limitations period]." Accord,
16 Marrero v. Goya de Puerto Rico, Inc., 304 F.3d 7 (1st Cir. 2002)
17 finding hostile work environment claims timely under the Morgan
18 premise.

19 Based on the foregoing, it is beyond cavil that the three
20 specific instances of plaintiff's non-selection to the Pit Boss
21 positions in 1996, 1997 and 1999 fall squarely within the discrete
22 acts of discrimination as defined in Morgan. Hence, plaintiff was
23 required to file individual administrative charges with respect to
24 each one of these alleged discriminatory events within 300 days
25 thereafter. It is undisputed that plaintiff in this case failed to do
26

2
3 so for which reason any claims based on these non-selections have
4 become stale.³

5 Accordingly, defendants' request for dismissal of plaintiff's
6 discrimination claim based on her non-selection to the Pit Boss
7 positions in the years 1996, 1997 and 1999 is **GRANTED** and it is
8 hereby **DISMISSED AS UNTIMELY**.

9 III. PATTERN OR PRACTICE

10 In response to defendant's untimeliness arguments regarding
11 alleged past discriminatory events, plaintiff further adduces the
12 existence of a pattern or practice of discrimination. In her
13 memoranda plaintiff argues that defendant "presents a distorted view
14 of the evidentiary requirement for establishing patterns and
15 practices that constitute sytematic [sic] violations." Plaintiff's
16 Sur-Reply (docket No. 120) p. 27.

17 At the outset, it is important to note that pattern or practice
18 discrimination does not constitute an independent cause of action but
19 rather an additional procedural vehicle available for establishing
20 disparate discriminatory treatment. "A pattern or practice case is

21
22 ³ This evidence, however, may still prove relevant for plaintiff
23 to establish her case. "A discriminatory action for which a claim was
24 not timely filed cannot be used as a basis for award relief but can
25 be used as background in support of later claims of gender
26 discrimination." DeClaire v. Mukasey, 530 F.3d 1, 18 (1st Cir. 2008).
See also, Morgan, 536 U.S. at 112 ("'[i]t may constitute relevant
background evidence in a proceeding in which the status of a current
practice is at issue'" (citing United Air Lines, Inc. v. Evans, 431
U.S. 553, 557 97 S.Ct. 1885, 52 L.Ed. 571 (1977))).

2
3 not a separate and free-standing cause of action... but is really
4 merely another method by which disparate treatment can be shown."
5 Celestine v. Petroleos de Venezuela S.A., 266 F.3d 343, 355 (5th Cir.
6 2001) (citation and internal quotation marks omitted).

7 In Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 97
8 S.Ct. 1843, 52 L.Ed.2d 396 (1977) the United States Supreme Court
9 described the mechanics of pattern or practice. Referring to the
10 legislative history of Title VII, the court cited the explanation
11 proffered by Senator Hubert Humphrey as to the meaning of the
12 "pattern or practice" language in the statute as follows:

13 [A] pattern or practice would be present only where the
14 denial of rights consists of something more than an
15 isolated, sporadic incident, but it is repeated, routine,
16 or of a generalized nature. There would be a pattern or
17 practice if, for example, a number of companies or persons
18 in the same industry or line of business discriminated, if
19 a chain of motels or restaurants practiced racial
20 discrimination throughout all or a significant part of its
21 system, or if a company repeatedly and regularly engaged in
22 acts prohibited by the statute.

23

24 The point is that single, insignificant, isolated acts
25 of discrimination by a single business would not justify a
26 finding of a pattern or practice....

2 Teamsters, 431 U.S. at 336 n.16

3
4 The pattern or practice suit is prosecuted in two phases.
5 Plaintiff must initially prove a pattern or practice of
6 discrimination exists which raises a presumption that all protected
7 class members are affected thereby. The burden then shifts to the
8 employer to establish that decisions regarding particular class
9 members were not based on impermissible discriminatory criteria.

10 Pattern-or-practice cases are typically tried in two or
11 more stages. During the first stage of trial, the
12 plaintiffs' burden is to demonstrate that an unlawful
13 discrimination has been a regular procedure or policy
14 followed by an employer or group of employers. Thus, at the
15 initial liability stage of a pattern-or-practice suit the
16 plaintiffs are not required to offer evidence that each
17 person for whom they will ultimately seek relief was a
18 victim of the employer's discriminatory policy. Instead,
19 plaintiffs' burden is to establish that such a policy
20 existed. The burden then shifts to the employer to defeat
21 the prima facie showing of a pattern or practice by
22 demonstrating that the plaintiffs' proof is either
23 inaccurate or insignificant. If an employer fails to rebut
24 the inference that arises from the plaintiffs' prima facie
25 case, the finder of fact can conclude that a violation has
26 occurred and the trial court can award prospective

2
3 equitable relief. If the plaintiffs also seek individual
4 relief for the victims of the discriminatory practice, the
5 case moves into the second or subsequent stages. In these
6 additional proceedings, it must be determined whether each
7 individual plaintiff was a victim of the discriminatory
8 practices. Importantly, by having prevailed in the first
9 stage of trial, the individual plaintiffs reap a
10 significant advantage for purposes of the second stage:
11 they are entitled to a presumption that the employer had
12 discriminated against them.

13 Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1106 (10th Cir.
14 2001) (citations, brackets and internal quotation marks omitted).

15 The plaintiff in a pattern-or-practice action is the
16 Government, and its initial burden is to demonstrate that
17 unlawful discrimination has been a regular procedure or
18 policy followed by an employer or group of employers. At
19 the initial 'liability' stage of a pattern-or-practice suit
20 the Government is not required to offer evidence that each
21 person for whom it will ultimately seek relief was a victim
22 of the employer's discriminatory policy. Its burden is to
23 establish a prima facie case that such a policy existed.
24 The burden then shifts to the employer to defeat the prima
25 facie showing of a pattern or practice by demonstrating
26

2
3 that the Government's proof is either inaccurate or
4 insignificant....

5 If an employer fails to rebut the inference that
6 arises from the Government's prima facie case, a trial
7 court may then conclude that a violation has occurred and
8 determine the appropriate remedy. Without any further
9 evidence from the Government, a court's finding of a pattern or pra
10 Teamsters, 431 U.S. at 360-61 (internal citation omitted).

11 "[I]n determining pattern or practice liability, the government
12 is not required to prove that any particular employee was a victim of
13 the pattern or practice; it need only establish a prima facie case
14 that such a policy existed." E.E.O.C. v. Joe's Stone Crab, Inc., 220
15 F.3d 1263, 1287 (11th Cir. 2000).

16 Once this pattern or practice is established, the
17 burden of proof then shifts to the employer to demonstrate
18 that the government's showing of a pattern or practice of
19 discrimination is either inaccurate or insignificant. If
20 the employer fails to rebut the government's prima facie
21 case, the resulting finding of a discriminatory pattern or
22 practice may give rise to an inference that all persons
23 subject to the policy were its victims and are entitled to
24 appropriate remedies... [O]nce a pattern and practice of
25 discrimination is established, a rebuttable presumption
26 that the plaintiff was discriminated against because of her

2
3 sex is entitled to recovery obtains. The employer may
4 overcome this presumption only with clear and convincing
5 evidence that job decisions made when the discriminatory
6 policy was in force were not made in pursuit of that
7 policy.

8 Joe's Stone Crab, 220 F.3d at 1287 (citation and internal quotation
9 marks omitted).

10 As previously noted, awards which are to be tailored to the
11 damages of the individual protected members will be determined at a
12 subsequent stage of the proceedings. "When the Government seeks
13 individual relief for the victims of the discriminatory practice, a
14 district court must usually conduct additional proceedings after the
15 liability phase of the trial to determine the scope of individual
16 relief... [A]s is typical of Title VII pattern-or-practice suits, the
17 question of individual relief does not arise until it has been proved
18 that the employer has followed an employment policy of unlawful
19 discrimination. The force of that proof does not dissipate at the
20 remedial stage of the trial." Teamsters, 431 U.S. at 361-62. "The
21 second stage of a pattern and practice claim is essentially a series
22 of individual lawsuits, except that there is a shift of the burden of
23 proof in the plaintiff's favor." Thiessen, 267 F.3d at 1106 n.7
24 (citation and internal quotation marks omitted).
25
26

2
3 Thus, it is clear that the evidentiary approach used in pattern
4 or practice cases varies substantially from that applied to
5 individual suits.

6 Pattern-or-practice cases differ significantly from
7 the far more common cases involving one or more claims of
8 individualized discrimination. In a case involving
9 individual claims of discrimination, the focus is on the
10 reason(s) for the particular employment decisions at
11 issue... In contrast, the initial focus in a pattern-or-
12 practice case is not on individual employment decisions but
13 on a pattern of discriminatory decisionmaking. Thus, the
14 order and allocation of proof, as well as the overall
15 nature of the trial proceedings, in a pattern-or-practice
16 case differ dramatically from a case involving only
17 individual claims of discrimination.

18 *Id.* at 1106 (citations, brackets and internal quotation marks
19 omitted).

20 "The typical pattern or practice discrimination case is brought
21 either by the government or as a class action to establish that
22 unlawful discrimination has been a regular procedure or policy
23 followed by an employer or group of employers." Celestine, 266 F.3d
24 at 355 (citation and internal quotation marks omitted). "In such
25 cases, the focus, at least initially, is upon a pattern of
26 discriminatory decision-making, i.e., the company's standard

2
3 operating procedure, rather than upon individual employment
4 decisions." Herendeen v. Michigan State Police, 39 F.Supp.2d 899, 905
5 (D. Mich. 1999) (citation and internal quotation marks omitted).

6 "The crucial difference between an individual's claim of
7 discrimination and a class action alleging general pattern or
8 practice of discrimination is manifest. The inquiry regarding an
9 individual's claim is the reason for a particular employment
10 decision, while at the liability stage of a pattern-or-practice trial
11 the focus often will not be on individual hiring decisions, but on a
12 pattern of discriminatory decisionmaking." Celestine, 266 F.3d at
13 355.

14 The Supreme Court has yet to extend the pattern or practice
15 approach to private, non-class suits. However, because of its
16 particular nature we find application of this evidentiary method to
17 actions brought by individual plaintiffs seeking personal relief in
18 individual claims of disparate treatment unsuitable. Multiple courts
19 have similarly concluded. See, i.e., Bacon v. Honda of Am. Mfg.,
20 Inc., 370 F.3d 565, 575 (6th Cir. 2004) ("We therefore hold that the
21 pattern-or-practice method of proving discrimination is not available
22 to individual plaintiffs. We subscribe to the rationale that a
23 pattern-or-practice claim is focused on establishing a policy of
24 discrimination; because it does not address individual hiring
25 decisions, it is inappropriate as a vehicle for proving
26 discrimination in an individual case"); Celestine, 366 F.3d at 356

2 ("As the plaintiffs are before us in their individual capacities...
3 the *Teamsters* method is not available to them"); Thiessen, 267 F.3d
4 at 1106 n.8 ("If the plaintiffs do not prevail during the first stage
5 of a pattern-or-practice trial, they are nevertheless entitled to
6 proceed on their individual claims of discrimination... Naturally,
7 however, they are left to proceed under the normal *McDonnell Douglas*
8 framework, rather than benefitting from a presumption of
9 discrimination"); Brown v. Coach Stores, Inc., 163 F.3d 706, 711 (2nd
10 Cir. 1998) ("[I]t is evident that the Court in *Teamsters* was not
11 laying down rules for private, non-class actions. Of the cases cited
12 by the Court for the proposition that non-applicants can recover,
13 none were private non-class actions" (citation and internal quotation
14 marks omitted)); Lowery v. Circuit City Stores, Inc., 158 F.3d 742,
15 761 (4th Cir. 1998) ("because the Supreme Court has never applied the
16 *Teamsters* method of proof in a private, non-class action for
17 employment discrimination, and because the nature of the proof and
18 remedies in class and government pattern or practice actions differs
19 vis-a-vis private, non-class actions, we decline to give individual
20 plaintiffs a pattern or practice cause of action or allow them to use
21 the *Teamsters* method of proof"); Babrocky v. Jewel Food Co., 773 F.2d
22 857, 866 n.6 (7th Cir. 1985) ("Plaintiffs' use of 'pattern-or-
23 practice' language also seems to be misplaced, since such suits by
24 their very nature, involve claims of classwide discrimination and the
25 five plaintiffs, while attacking policies that would have affected
26

2
3 all of [defendant's] women employees as a class, have stated only
4 their individual claims, not a class action" (citation and internal
5 quotation marks omitted)); Murphy v. Price Waterhouse Coopers, LLP,
6 357 F.Supp. 230, 246 (D.D.C. 2004) ("[Defendant'] first challenge to
7 the plaintiffs' 'pattern and practice' claim is that they may not
8 proceed on this theory in an individual action for discrimination.
9 The Court agrees"); Herendeen, 39 F.Supp.2d at 906 (declining to
10 apply pattern or practice evidentiary proof method to individual
11 discrimination claims). See also, Jones v. U.P.S., Inc., 502 F.3d
12 1176, 1188 n.5 (10th Cir. 2007) (declining to "decide whether the
13 pattern-or-practice method of proof is available to individual
14 plaintiffs" but acknowledging "that other circuits have held that
15 this method of proof is not available in a private, non-class suit.")

16 We therefore hold that plaintiff in this action does not have
17 available the pattern or practice vehicle to prove her individual
18 discrimination claim.⁴ Accordingly, plaintiff's discrimination claim
19 based on pattern or practice is hereby **DISMISSED**.

21
22 ⁴ These past events may, however, depending on the particular
23 circumstances, be used as additional evidence to meet plaintiff's
24 *McDonnell Douglas* burden. See, Lowery, 158 F.3d at 761 ("[e]vidence
25 of a pattern or practice of discrimination may very well be useful
26 and relevant to prove the fourth element of a *prima facie* case... or
to establish the plaintiff's ultimate burden"); Murphy, 357 F.Supp.2d
at 247 ("notwithstanding the unavailability of a 'pattern and
practice' theory, the plaintiffs may still use evidence of systematic
or general discrimination in establishing their individual
discrimination claims.")

2
3 **IV. SUMMARY JUDGMENT STANDARD**

4 Rule 56(c) Fed. R. Civ. P., which sets forth the standard for
5 ruling on summary judgment motions, in pertinent part provides that
6 they shall be granted "if the pleadings, depositions, answers to
7 interrogatories, and admissions on file, together with the
8 affidavits, if any, show that there is no genuine issue as to any
9 material fact and that the moving party is entitled to a judgment as
10 a matter of law." Sands v. Ridefilm Corp., 212 F.3d 657, 660-61 (1st
11 Cir. 2000); Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir.
12 1999). The party seeking summary judgment must first demonstrate the
13 absence of a genuine issue of material fact in the record.
14 DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997). A genuine
15 issue exists if there is sufficient evidence supporting the claimed
16 factual disputes to require a trial. Morris v. Gov't Dev. Bank of
17 Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994); LeBlanc v. Great Am.
18 Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993), *cert. denied*, 511 U.S.
19 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994). A fact is material if
20 it might affect the outcome of a lawsuit under the governing law.
21 Morrissey v. Boston Five Cents Sav. Bank, 54 F.3d 27, 31 (1st Cir.
22 1995).

23 "In ruling on a motion for summary judgment, the court must view
24 'the facts in the light most favorable to the non-moving party,
25 drawing all reasonable inferences in that party's favor.'" Poulis-
26 Minott v. Smith, 388 F.3d 354, 361 (1st Cir. 2004) (citing Barbour v.

2
3 Dynamics Research Corp., 63 F.3d 32, 36 (1st Cir.1995)). "In
4 marshaling the facts for this purpose we must draw all reasonable
5 inferences in the light most favorable to the nonmovant. That does
6 not mean, however, that we ought to draw *unreasonable* inferences or
7 credit bald assertions, empty conclusions, rank conjecture, or
8 vitriolic invective." Caban Hernandez v. Philip Morris USA, Inc., 486
9 F.3d 1, 8 (1st Cir. 2007) (internal citation omitted italics in
10 original).

11 Credibility issues fall outside the scope of summary judgment.
12 "'Credibility determinations, the weighing of the evidence, and the
13 drawing of legitimate inferences from the facts are jury functions,
14 not those of a judge.'" Reeves v. Sanderson Plumbing Prods., Inc.,
15 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (citing
16 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505,
17 91 L.Ed.2d 202 (1986)). See also, Dominquez-Cruz v. Suttle Caribe,
18 Inc., 202 F.3d 424, 432 (1st Cir. 2000) ("court should not engage in
19 credibility assessments."); Simas v. First Citizens' Fed. Credit
20 Union, 170 F.3d 37, 49 (1st Cir. 1999) ("credibility determinations
21 are for the factfinder at trial, not for the court at summary
22 judgment."); Perez-Trujillo v. Volvo Car Corp., 137 F.3d 50, 54 (1st
23 Cir. 1998) (credibility issues not proper on summary judgment);
24 Molina Quintero v. Caribe G.E. Power Breakers, Inc., 234 F.Supp.2d
25 108, 113 (D.P.R. 2002). "There is no room for credibility
26 determinations, no room for the measured weighing of conflicting

2
3 evidence such as the trial process entails, and no room for the judge
4 to superimpose his own ideas of probability and likelihood. In fact,
5 only if the record, viewed in this manner and without regard to
6 credibility determinations, reveals no genuine issue as to any
7 material fact may the court enter summary judgment." Cruz-Baez v.
8 Negron-Irizarry, 360 F.Supp.2d 326, 332 (D.P.R. 2005) (internal
9 citations, brackets and quotation marks omitted).

10 In cases where the non-movant party bears the ultimate burden of
11 proof, he must present definite and competent evidence to rebut a
12 motion for summary judgment, Anderson v. Liberty Lobby, Inc., 477
13 U.S. at 256-257, 106 S.Ct. 2505, 91 L.Ed.2d 202; Navarro v. Pfizer
14 Corp., 261 F.3d 90, 94 (1st Cir. 2000); Grant's Dairy v. Comm'r of
15 Maine Dep't of Agric., 232 F.3d 8, 14 (1st Cir. 2000), and cannot rely
16 upon "conclusory allegations, improbable inferences, and unsupported
17 speculation". Lopez-Carrasquillo v. Rubianes, 230 F.3d 409, 412 (1st
18 Cir. 2000); Maldonado-Denis v. Castillo-Rodríguez, 23 F.3d 576, 581
19 (1st Cir. 1994); Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d
20 5, 8 (1st Cir. 1990).

21 **V. LOCAL RULE 56(c)**

22 Motions for summary judgment must comport with the provisions of
23 Local Rule 56(c) which, in pertinent part, reads:

24 A party opposing a motion for summary judgment shall
25 submit with its opposition a separate, short, and concise
26 statement of material facts. The opposing statement shall

2
3 admit, deny or qualify the facts by reference to each
4 numbered paragraph of the moving party's statement of
5 material facts and unless a fact is admitted, shall support
6 each denial or qualification by a record citation as
7 required by this rule. The opposing statement may contain
8 in a separate section additional facts, set forth in
9 separate numbered paragraphs and supported by a record
10 citation as required by subsection (e) of this rule.

11 This provision specifically requires that in its own statement
12 of material fact respondent either admit, deny, or qualify each of
13 movant's proffered uncontested facts and for each denied or qualified
14 statement cite the specific part of the record which supports its
15 denial or qualification. Respondent must prepare its separate
16 statement much in the same manner as when answering the complaint.

17 The purpose behind the local rule is to allow the court to
18 examine each of the movant's proposed uncontested facts and ascertain
19 whether or not there is adequate evidence to render it uncontested.
20 "This 'anti-ferret' rule aims to make the parties organize the
21 evidence rather than leaving the burden upon the district judge."
22 Alsina-Ortiz v. Laboy, 400 F.3d 77, 80 (1st Cir. 2005). "The purpose
23 of this 'anti-ferret rule' is to require the parties to focus the
24 district court's attention on what is, and what is not, genuinely
25 controverted. Otherwise, the parties would improperly shift the
26 burden of organizing the evidence presented in a given case to the

2
3 district court." Mariani-Colon v. Dep't of Homeland Sec., 511 F.3d
4 216, 219 (1st Cir. 2007) (internal citations omitted). See also,
5 Morales v. A.C. Orssleff's EFTE, 246 F.3d 32, 33 (1st Cir. 2001)
6 (summary judgment should not "impose [upon the court] the daunting
7 burden of seeking a needle in a haystack"); Leon v. Sanchez-Bermudez,
8 332 F.Supp.2d 407, 415 (D.P.R. 2004).

9 "When complied with, they serve to dispel the smokescreen behind
10 which litigants with marginal or unwinnable cases often seek to hide
11 and greatly reduce the possibility that the district would will fall
12 victim to an ambush." Caban Hernandez, 486 F.3d at 7 (citation,
13 internal quotation marks and brackets omitted).

14 Apart from the fact that Local Rule 56(e) itself provides that
15 "[f]acts contained in a supporting or opposing statement of material
16 facts, if supported by record citations as required by this rule,
17 shall be deemed admitted unless properly controverted" in discussing
18 Local Rule 311.12, its predecessor, the First Circuit Court of
19 Appeals stressed the importance of compliance by stating that the
20 parties who ignore its strictures run the risk of the court deeming
21 the facts presented in the movant's statement of fact admitted.
22 "Given the vital purpose that such rules serve, litigants ignore them
23 at their peril. In the event that a party opposing summary judgment
24 fails to act in accordance with the rigors that such a rule imposes,
25 a district court is free, in the exercise of its sound discretion, to
26 accept the moving party's facts as stated." *Id.* See also, Alsina-

2
3 Laboy, 400 F.3d at 80 (“Where the party opposing summary judgment
4 fails to comply, the rule permits the district court to treat the
5 moving party’s statement of facts as uncontested”); Cosme-Rosado v.
6 Serrano-Rodriguez, 360 F.3d 42, 46 (1st Cir. 2004) (“uncontested”
7 facts pleaded by movant deemed admitted due to respondent’s failure
8 to properly submit statement of contested facts.)

9 “[A]bsent such rules, summary judgment practice could too easily
10 become a game of cat-and-mouse, giving rise to the ‘specter of
11 district court judgment being unfairly sandbagged by unadvertised
12 factual issues.’” Ruiz-Rivera v. Riley, 209 F.3d 24, 28 (1st Cir.
13 2000) (citing Stepanischen v. Merchants Despatch Transp. Corp., 722
14 F.2d 922, 931 (1st Cir. 1983)).

15 Providing an alternative statement of facts without addressing
16 the movant’s factual proposals individually does not conform to the
17 Local Rule’s mandate and will cause defendant’s proffered facts to be
18 deemed uncontested. Mariani-Colon, 511 F.3d at 219. Further, denials
19 without more are ineffective. Rather, the opposing party “must offer
20 specific facts to counter those set out by [defendant].
21 [N]onmovant’s facts must demonstrate the existence of definite
22 competent evidence fortifying plaintiff’s version of the truth. This
23 is the case even where motive and intent are at issue. [Plaintiff]
24 may not meet his burden by citing an inequity and tacking on the
25 self-serving conclusion that the defendant was motivated by a
26 discriminatory animus.” Arroyo-Audifred v. Verizon Wireless, Inc.,

2
3 527 F.3d 215, 219-20 (1st Cir. 2008) (internal citations and quotation
4 marks omitted).

5 A party's failure to abide by the strictures of Local Rule
6 56(c), however, does not automatically entitle movant to summary
7 judgment as requested. "It mainly means that the district judge can
8 accept the moving party's allegedly uncontested facts as true, but
9 whether or not this justifies summary judgment for the moving party
10 depends upon the legal and factual configuration that results." Caban
11 Hernandez, 486 F.3d at 8.

12 In the case before us, plaintiff only raised objections as to
13 part of MARRIOTT's Statement of Uncontested Facts. Accordingly, we
14 shall consider those facts not objected to as uncontested.⁵ Further,
15 we shall also deem as uncontested those facts adequately proffered by
16 defendants which were not properly objected to by plaintiff.⁶

17 Additionally, plaintiff failed to submit her own proffered
18 uncontested facts. Rather, in her response plaintiff included a
19 section entitled "Additional Material Facts" which reads as follows:

20 The Plaintiff does hereby incorporate and makes a part
21 hereof her **entire Sworn Statement** under Penalty of Perjury
22 pursuant to 28 USC Section 1746, hereto included as

23
24 ⁵ Specifically, plaintiff did not oppose ¶¶ 46-137 of MARRIOTT's
25 Statement of Uncontested Facts (docket No. 82-3) pertaining to her
26 retaliation claim.

⁶ See Order in the Matter of Motion to Deem as Uncontested
Defendant's Statement of Uncontested Facts issued on this date.

2
3 Exhibit 9, as additional facts supported by her testimony
4 as facts material to her opposition to the Defendant's
5 Motion for Summary Judgment.

6 Plaintiff's Reply to Defendant's Statement of Purported Uncontested
7 Material Facts (docket No. 92) p.7 (emphasis ours).

8 In other words, rather than itemizing each proffered fact
9 separately with reference to its particular evidentiary source as the
10 Local Rule requires which would then allow defendant the opportunity
11 to address them individually, plaintiff would have us extrapolate
12 material facts to the controversy at hand from her sworn statement.
13 This is precisely what this provision seeks to avoid.

14 Accordingly, we need not consider plaintiff's declaration as a
15 substitute for the Local Rule 56(c) requirements.

16 VI. PLAINTIFF'S UNSWORN STATEMENT

17 MARRIOTT has sought to exclude plaintiff's Unsworn Statement
18 arguing that it is self-serving and contradicts prior deposition
19 testimony and was never previously disclosed as part of the discovery
20 process. According to MARRIOTT, plaintiff's "attempt to contradict
21 and supplement her own deposition testimony with a self-serving and
22 recently created Unsworn Statement which is wholly inadmissible,
23 inasmuch as it was not produced to defendant during the course of
24 discovery, contradicts her prior deposition testimony, and states
25 plaintiff's opinions without evidentiary support." Reply to
26 Plaintiff's Motion (docket No. 105) p. 6.

2
3 Initially, we must note that the information contained in
4 plaintiff's Unsworn Statement at ¶¶ 22 to 37 pertains to her
5 retaliation claim. Inasmuch as defendants' proffered facts regarding
6 the retaliation claim were deemed uncontested due to plaintiff's
7 failure to address them in accordance with the provisions of Local
8 Rule 56(c), we shall disregard this part of the Unsworn Statement.

9 **A. Discovery**

10 Movants contend that plaintiff's failure to furnish copy of her
11 statement during the discovery process contravenes Rule 26(a) Fed. R.
12 Civ. P. However, this provision is limited to the initial disclosures
13 of "individual[s] likely to have discoverable information... that the
14 disclosing party may use to support its claims", documents in its
15 possession which may be used to support its claims, computation of
16 damages and insurance agreements.

17 The Unsworn Statement is nothing more than plaintiff's relation
18 of her educational background, work experience, efforts to get
19 promoted to the Pit Boss position and her eventual resignation
20 interspersed by her subjective appreciation of the events which she
21 alleges were motivated by discriminatory animus.

22 Accordingly, we find no information therein which would have
23 been subject to the Rule 26(a) mandate.

24 **B. Recanting**

25 "It is settled that '[w]hen an interested witness has given
26 clear answers to unambiguous questions, he cannot create a conflict

2
3 and resist summary judgment with an affidavit that is clearly
4 contradictory, but does not give a satisfactory explanation of why
5 the testimony is changed.'" Torres v. E.I. Dupont de Nemours & Co.,
6 219 F.3d 13, 20 (1st Cir. 2000) (citing Colantouni v. Alfred Calgagni
7 & Sons, Inc., 44 F.3d 1, 4-5 (1st Cir. 1994)); Sailor Inc. F/V v. City
8 of Rockland, 324 F.Supp.2d 197, 202 (D.Me. 2004).

9 [A] party cannot create a genuine issue of fact sufficient to
10 survive summary judgment simply by contradicting his or her own
11 previous sworn statement (by, say, filing a later affidavit that
12 flatly contradicts that party's earlier sworn deposition) without
13 explaining the contradiction or attempting to resolve the disparity."
14 Cleveland v. Policy Mgt. Sys. Corp., 526 U.S. 795, 806, 119 S.Ct.
15 1597, 143 L.Ed.2d 966 (1999).

16 The timing of the recanting, i.e., in response to a summary
17 judgment request, has been held crucial as well as whether or not a
18 satisfactory explanation for the change in testimony has been
19 provided. Orta-Castro v. Merck, Sharp & Dohme Quimica P.R., Inc., 447
20 F.3d 105, 110 (1st Cir. 2006); Colantuoni, 44 F.3d at 5. See, i.e.,
21 Torres, 219 F.3d at 20-21 ("post-summary judgment affidavit... does
22 not indicate that there was any confusion at the time of [affiant's]
23 deposition testimony... nor does it allege that the prior testimony
24 was in error.")

25 With regard to MARRIOTT's recanting argument, defendants have
26 failed to identify any specific questions posed during discovery with

2
3 the answers provided by plaintiff in order for the court to ascertain
4 whether indeed they are contrary to her statement. In other words,
5 MARRIOTT has not identified the "clear answers to unambiguous
6 questions" asked by defendants during plaintiff's deposition which
7 she is now renegeing in order to create an issue of fact.⁷ Absent this
8 information, we cannot accept defendants' argument.

9 C. Conclusory Statements

10 On the other hand, any testimony used in support of
11 discriminatory motive in a motion for summary judgment setting must
12 be admissible in evidence, i.e., based on personal knowledge and
13 otherwise not contravening evidentiary principles. Rule 56(e)
14 specifically mandates that affidavits submitted in conjunction with
15 the summary judgment mechanism must "be made on personal knowledge,
16 shall set forth such facts as would be admissible in evidence, and
17 shall show affirmatively that the affiant is competent to testify to
18 the matters stated therein." Hoffman v. Applicators Sales and Serv.,
19 Inc., 439 F.3d 9 16 (1st Cir. 2006); Nieves-Luciano v. Hernandez-
20 Torres, 397 F.3d 1, 5 (1st Cir. 2005); Carmona v. Toledo, 215 F.3d
21 124, 131 (1st 2000). See also, Quiñones v. Buick, 436 F.3d 284, 290
22 (1st Cir. 2006) (affidavit inadmissible given plaintiff's failure to
23 cite "supporting evidence to which he could testify in court").
24 Additionally, the document "must concern facts as opposed to

25 ⁷ Plaintiff has also correlated the portions of her deposition
26 testimony with the pertinent paragraphs of her declaration and there
does not seem to be any apparent inconsistency between the two.

2
3 conclusions, assumptions, or surmise", Perez v. Volvo Car Corp., 247
4 F.3d 303, 316 (1st Cir. 2001), not conclusory allegations Lopez-
5 Carrasquillo v. Rubianes, 230 F.3d at 414.

6 "To the extent that affidavits submitted in opposition to a
7 motion for summary judgment merely reiterate allegations made in the
8 complaint, without providing specific factual information made on the
9 basis of personal knowledge, they are insufficient. However, a
10 party's own affidavit, containing relevant information of which he
11 has firsthand knowledge, may be self-serving, but it is nonetheless
12 competent to support or defeat summary judgment." Santiago v.
13 Centennial, 217 F.3d 46, 53 (1st Cir. 2000) (internal citations and
14 quotation marks omitted).

15 Hence, with regard to ¶¶ 1 through 21, only those facts
16 personally known to plaintiff as to which she could testify in court
17 may be relied upon. However, those portions of plaintiff's statement
18 which merely embellish facts and provide her subjective
19 characterization of the circumstances leading to her employment with
20 MARRIOTT and her perception of the alleged discriminatory reasons
21 purportedly forcing her resignation are inappropriate under the
22 confines of Rule 56(e).

23 VII. TITLE VII - DISCRIMINATION

24 "When... direct evidence is lacking to support a discrimination
25 claim, the plaintiff must rely on establishing a prima facie case
26 through the familiar steps of the [*McDonnell Douglas*] burden-shifting

2
3 framework." Moron-Barradas v. Dep't of Educ., 488 F.3d 472, 480 (1st
4 Cir. 2007). "[T]he burden for establishing a prima facie case is not
5 onerous." Douglas v. J.C. Penney Co., Inc., 474 F.3d 10, 14 (1st Cir.
6 2007).

7 "Disparate treatment cases ordinarily proceed under the three-
8 step, burden-shifting framework outlined in *McDonnell Douglas Corp.*
9 *v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). First,
10 the plaintiff must establish, by a preponderance of the evidence, a
11 prima facie case of discrimination. Second, if the plaintiff makes
12 out this prima facie case, the defendant must articulate a
13 legitimate, nondiscriminatory explanation for its actions. Third, if
14 the defendant carries this burden of production, the plaintiff must
15 prove by a preponderance that the defendant's explanation is a
16 pretext for unlawful discrimination. The burden of persuasion remains
17 at all times with the plaintiff." Mariani-Colon, 511 F.3d at 221
18 (citation and internal quotation marks omitted); Douglas, 474 F.3d at
19 14.

20 "Generally, a plaintiff establishes a prima facie case of
21 discrimination by showing: 1) he is a member of a protected class, 2)
22 he is qualified for the job, 3) the employer took an adverse
23 employment action against him, and 4) the position remained open, or
24 was filled by a person with similar qualifications. This burden is
25 not onerous, as only a small showing is required." Mariani-Colon, 511
26 F.3d at 221-22 (citation and internal quotation marks omitted);

2
3 Douglas, 474 F.3d at 13-14. See also, Moron-Barradas, 488 F.3d at 481
4 (prima facie case established by presenting evidence that (1)
5 plaintiff was "a member of a protected class, (2) she applied and was
6 qualified for the... position, and... (3) was rejected... and (4)
7 [defendant] hired someone with similar or lesser qualifications").

8 Once plaintiff has complied with this initial prima facie burden
9 the defendant must "articulate a legitimate nondiscriminatory reason"
10 for the challenged conduct at which time presumption of
11 discrimination fades and the burden then falls back on plaintiff who
12 must then demonstrate that the proffered reason was a "pretext" and
13 that the decision at issue was instead motivated by discriminatory
14 animus. Rivera-Aponte v. Rest. Metropol #3, Inc., 338 F.3d 9, 11
15 (1st Cir. 2003); Gu v. Boston Police Dept., 312 F.3d 6, 11 (1st Cir.
16 2002); Gonzalez v. El Dia, Inc., 304 F.3d at 69; Zapata-Matos v.
17 Reckitt & Colman, Inc., 277 F.3d 40, 44-45 (1st Cir. 2002); Feliciano
18 v. El Conquistador, 218 F.3d 1, 5 (1st Cir. 2000); Santiago-Ramos v.
19 Centennial P.R. Wireless Corp., 217 F.3d. 46, 54 (1st Cir. 2000). "At
20 this third step in the burden-shifting analysis, the *McDonnell*
21 *Douglas* framework falls by the wayside because the plaintiff's burden
22 of producing evidence to rebut the employer's stated reason for its
23 employment action merges with the ultimate burden of persuading the
24 court that she has been the victim of intentional discrimination."
25 Feliciano, 218 F.3d at 6 (citing Texas Dept. of Community Affairs v.

2
3 Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981))
4 (internal citations and quotation marks omitted).

5 Defendant's "burden is one of production, not persuasion"
6 Reeves, 530 U.S. at 142, and "[a]t all times, the plaintiff bears the
7 'ultimate burden of persuading the trier of fact that the defendant
8 intentionally discriminated against the plaintiff.'" Gu v. Boston
9 Police Dept., 312 F.3d at 11 (citing Texas Dept. of Cmty. Affairs v.
10 Burdine, 450 U.S. at 253). See also, Reeves, 530 U.S. at 143.

11 "Upon the emergence of such an explanation, it falls to the
12 plaintiff to show both that the employer's proffered reasons is a
13 sham, and that discriminatory animus sparked its actions." Cruz-Ramos
14 v. Puerto Rico Sun Oil Co., 202 F.3d 381, 384 (1st Cir. 2000)
15 (citation and internal quotation marks omitted). "The plaintiff must
16 then show, without resort to the presumption created by the prima
17 facie case, that the employer's explanation is a pretext for...
18 discrimination." Rivera-Aponte v. Rest. Metropol # 3, Inc., 338 F.3d
19 at 11.

20 Thus, in a summary judgment context the court must determine
21 "whether plaintiff has produced sufficient evidence that he was
22 discriminated against due to his [age] to raise a genuine issue of
23 material fact." Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d at
24 45; Rivas Rosado v. Radio Shack, Inc., 312 F.3d 532, 534 (1st Cir.
25 2002). Summary judgment will be denied if once the court has reviewed
26 the evidence submitted by the parties in the light most favorable to

2
3 the plaintiff it finds there is sufficient evidence from which a
4 trier of fact could conclude that the reasons adduced for the charged
5 conduct are pretextual and that the true motive was discriminatory.
6 Santiago-Ramos v. Centennial, 217 F.3d at 57; Rodriguez-Cuervos v.
7 Wal-Mart Stores, Inc., 181 F.3d 15. 20 (1st Cir. 1999).

8 Strict adherence to the *McDonnell Douglas* procedural paradigm is
9 not imperative when ruling on a summary judgment. "[A] court may
10 often dispense with strict attention to the burden-shifting
11 framework, focusing instead on whether the evidence as a whole is
12 sufficient to make out a question for a factfinder as to pretext and
13 discriminatory animus.'" Calero-Cerezo v. U.S. Dep't of Justice, 355
14 F.3d 6, 26 (1st Cir. 2004) (citing Fennell v. First Step Designs,
15 Ltd., 83 F.3d 526, 535-36 (1st Cir. 1996)).

16 However, in the context of a summary judgment "the need to
17 order the presentation of proof is largely obviated, and a court may
18 often dispense with strict attention to the burden-shifting
19 framework, focusing instead on whether the evidence as a whole is
20 sufficient to make out a question for a factfinder as to pretext and
21 discriminatory animus.'" Calero-Cerezo v. U.S. Dep't of Justice, 355
22 F.3d at 26 (citing Fennell v. First Step Designs, Ltd., 83 F.3d at
23 535).

24 "Proof of more than [plaintiff's] subjective belief that he was
25 the target of discrimination however, is required. In order to
26 establish a disparate treatment claim, a plaintiff must show that

2
3 others similarly situated to him in all relevant respects were
4 treated differently by the employer." Mariani-Colon, 511 F.3d at 222
5 (citations and internal quotation marks omitted).

6 "To survive a defendant's motion for summary judgment on a
7 discrimination claim, a plaintiff must produce sufficient evidence to
8 create a genuine issue of fact as to two points: 1) the employers'
9 articulated reasons for its adverse actions were pretextual, and 2)
10 the real reason for the employers' actions was discriminatory animus
11 based on a protected category." *Id.* at 223.

12 "At the third stage of the *McDonnell Douglas/Burdine* framework,
13 the ultimate burden is on the plaintiff to persuade the trier of fact
14 that she has been treated differently because of her [sex]." Thomas
15 v. Eastman Kodak co., 183 F.3d 38, 56 (1st Cir. 1999). "Plaintiff may
16 use the same evidence to support both conclusions [pretext and
17 discriminatory animus], provided that the evidence is adequate to
18 enable a rational factfinder reasonably to infer that unlawful
19 discrimination was a determinative factor in the adverse employment
20 action." Thomas, 183 F.3d at 57 (citation and internal quotation
21 marks omitted).

22 **A. Proffered Facts Relevant to the Selection Process**

23 We find the following facts, proffered by defendants in their
24 Statement of Uncontested Facts (docket No. 82-2) and which are
25 relevant to the selection process for the Pit Boss position in March
26 2004, are uncontested.

2
3 **1. Background**

4 The following individuals, currently employed by MARRIOTT, were
5 somehow connected to the allegations charged in the complaint:

- 6 STUART LEVENE - Casino Director since 2003.
7 CARLOS OTERO - Casino Manager since mid 1998.
8 NESTOR DEL VALLE - Manager, Casino Slots Department since
9 2001-2002.
10 HECTOR MALDONADO - Casino Slots Department Assistant
11 Manager since 2003-2004.
12 LUIS MARIA ACUÑA - Human Resources Director since July
13 2002.
14 ELIZABETH ARVELO - Director of Personnel Services since
15 2004.
16 PEDRO RIVERA - Area Director of Loss Prevention and
17 Casino Surveillance for Latin-America
18 and the Caribbean since 1999.
19 GLADYS RODRIGUEZ - Casino Floor Supervisor.

20 VENTURA ACOSTA, MIGUEL MALDONADO FONTAN, LUIS GUEVARA, JULIO
21 VAZQUEZ and NORBERTO SANTIAGO have been Pit Bosses at the MARRIOTT's
22 Casino since at least March 2004.

23 Plaintiff, MARIA VELEZ, commenced working at Marriott on
24 December 6, 1994, as a Casino Floor Supervisor. From 1995 to 1999 she
25 applied on three separate occasions to a Pit Boss position in the
26 Casino but was never selected.

2
3 In March 2004 plaintiff again applied for a Pit Boss vacant
4 position but WILFREDO GUZMAN was chosen instead.

5 **2. March 2004 Pit Boss Vacancy**

6 Late 2003 Casino management decided to open its table games
7 operation twenty four hours a day starting in December 2003, for a
8 trial period of three months. As a result thereof, the need arose for
9 a new Pit Boss to work the newly-created shift, from 4:00 a.m. until
10 12:00 noon.

11 The selection for the position was made by a committee composed
12 by the five Pit Bosses,⁸ the Casino Director⁹ and the Casino Manager.¹⁰
13 GLADYS RODRIGUEZ, Casino Floor Supervisor, was also present during
14 the selection meeting, but did not take part in the decision.

15 The selection process consisted of individual evaluations by
16 each of the Pit Bosses, the Casino Manager and the Casino Director,
17 using a form which contained the names of the candidates under
18 consideration and the attributes required for the position. The
19 individual committee members scored each candidate on each category.
20 Thereafter, the decision makers conferred and reached a consensus as
21 to the selected candidate.

22
23
24 ⁸ NORBERTO SANTIAGO, VENTURA ACOSTA, MIGUEL MALDONADO, LUIS
GUEVARA and JULIO VAZQUEZ.

25 ⁹ CARLOS OTERO.

26 ¹⁰ STUART LEVENE.

2
3 The Pit Boss selected for the new shift would be responsible for
4 the entire Casino operation during that shift. Therefore, the Casino
5 management decided to give the opportunity to three supervisors to
6 perform the duties of a Pit Boss during one month each, to see if one
7 of them demonstrated the qualifications as the right candidate for
8 the permanent position.

9 LUZ MEDINA, EDWIN CABRERA and LUIS FUENTES were chosen for this
10 trial opportunity. However, none of them performed as expected and in
11 March 2004 an opening for the Pit boss position was again published
12 to consider additional candidates.

13 This time the decision makers considered plaintiff and WILFREDO
14 GUZMAN as the two top candidates. GUZMAN was eventually selected over
15 plaintiff.

16 **B. Additional Facts**

17 We find the following additional facts relevant to the selection
18 process uncontroverted for purposes of the summary judgment now
19 before us based on the evidence on record.

20 **1. The Selection Process**

21 LEVENE's role during the selection meeting was that of a
22 facilitator. "I'm listening. I'm sort of facilitating the meeting.
23 I'm not passing judgment on anyone, because I did not or never had an
24 opportunity to work very closely with any of them. But I'm just
25 facilitating the process to try to make sure that, you know, that
26

2
3 people are being candid and fair." LEVENE Depo. Tr. 46 (docket No.
4 82-17).

5 Each member would be handed a scoring sheet to fill out and the
6 individual results for each candidate would be added up. LUIS GUEVARA
7 Depo. Tr. 61 (docket No. 82-19); CARLOS OTERO Depo. Tr. 48 (docket
8 No. 82-18). "[E]verybody was given an opportunity to rank, or rate,
9 or somehow figure out how they stacked-up against each other, and
10 that was done individually. So everyone went to a cubicle or an
11 office and filled out the form." LEVENE Depo. Tr. 42 (docket No. 82-
12 17).

13 After each committee member had assessed the individual
14 applicants independently of each other using the form they had been
15 provided for this purpose, they met to discuss the candidates.
16 "[E]verybody stood up and vocalized their thoughts, and we discussed
17 the candidates." LEVENE Depo. Tr. 44 (docket No. 82-17). Once the
18 scores were added up, the "weaknesses and strengths of each
19 [candidate], aside from the ones that were there as guidelines [were
20 discussed]." NORBERTO SANTIAGO Depo. Tr. 50 (docket No. 100-3).
21 "Later on, we got together in a group to discuss what each one had...
22 stated as opinion." CARLOS OTERO Depo. Tr. 48 (docket No. 82-18).

23 However, according to the decision makers, getting the highest
24 scores in the individual evaluation forms was not conclusive. "[It]
25 does not mean that automatically he is going to be chosen." NORBERTO
26 SANTIAGO Depo. Tr. 48 (docket No. 100-3).

2
3 The decision makers considered plaintiff and WILFREDO GUZMAN as
4 the two top candidates for the position. WILFREDO GUZMAN was
5 eventually selected over plaintiff. "Wilfredo Guzman and Maria...
6 were the top two (2) candidates." LEVENE Depo. Tr. 45 (docket No. 82-
7 17). The results for Wilfredo Guzman, Maria Velez and Luis Fuentes
8 were "close". CARLOS OTERO Depo. Tr. 53-54 (docket No. 82-18). "[T]he
9 first candidates were Wilfredo Guzman, Maria Velez and I don't recall
10 who was third, because it was practically the two of them who had the
11 most points, Wilfredo Guzman and Maria Velez." CARLOS OTERO Depo. Tr.
12 54 (docket No. 82-18). WILFREDO and MARIA VELEZ were the final
13 candidates. LUIS GUEVARA Depo. Tr. 63 (docket No. 82-19).

14 Because the two finalists were so close the committee went on to
15 discuss the strong points and weaknesses of each one of them. CARLOS
16 OTERO Depo. Tr. 57 (docket No. 100-9). "It was an open discussion,
17 they were verifying who were [sic] going to be rejected... in
18 accordance to the ones who were closer or had a higher score... they
19 began to talk about strong points and weaknesses that each one of
20 them had." CARLOS OTERO Depo. Tr. 54 (docket No. 82-18). After the
21 two final candidates were chosen, "[t]here was discussion as to what
22 is the person they were looking for, what was being looked for... in
23 a pit boss; and they discussed problems that had... that had arisen;
24 they discussed... well, the pros and the cons of each one." LUIS
25 GUEVARA Depo. Tr. 63 (docket No. 82-19).

2
3 According to LEVENE, "Wilfredo was selected because of the five
4 (5) candidates we thought that he was the most qualified." LEVENE
5 Depo. Tr. 42 (docket No. 82-17). "[T]here were several
6 considerations... table games knowledge... work experience...
7 attitude, associate relations, customer relations, team work." LEVENE
8 Depo. Tr. 42 (docket No. 82-17).

9 When inquired regarding the reasons for having selected WILFREDO
10 over plaintiff, LEVENE responded: "I think a lot of positive things
11 were said about both candidates. I think that they were both good...
12 And I believe that Wilfredo may have inched-out Maria on the basis of
13 team work and team chemistry and customer relations and associate
14 relations." LEVENE Depo. Tr. 45 (docket No. 82-17). However, LEVENE
15 could not "recall the specifics" regarding the committee members'
16 concerns in these areas. LEVENE Depo. Tr. 46 (docket No. 82-17).

17 WILFREDO GUZMAN's strong points were: "[h]e had knowledge of the
18 game... he had good rapport with the associates. He had good
19 teamwork, and he treated clients very well." CARLOS OTERO Depo. Tr.
20 55 (docket No. 82-18). "[H]e was a person who had very good relations
21 with all the associates, including supervisors, including coworkers,
22 associates and superiors. That he is a person who also gets along
23 excellently with the players, with the clients; that, as far as I am
24 concerned, is an area that was one of the most important ones." LUIS
25 GUEVARA Depo. Tr. 67 (docket No. 82-19).

2
3 As to his weaknesses, "he worked more in the work shift during
4 the daytime, and maybe did not have the... in other words, that there
5 as [sic] many games going on at night as such... In other words,
6 maybe he was not accustomed to so many games." CARLOS OTERO Depo. Tr.
7 55 (docket No. 82-18). Additionally, he did not know the roulette
8 game. LUIS GUEVARA Depo. Tr. 66 (docket No. 82-19).

9 The issue of a "warning" issued to WILFREDO GUZMAN a year before
10 due to the untimely renewal of his licence also came up but the
11 warning had expired. LUIS GUEVARA Depo. Tr. 66 (docket No. 100-7).
12 WILFREDO GUZMAN was given a warning by JULIO VAZQUEZ for having
13 failed to timely renew his "croupier's" licence because of problems
14 with ASUME.¹¹ WILFREDO GUZMAN Depo. Tr. 48-51 (docket No. 100-4).

15 As to MARIA, "[h]er strong points [were], knowledge of the
16 games, knowledge of the slot machine area... and experience, those
17 were her strong points." CARLOS OTERO Depo. Tr. 55 (docket No. 82-
18 18). "[S]he knew all the games... had more experience... than
19 Wilfredo Guzman." LUIS GUEVARA Depo. Tr. 66-67 (docket No. 82-19).
20 "[She] knew the games, she had experience". JULIO VAZQUEZ Depo. Tr.
21 42 (docket No. 82-20).

22 Regarding plaintiff's weak points as a candidate, LEVENE
23 indicated that "[he] didn't have any team work issues with any of
24

25
26 ¹¹ State agency responsible for procuring child support for
minors.

2
3 [the candidates] but the people who knew them best, obviously, had
4 some concerns". LEVENE Depo. Tr. 46 (docket No. 82-17).

5 "Her weaknesses turn out to be teamwork, how to deal with the
6 clients..." CARLOS OTERO Depo. Tr. 55 (docket No. 82-18). "I always
7 remember that there had been two or three clients who had complained
8 about [plaintiff], because [plaintiff] was not... she was very rough,
9 rough with them, in other words, very explosive." JULIO VAZQUEZ Depo.
10 Tr. 46 (docket No. 82-20).

11 Q. Okay. Any other negative instance of Maria that was
12 discussed?

13 A. [I]t was basically her attitude, her attitude as a
14 supervisor toward... towards the associates, which was
15 a bit... it ... it was an attitude, well... how could
16 I say it... rough, or maybe, on occasions it could
17 border on".

18 LUIS GUEVARA Depo. Tr. 65 (docket No. 82-19).

19 The committee members were also allegedly worried about "some
20 incidents with some female employees who had accused [plaintiff]
21 of... of her having threatened them because of talking to
22 [plaintiff'] partner." JULIO VAZQUEZ Depo. Tr. 42 (docket No. 82-20).
23 Specifically, JULIO VAZQUEZ indicated that a Pit Clerk by the name of
24 JUDITH had complained that plaintiff had threatened her because
25 plaintiff did not like her talking to MARIO CRUZ and that plaintiff
26 had called JUDITH's husband to tell him that JUDITH was trying to

2
3 seduce MARIO. JULIO VAZQUEZ Depo. Tr. 43-44 (docket No. 82-20); LUIS
4 GUEVARA Depo. Tr. 64-65 (docket No. 82-19). Supposedly another Pit
5 Clerk named JANESA indicated that plaintiff had also called her
6 husband. JULIO VAZQUEZ Depo. Tr. 47 (docket No. 82-20).

7 Additionally, plaintiff had procured a protective order against
8 MARIO CRUZ, a coworker. JULIO VAZQUEZ Depo. Tr. 44 (docket No. 82-
9 20). "[T]he entire conversation revolved around Mario and Maria's
10 problem at work." JULIO VAZQUEZ Depo. Tr. 45 (docket No. 82-20).

11 Another factor discussed was the fact that plaintiff would be
12 supervising her partner if promoted to the pit boss position. Someone
13 present raised the matter during the discussion. LEVENE Depo. Tr. 48
14 (docket No. 82-17). This factor, although did not "disqualify her,
15 but [] was given weight" in the selection process. LEVENE Depo. Tr.
16 48 (docket No. 82-17).

17 According to the committee members, this was a matter of concern
18 due to a recent incident involving a theft at the casino by a couple
19 working together. CARLOS OTERO Depo. Tr. 81 (docket No. 82-18).

20 Well, there was a situation that is rather sort of
21 bizarre and unique unto itself that happened Tuesday.
22 That's for sure, I remember exactly when it happened, and
23 all hell broke loose. There was a little bit of a scam that
24 involved the collusion between two (2) people: one was the
25 Auditor and the other was the slot supervisor. And somehow
26 they absconded with about a hundred and twenty thousand

2
3 dollars (\$120,000.00) And the Auditor was really the safety
4 net that was supposed to be double checking the paper work
5 and that was being erroneously processed. And we discovered
6 it, and eventually recovered the funds, but it just scared
7 the... You know, this was something that was so significant
8 the auditors got involved; the regional team got involved;
9 everybody had an opinion on everything from our procedures,
10 to relationships, to whatever, and that was a difficult
11 time.

12 LEVENE Depo. Tr. 47-48 (docket No. 82-17).

13 However, no measures were taken with regard to the couples who
14 were already working at the Casino. GLADYS RODRIGUEZ Depo. Tr. 49
15 (docket No. 82-21).

16 2. Non-discriminatory Reasons Proffered

17 Plaintiff's initial prima facie burden is easily met in this
18 suit and defendants have so conceded. "In this case Marriott is not
19 contesting plaintiff's *prima facie* case. That is, plaintiff is
20 obviously a female individual; she had acceptable performance
21 evaluations, and she was not granted a promotion she requested."
22 Memorandum of Law (docket No. 82) p. 5.

23 Thus, the burden falls upon the defendants to articulate a
24 legitimate nondiscriminatory reason for having selected WILFREDO
25 GUZMAN for the Pit Boss position over plaintiff.
26

2
3 According to MARRIOTT, the selection committee opted for the
4 male applicant "inasmuch as he had the required table games
5 knowledge, experience, attitude, associate's relations, customer
6 relations and teamwork." Memorandum of Law (docket No. 82) pp. 6-7.
7 Even though "[p]laintiff was seriously considered for the position,
8 as she had the table games knowledge and experience needed... Guzman
9 outscored her in teamwork, team chemistry, customer's relations and
10 associate's relations." Memorandum of Law (docket No. 82) p. 7.

11 MARRIOTT explains that its decision was not based on a single
12 factor but rather "a combination of factors that weighed in favor of
13 selecting Guzman over plaintiff, including attitude, associate and
14 customer's relations skills (for example, plaintiff's incidents with
15 co-workers and clients, such as a discussion with a female co-worker
16 motivated by jealousy), teamwork, inability to keep the personal life
17 outside the workplace, and the fact that, if awarded the position,
18 plaintiff would supervise her then live-in partner." Reply (docket
19 No. 105) at 14.

20 Defendants having come forth with legitimate nondiscriminatory
21 reasons for having rejected plaintiff's promotion the evidentiary
22 presumption of discrimination vanishes and the burden falls back upon
23 plaintiff to demonstrate that the proffered grounds for her non-
24 selection were a "pretext" and the decision was motivated instead by
25 sex discrimination.
26

2
3 The fact that the reasons proffered by the employer are
4 discredited by plaintiff does not automatically mandate a finding of
5 discrimination. "That is because the ultimate question is not whether
6 the explanation was false, but whether discrimination was the cause
7 of the [conduct at issue]. We have adhered to a case by case
8 weighing. Nonetheless, disbelief of the reason may, along with the
9 prima facie case, on appropriate facts, permit the trier of fact to
10 conclude the employer had discriminated." Zapata-Matos v. Reckitt &
11 Colman, Inc., 277 F.3d at 45 (citations omitted); Reeves, 530 U.S. at
12 147-48. Plaintiff's challenges to defendant's proffered reasons is
13 not sufficient to meet his burden. See, Ronda-Perez v. Banco Bilbao
14 Vizcaya, 404 F.3d 42, 44 (1st Cir. 2005). Rather, "[t]he question to
15 be resolved is whether the defendant's explanation of its conduct,
16 together with any other evidence, could reasonably be seen by a jury
17 not only to be false but to suggest an age-driven animus." *Id.* See
18 also, Candelario Ramos v. Baxter Healthcare Corp. of P.R., 360 F.3d
19 53, 56 (1st Cir. 2004).

20 Plaintiff first contends that MARRIOTT failed to articulate a
21 legitimate, non-discriminatory reason for the challenged selection
22 process. In the alternative, she posits that there are genuine issues
23 of material facts regarding defendants' articulated reasons for her
24 non-selection which point to discriminatory animus.

25 We find that defendants have met their burden of advancing
26 gender-free reasons for having selected WILFREDO GUZMAN over

2
3 plaintiff for the Pit Boss position sufficiently to shift the burden
4 to plaintiff to establish that the reasons given were but a pretext
5 for sex discrimination.

6 3. Pretext

7 In support of her pretext argument plaintiff initially contends
8 that she is entitled to an evidentiary inference in her favor due to
9 spoliation of relevant documents. Plaintiff contends that she is
10 entitled to an inference that she was better qualified than her male
11 counterpart for the vacant Pit Boss position in March of 2004 because
12 the selection committee evaluations are no longer available.

13 a. Spoliation

14 GLADYS RODRIGUEZ testified in her deposition that she had been
15 handed the documents used by the decision-makers for calculating the
16 applicant's score at the conclusion of their meeting for safekeeping
17 which she placed in a filing cabinet in her office. She further
18 indicated that her office keys were misplaced and the documents were
19 taken from her office. "Well, it was stolen, they took it. My key
20 from the, from the, from my office was lost and, well, apparently
21 they took it." GLADYS RODRIGUEZ Depo. Tr. 54 (docket No. 100-5).

22 According to plaintiff, the written evaluations forms filled out
23 by the individual committee members during the selection process are
24 critical to demonstrate the underlying discriminatory reasons for not
25 having been selected over the male candidate because they have
26 disappeared under unknown circumstances. "A reasonable inference

2
3 deriving from the non-production of the selection committee
4 evaluations is that she outscored her male counterpart in her overall
5 score particularly given the direct evidence that [plaintiff] was
6 clearly the most experienced of the two final candidates.”
7 Plaintiff’s Motion in Opposition (docket No. 92-2) p. 20 & Sur-reply
8 (docket No. 120) p. 13.

9 “Spoliation refers to the destruction or material alteration of
10 evidence or to the failure to preserve property for another’s use as
11 evidence in pending or reasonably foreseeable litigation.” Silvestri
12 v. Gen. Motors Corp., 271 F.3d 583, 590 (1st Cir. 2001).

13 Litigants have the responsibility of ensuring that relevant
14 evidence is protected from loss or destruction. “‘A litigant has a
15 duty to preserve relevant evidence.’” Perez-Velasco v. Suzuki Motor
16 Co. Ltd., 266 F.Supp.2d 266, 268 (D.P.R. 2003) (citing Vazquez
17 Corales v. Sea-Land Serv., Inc., 172 F.R.D. 10, 11-12 (D.P.R. 1997)).

18 Further, this obligation predates the filing of the complaint
19 and arises once litigation is reasonably anticipated. The duty
20 extends to giving notice if the evidence is in the hands of third-
21 parties. “‘The duty to preserve material evidence arises not only
22 during litigation but also extends to that period before the
23 litigation when a party reasonably should know that the evidence may
24 be relevant to anticipated litigation... If a party cannot fulfill
25 this duty to preserve because he does not own or control the
26 evidence, he still has an obligation to give the opposing party

2
3 notice of access to the evidence or of the possible destruction of
4 the evidence if the party anticipates litigation involving that
5 evidence.'" Perez-Velasco, 266 F.Supp.2d at 268 (citing Silvestri,
6 271 F.3d at 591).

7 Relevant evidence is that which may prove or disprove a party's
8 liability theory. Perez-Velasco; Vazquez Corales.

9 If the court finds that a party is accountable for the
10 spoliation it may impose sanctions to avoid unfair prejudice to the
11 opposing party. "[T]he district court has inherent power to exclude
12 evidence that has been improperly altered or damaged by a party where
13 necessary to prevent the non-offending side from suffering unfair
14 prejudice.'" Collazo-Santiago v. Toyota Motor Corp., 149 F.3d 23, 28
15 (1st Cir. 1998) (citing Sacramona v. Bridgestone/Firestone, Inc., 106
16 F.3d 444, 446 (1st Cir. 1997)); Silvestri, 271 F.3d at 590; Collazo-
17 Santiago v. Toyota Motor Corp., 149 F.3d 29, 28 (1st Cir. 1998).

18 Prejudice will be measured by the degree in which a party's
19 ability to adequately develop its liability theory or mount a proper
20 defense has been hampered. Perez-Velasco, 266 F.Supp.2d at 269;
21 Driqgin v. Am. Sec. Alarm Co., 141 F.Supp.2d 113, 121 (D.Me. 2000);
22 Vazquez-Corales, 172 F.R.D. at 14.

23 "The intended goals behind excluding evidence, or at the
24 extreme, dismissing a complaint, are to rectify any prejudice the
25 non-offending party may have suffered as a result of the loss of the
26 evidence and to deter any future conduct, particularly deliberate

2
3 conduct, leading to such loss of evidence... Therefore, of particular
4 importance when considering the appropriateness of sanctions is the
5 prejudice to the non-offending party and the degree of fault of the
6 offending party. Collazo-Santiago, 149 F.3d at 29. See *i.e.*,
7 Silvestri, 271 F.3d at 594 ("even when conduct is less culpable,
8 dismissal may be necessary if the prejudice to the defendant is
9 extraordinary, denying it the ability to adequately defend its
10 case"); Flury v. Daimler Chrysler Corp., 427 F.3d 939, 943 (1st Cir.
11 2005) ("[t]his case hinges upon the significance of the evidence
12 destroyed and upon the extreme prejudice the defendant suffered as a
13 result. Although the district court is afforded a considerable amount
14 of discretion in imposing sanctions, we believe the extraordinary
15 nature of plaintiff's actions coupled with extreme prejudice to the
16 defendant warrants dismissal.")

17 Applicable caselaw in the First Circuit has clearly established
18 that "bad faith or comparable bad motive" is not required for the
19 court to exclude evidence in situations involving spoliation. Trull
20 v. Volkswagen of America, Inc., 187 F.3d 88, 95 (1st Cir. 1999).

21 In addition to the severity of the prejudice suffered the court
22 must also consider "whether the non-offending party bears any
23 responsibility for the prejudice from which he suffers." Driggin, 141
24 F.Supp.2d at 121. "Fairness to the opposing party... plays a
25 substantial role in determining the proper response to a spoliation
26 motion, and punishment for egregious conduct is not the sole

2
3 rationale for the most severe sanction of exclusion." Trull, 187 F.3d
4 at 95.

5 Sanctions for spoliation range from dismissal of the action,
6 exclusion of evidence or testimony or instructing the jury on a
7 negative inference to spoliation whereby the jury may infer that a
8 party who destroyed evidence did so out of realization that it was
9 unfavorable. The measure of the appropriate sanctions will depend on
10 the severity of the prejudice suffered. Driggin, 141 F.Supp.2d at
11 121; Vazquez-Corales, 172 F.R.D. at 13, 15.

12 It is not known at what particular point in time the evaluation
13 forms disappeared. All we have before us is the deposition testimony
14 of MS. RODRIGUEZ, in charge of their safekeeping, who indicated that
15 "[t]he exact date [of their disappearance] as such I don't remember.
16 I know that at a given moment, well, I needed the documents and when
17 I went to look for them they were not, they were not there." GLADYS
18 RODRIGUEZ Depo. Tr. 82 (docket No. 100-5).

19 Thus, it is difficult for the court to conclude that the timing
20 of the disappearance coincided with the foreseeability of litigation
21 which would have triggered defendants' duty to preserve these
22 documents.

23 Further, because we find that plaintiff has available sufficient
24 evidence to raise issues of material fact regarding the veracity of
25 defendant's proffered reasons for its decision as well as an
26

2
3 inference of discriminatory animus we do not find that plaintiff has
4 been unfairly prejudiced by their unavailability.

5 Accordingly, we reject plaintiff's spoliation argument.

6 **b. Subjective Factors**

7 It is evident from the testimony adduced by the parties that
8 during the selection process the objective factors listed in the
9 evaluation form were deemed less important than subjective ones. As
10 a matter of fact, all the committee members coincided when they found
11 that plaintiff was more experienced and more dexterous at the table
12 games than WILFREDO. Accordingly, we shall focus our attention on
13 whether the subjective reasons proffered by MARRIOTT for not
14 selecting plaintiff can be deemed a subterfuge for sex
15 discrimination.

16 We shall commence our review with the anecdotal stories
17 surrounding plaintiff's personal life. Indeed, this particular
18 subject took up a significant portion of the discussion during the
19 selection process and also weighed heavily on the reasons advanced
20 for plaintiff's non-selection to the Pit Boss position.

21 Defendants justify their choice of candidate and deny that the
22 subjective evaluation factors were rumors but rather that these were
23 real events either documented in plaintiff's personnel file or
24 admitted by plaintiff during her deposition.

25 However, we must note that the events pertaining to plaintiff's
26 life which were relied upon by defendants in support of their

2
3 selection process date from 1997 to 1998, that is, six years prior to
4 the decision at issue in this litigation.¹² No evidence of more recent
5 incidents has been submitted. Plaintiff's personal life seems to have
6 seeped into the center of the decision-making process without
7 specific notice of how it would impinge on her ability to do her job
8 in 2004.

9 Plaintiff also challenges as disqualifying criteria the fact
10 that she would supervise her then live-in partner if she were
11 promoted to the Pit Boss position. It is undisputed that in March
12 2004 various Casino employees had ongoing relationships with other
13 Casino employees¹³ with no effect in their employment. According to
14 CARLOS OTERO, nothing was done regarding couples who were already
15 working at MARRIOTT. Rather, things continued as before. CARLOS OTERO
16 Depo. Tr. 82 (docket No. 82-18).

17 As a matter of fact, CARLOS OTERO had a common law partner with
18 a lesser rank at the Casino and depending on their shifts they

19
20 ¹² For example: Record of Conversation dated December 1, 1997,
21 Memo from Gil Torres to plaintiff dated December 8, 1997, Record of
22 Conversation dated January 24, 1998, and Record of Conversation dated
23 January 25, 1998. Defendants' Motion for Summary Judgment... (docket
24 No. 82) Exhs. 18-21. According to plaintiff, the restraining order
was issued in 1999 but we have not seen any evidence confirming this
date. See Plaintiff's Motion in Opposition (docket No. 92-2) p. 23-
24.

25 ¹³ For example: DEREK LOPEZ and JOMARIE COLON, DORIS RODRIGUEZ
26 and DANIEL CARRASQUILLO, GRISELL CASTILLO and CARLOS OTERO. GLADYS
RODRIGUEZ Depo. Tr. 51 (docket No. 100-5); CARLOS OTERO Depo. Tr. 82
(docket No. 82-18).

2
3 coincided at work. This situation was never taken up with MR. OTERO
4 even though he held the position of Casino Manager, the second in
5 command in the Casino hierarchy. CARLOS OTERO Depo. Tr. 81 (docket
6 No. 82-18).

7 There is no evidence on record of an extant policy at MARRIOTT
8 during that period of time proscribing couples from working together
9 at the Casino. Further, apart from the concern raised exclusively in
10 plaintiff's situation no prospective measures were taken regarding
11 employed couples to avoid possible embezzlements in the future.

12 Lastly, it is important to distinguish between the nature of the
13 supervisory role played by a Pit Boss and a games employee with that
14 of an auditor - the final check and balance in the Casino operation.
15 According to LEVENE, the comptroller "[is] responsible for all
16 finance/accounting/audits, the cage operations, [and] the cage
17 cashiers". LEVENE Depo. Tr. 61 (docket No. 82-17).

18 For purposes of the summary judgment request presently before us
19 "'the focus should be on the ultimate issue: whether, viewing the
20 aggregate package of proof offered by the plaintiff and taking all
21 inferences in the plaintiff's favor, the plaintiff has raised a
22 genuine issue of fact as to whether the termination of the
23 plaintiff's employment was motivated by [sex] discrimination.'" Rivas
24 Rosado v. Radio Shack, Inc., 312 F.3d 532, 535 (1st Cir. 2002) (citing
25 Dominquez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 430-31 (1st Cir.
26 2000)).

2
3 The candidate's personnel records, including their formal
4 evaluations and/or negative entries for the previous years were not
5 considered in the decision-making process.¹⁴ Even though there were
6 vague references as to plaintiff's difficulties with co-workers and
7 instances of problems with clients,¹⁵ the final selection hinged on
8 subjective factors such as outdated anecdotal stories regarding
9 plaintiff's personal life and unevenly applied criteria involving
10 working couples used by a group composed exclusively by seven men -
11 for MS. RODRIGUEZ was merely a witness to the process.

12 As to the alleged security concern, it seems illogical to
13 consider a potential for defalcation due to plaintiff's personal
14 relationship and not between someone much higher in the Casino
15 organization and his partner. The fact that absolutely nothing was
16 done regarding employees in similar personal conditions working at
17 the Casino either at the time of the events involving this litigation

18
19 ¹⁴ LEVENE Depo. Tr. 52-53 (docket No. 88-4).

20 ¹⁵ With respect to plaintiff's relationship with clients JULIO
21 VAZQUEZ stated that on two or three occasions clients had complained
22 that plaintiff was "very rough", "very explosive". Yet there is no
23 record of anything being done about this matter such as interviewing
24 the clients and formally placing their complaints in plaintiff's
25 personnel file. Under the circumstances it is for the trier of facts
26 to determine what actions or comments of plaintiff would lead to the
conclusion that she was "very rough" and "very explosive" other than
affiant JULIO VAZQUEZ' subjective perception. With respect to
plaintiff's attitude toward fellow workers, LUIS GUEVARA's vague
statement is that it was "a bit... it... was an attitude, well.. how
could I say it... rough, or maybe, on occasions it could border on
haughtiness." LUIS GUEVARA Depo. Tr. 65-66 (docket No. 82-19).

2
3 or prospectively, together with the other evidence available to the
4 court raises the specter of sex based discrimination.¹⁶

5 Accordingly, we find that taking all inferences in plaintiff's
6 favor, she has sufficiently raised issues of material fact to warrant
7 denial of defendants' request to dismiss her sex discrimination claim
8 based on her non-selection for the Pit Boss position in March 2004.

9 **VIII. TITLE VII - RETALIATION**

10 **A. Timeliness**

11 Plaintiff also alleges that she suffered retaliation while
12 employed at MARRIOTT in the form of a hostile work environment.

13 Plaintiff filed her initial discriminatory charge challenging
14 defendants' failure to promote her to the Pit Boss position on March
15 26, 2004. The following year, on March 25, 2005, she submitted a
16 retaliation charge.

17 Defendants argue that exhaustion of administrative remedies is
18 mandated as to all allegedly retaliatory conduct asserted by
19 plaintiff for which reason part of the events underlying plaintiff's
20 retaliation claim, which were never presented to the pertinent agency
21 for investigation, are time-barred.

22
23 ¹⁶ We reject plaintiff's proffer regarding WILFREDO's low scores
24 in past evaluations, purported admonishments and discipline record as
25 well as the allegedly late submission of his application for the Pit
26 Boss position in March 2004 bypassing the Human Resources Office as
unfounded. Further, defendants submitted WILFREDO's evaluations for
the years 2002 through 2004 which refute this claim.

2
3 Indeed, as previously noted, exhaustion of administrative
4 remedies is an integral component of the Title VII legislative
5 scheme. In Puerto Rico, an aggrieved employee has 300 days from the
6 occurrence of the employment action complained of to file an
7 administrative charge in instances where the local Department of
8 Labor is empowered to provide relief, i.e., in instances of
9 "deferral" jurisdiction. Bonilla, 194 F.3d at 278 n.4; Lebron-Rios v.
10 U.S. Marshal Serv., 341 F.3d 7, 11 n.5 (1st Cir. 2003). Otherwise, the
11 applicable period is 180 days. See, 42 U.S.C. § 2000e-5(e) (1).¹⁷

12 The Puerto Rico Anti-Discrimination Unit of the Department of
13 Labor has no jurisdiction over Title VII retaliation claims and thus,
14 is not deemed a Designated Agency under § 2000e-5(e) (1). Therefore,
15 claims for retaliation must be filed with the EEOC within 180 days

16
17
18 ¹⁷ In pertinent part, § 2000e-5(e) (1) reads:

19 A charge under this section shall be filed
20 within **one hundred and eighty days** after the
21 alleged unlawful employment practice occurred...
22 except that in a case of an unlawful employment
23 practice with respect to which the person
24 aggrieved has initially instituted proceedings
25 with a state or local agency with authority to
26 grant or seek relief from such practice or to
institute criminal proceedings with respect
thereto... such charge shall be filed by or on
behalf of the person aggrieved within **three
hundred days** after the alleged unlawful
employment practice occurred.

(Emphasis ours).

2
3 from the events complained of.¹⁸ See also, Alvarez v. Delta Airlines,
4 Inc., 319 F.Supp.2d 240, 249 (D.P.R. 2004) ("The EEOC has not
5 conferred the ADU in Puerto Rico with jurisdiction to hear claims for
6 retaliation under section 704(a) of Title VII, 42 U.S.C. § 2000e-
7 3(a), such as the one presented by [plaintiff], which is an
8 independent cause of action from his sexual harassment claims. See 29
9 C.F.R. § 1601.74. In such a case, a claimant will have 180 days, not
10 300 days, from the alleged unlawful employment practice to file a
11 charge of retaliation under Title VII with the EEOC.")

12 However, the Court of Appeals for the First Circuit has held
13 that the exhaustion requirement may prove inadequate in some
14 instances and may be waived "so long as the retaliation is reasonably
15 related to and grows out of the discrimination complained of to the
16 agency - e.g., the retaliation is for filing the agency complaint
17 itself." Clockedile v. New Hampshire Dep't of Corrections, 245 F.3d
18 1, 6 (1st Cir. 2001).

19 Given the fact that the purportedly stale retaliatory events
20 allegedly arose from plaintiff having filed her initial
21 discriminatory claim with the ADU in March of 2004, we reject
22 defendants' timeliness argument based on Clockedile.

23
24
25 ¹⁸ The designation of Puerto Rico as a "deferral" state for
26 Title VII violations specifically excludes retaliation claims
asserted under Sec. 704(a), 42 U.S.C. § 2000e-3(a). See, 29 C.F.R. §
1601.74.

2
3 **B. Retaliation - The Law**

4 Our review of the facts necessary to rule on the retaliation
5 claim in this action is limited by plaintiff's failure to abide by
6 the Local Rule 56(c) requirements.¹⁹ Because plaintiff did not
7 adequately challenge the underlying facts advanced by MARRIOTT in
8 support of its request for dismissal of this particular cause of
9 action, we shall examine defendants' proffered explanations for these
10 events as uncontested.

11 "Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a),
12 states that it is unlawful for an employer to discriminate against an
13 employee because 'he has opposed any practice made an unlawful
14 employment practice..., or because he has made a charge, testified,
15 assisted, or participated in any matter in an investigation,
16 proceeding, or hearing.'" DeClaire, 530 F.3d at 19.

17 The interests sought to be protected by Title VII's anti-
18 discrimination mandate differ from those underlying its retaliation
19 clause. "The substantive provision seeks to prevent injury to
20 individuals based on who they are, *i.e.*, their status. The anti-
21 retaliation provision seeks to prevent harm to individuals based on
22 what they do, *i.e.*, their conduct." Burlington N. & Santa Fe Ry. Co.
23 v. White, 548 U.S. 53, 63, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).

24
25 ¹⁹ As previously noted, because plaintiff failed to address
26 defendants' proffered facts ¶¶ 46-137 we shall deem them uncontested
when addressing MARRIOTT's explanations surrounding these events.

2
3 "It therefore does not matter for retaliation purposes whether [the
4 employer] would have treated a male [employee] the same way he
5 treated [plaintiff]. The relevant question is whether [the employer]
6 was retaliating against [plaintiff] for filing a complaint, not
7 whether he was motivated by gender bias at the time." DeClaire, 530
8 F.3d at 19.

9 Hence, for retaliation purposes "[t]he relevant conduct is that
10 which occurred *after* [plaintiff] complained about his superior's
11 [discriminatory] related harassment." Quiles-Quiles v. Hendeson, 439
12 F.3d 1, 8 (1st Cir. 2006).

13 C. Burden of Proof - McDonnell Douglas

14 "The evidence of retaliation can be direct or circumstantial."
15 DeClaire, 530 F.3d at 20. Unless direct evidence is available, Title
16 VII retaliation claims may be proven by using the burden-shifting
17 framework set forth down in McDonnell Douglas. "In order to
18 establish a prima facie case of retaliation, a plaintiff must
19 establish three elements. First, the plaintiff must show that he
20 engaged in a protected activity. Second, the plaintiff must
21 demonstrate he suffered a materially adverse action, which caused him
22 harm, either inside or outside of the workplace. The impact of this
23 harm must be sufficient to dissuade a reasonable worker from making
24 or supporting a charge of discrimination. Third, the plaintiff must
25 show that the adverse action taken against him was causally linked to
26 his protected activity." Mariani-Colon, 511 F.3d at 223 (citations

2
3 and internal quotation marks omitted); Moron-Barradas, 488 F.3d at
4 481; Quiles-Quiles, 439 F.3d at 8.

5 “Under the *McDonnell Douglas* approach, an employee who carries
6 her burden of coming forward with evidence establishing a prima facie
7 case of retaliation creates a presumption of discrimination, shifting
8 the burden to the employer to articulate a legitimate, non-
9 discriminatory reason for the challenged actions... If the employer’s
10 evidence creates a genuine issue of fact, the presumption of
11 discrimination drops from the case, and the plaintiff retains the
12 ultimate burden of showing that the employer’s stated reason for the
13 challenged actions was in fact a pretext for retaliating.” Billings
14 v. Town of Grafton, 515 F.3d 39, 55 (1st Cir. 2008) (citations,
15 internal quotation marks and brackets omitted).

16 “[A]n employee engages in protected activity, for purposes of a
17 Title VII retaliation claim, by opposing a practice made unlawful by
18 Title VII, or by participating in any manner in an investigation or
19 proceeding under Title VII.” Mariani-Colon, 511 F.3d at 224.

20 “[Title VII’s] anti-retaliation provision protects an individual
21 not from all retaliation, but from retaliation that produces an
22 injury or harm.” Burlington, 548 U.S. at 67. In order to prevail on
23 a retaliation claim “a plaintiff must show that a reasonable employee
24 would have found the challenged action materially adverse, which in
25 this context means it well might have dissuaded a reasonable worker
26 from making or supporting a charge of discrimination.” *Id.* at 68. It

2
3 is not necessary that the conduct at issue affect the employee's
4 "ultimate employment decisions." *Id.* at 67.

5 According to Burlington, the determination of whether a
6 particular action is "materially adverse" must be examined based on
7 the facts present in each case and "should be judged from the
8 perspective of a reasonable person in the plaintiff's position,
9 considering all the circumstances." *Id.* at 71 (citation and internal
10 quotation marks omitted).

11 In reaching its decision in Burlington, the Supreme Court
12 considered factors such as the fact that the duties of a position
13 "were... more arduous and dirtier" when compared to the other
14 position which "required more qualifications, which is an indication
15 of prestige [] and... was objectively considered a better job". *Id.*
16 (citation and quotation marks omitted).

17 In Billings the court distinguished between minor incidents
18 which take place in the usual course of a work setting and have no
19 import on an individual's decision to file a discrimination charge
20 and those which might deter an employee from complaining of such
21 conduct. Specifically, the court noted that "some of [the
22 supervisor's] behavior - upbraiding [plaintiff] for her question at
23 the Board of Selectmen meeting, criticizing her by written memoranda,
24 and allegedly becoming aloof toward her - amounts to the kind of
25 petty slights or minor annoyances that often take place at work and
26 that all employees experience and that, consequently, fall outside

2
3 the scope of the antidiscrimination laws... But we cannot say the
4 same for the other incidents, namely, investigating and reprimanding
5 [plaintiff] for opening the letter from [the supervisor's] attorney,
6 charging her with personal time for attending her deposition in this
7 case, and barring her from the Selectmen's Office. While these
8 measures might not have made a dramatic impact on [plaintiff's] job,
9 conduct need not relate to the terms or conditions of employment to
10 give rise to a retaliation claim. Indeed, we think that these
11 actions, by their nature, could well dissuade a reasonable employee
12 from making or supporting a charge of discrimination. An employee who
13 knows that, by doing so, she risks a formal investigation and
14 reprimand - including a threat of further, more serious discipline -
15 for being insufficiently careful in light of her pending litigation
16 as well as the prospect of having to take personal time to respond to
17 a notice of deposition issued by her employer in that litigation,
18 might well choose not to proceed with the litigation in the first
19 place." Billings, 515 F.3d at 54 (citations, internal quotation marks
20 and brackets omitted).

21 "It is true that an employee's displeasure at a personnel action
22 cannot, standing alone, render it materially adverse... [but
23 plaintiff] came forward with enough objective evidence contrasting
24 her former and current jobs to allow the jury to find a materially
25 adverse employment action." *Id.* at 53.
26

2
3 Depending on the particular set of facts at hand, "temporal
4 proximity alone can suffice to meet the relatively light burden of
5 establishing a prima facie case of retaliation." DeClaire, 530 F.3d
6 at 19 (citation and internal quotation marks omitted). *See also*,
7 Mariani-Colon, 511 F.3d at 224 ("[T]he 'temporal proximity' between
8 appellant's allegations of discrimination in June 2002 and his
9 termination in August 2002 is sufficient to meet the relatively light
10 burden of establishing a prima facie case of retaliation"); Quiles-
11 Quiles, 439 F.3d at 8 ("[I]n proper circumstances, the causation
12 element may be established by evidence that there was a temporal
13 proximity between the behavior in question and the employee's
14 complaint.")

15 "[T]here is no mechanical formula for finding pretext. One way
16 to show pretext is through such weaknesses, implausibilities,
17 inconsistencies, incoherencies, or contradictions in the employer's
18 proffered legitimate reasons for its action that a reasonable
19 factfinder could rationally find them unworthy of credence and with
20 or without the additional evidence and inferences properly drawn
21 therefrom infer that the employer did not act for the asserted non-
22 discriminatory reasons." Billings, 515 F.3d at 55-56 (citations,
23 internal quotation marks and brackets omitted).

24 Plaintiff carries the burden of presenting admissible evidence
25 of retaliatory intent in response to a summary judgment request. The
26 court need not consider unsupported suppositions. "While [plaintiff]

2 engages in much speculation and conjecture, a plaintiff cannot defeat
3 summary judgment by relying on conclusory allegations, or rank
4 speculation. To defeat summary judgment, a plaintiff must make a
5 colorable showing that an adverse action was taken for the purpose of
6 retaliating against him." Mariani-Colon, 511 F.3d at 224 (citations
7 and internal quotation marks omitted).
8

9 Additionally, even though "it is *permissible* for the trier of
10 fact to infer the ultimate fact of discrimination from the falsity of
11 the employer's discrimination, but doing so is not required, as there
12 will be instances where, although the plaintiff has established a
13 prima facie case and set forth sufficient evidence to reject the
14 defendant's explanation, no rational fact-finder could conclude that
15 the action was discriminatory." DeClaire, 530 F.3d at 19-20 (italics
16 in original).

17 Lastly, there are instances where issues of fact regarding the
18 veracity of the allegedly pretextual reasons demand that trial be
19 held to resolve them. See *i.e.*, Billings, 515 F.3d at 56 (citations
20 and internal quotation marks omitted) ("But we think that, under the
21 circumstances of this case, it is the jury that must make this
22 decision, one way or another. As we have advised, where a plaintiff
23 in a discrimination case makes out a prima facie case and the issue
24 becomes whether the employer's stated nondiscriminatory reason is a
25 pretext for discrimination, courts must be particularly cautious
26 about granting the employer's motion for summary judgment. Such

2
3 caution is appropriate here, given the factual disputes swirling
4 around the transfer decision.”)

5 D. Hostile Environment

6 In retaliation cases, “[t]he adverse employment action may be
7 satisfied by showing the creation of a hostile work environment or
8 the intensification of a pre-existing hostile environment.” Quiles-
9 Quiles, 439 F.3d at 9. See also, Noviello, 398 F.3d at 89 (“[T]he
10 creation and perpetuation of a hostile work environment can comprise
11 a retaliatory adverse employment action”). “[A] hostile work
12 environment, tolerated by the employer, is cognizable as a
13 retaliatory adverse employment action... This means that workplace
14 harassment, if sufficiently severe or pervasive, may in and of itself
15 constitute an adverse employment action sufficient to satisfy the
16 second prong of the prima facie case for... retaliation cases.” *Id.*
17 (under Title VII). “Harassment by coworkers as a punishment for
18 undertaking protected activity is a paradigmatic example of adverse
19 treatment spurred by retaliatory motives and, as such, is likely to
20 deter the complaining party (or others) from engaging in protected
21 activity.” *Id.* at 90.

22 “[R]etaliatory actions that are not materially adverse when
23 considered individually may collectively amount to a retaliatory
24 hostile work environment.” Billings, 515 F.3d at 54 n.13.

25 “In looking at a claim for hostile work environment, we assess
26 whether a plaintiff was subjected to severe or pervasive harassment

2
3 that materially altered the conditions of his employment. To sustain
4 a claim of hostile work environment, [plaintiff] must demonstrate
5 that the harassment was sufficiently severe or pervasive so as to
6 alter the conditions of his employment and create an abusive work
7 environment and that the [discriminatory] objectionable conduct was
8 both objectively and subjectively offensive, such that a reasonable
9 person would find it hostile or abusive and [that plaintiff] in fact
10 did perceive it to be so." Thompson v. Coca-Cola Co., 522 F.3d 168,
11 179 (1st Cir. 2008) (internal citations and quotation marks and
12 brackets omitted).

13 "The environment must be sufficiently hostile or abusive in
14 light of all of the circumstances, including the frequency of the
15 discriminatory conduct; its severity; whether it is physically
16 threatening or humiliating, or a mere offensive utterance; and
17 whether it unreasonably interferes with an employee's work
18 performance." Prescott v. Higgins, 538 F.3d 32, 42 (1st Cir. 2008)
19 (citation and internal quotation marks omitted); Rios-Jimenez v.
20 Principi, 520 F.3d 31, 43 (1st Cir. 2008); Torres-Negron v. Merck &
21 Co., Inc., 488 F.3d 34, 39 (1st Cir. 2007).

22 "There is no mathematically precise test we can use to determine
23 when this burden has been met, instead, we evaluate the allegations
24 and all the circumstances, considering the frequency of the
25 discriminatory conduct; its severity; whether it was physically
26 threatening or humiliating, or a mere offensive utterance, and

2
3 whether it unreasonably interfered with an employee's work
4 performance." Carmona-Rivera v. Commonwealth of Puerto Rico, 464 F.3d
5 14, 19 (1st Cir. 2006) (citation and internal quotation marks
6 omitted).

7 "In determining whether a reasonable person would find
8 particular conduct hostile or abusive, a court must mull the totality
9 of the circumstances, including factors such as the frequency of the
10 discriminatory conduct; its severity; whether it is physically
11 threatening or humiliating, or a mere offensive utterance; and
12 whether it unreasonably interferes with an employee's work
13 performance. The thrust of this inquiry is to distinguish between the
14 ordinary, if occasionally unpleasant, vicissitudes of the workplace
15 and actual harassment." Noviello, 398 F.3d at 92 (citations and
16 internal quotation marks omitted).

17 Plaintiff must provide "evidence of ridicule, insult, or
18 harassment such that a court could find behavior on the part of the
19 defendants that was objectively and subjectively offensive behavior
20 that a reasonable person would find hostile or abusive." Carmona-
21 Rivera, 464 F.3d at 19 (citation and internal quotation marks
22 omitted). See also, Noviello, 398 F.3d at 92 ("rudeness or ostracism,
23 standing alone, usually is not enough to support a hostile work
24 environment claim."); De la Vega v. San Juan Star, Inc., 377 F.3d
25 111, 118 (1st Cir. 2004) (general claims of "humiliating and
26 discriminatory treatment" not sufficient).

2
3 "[I]f protected activity leads only to commonplace indignities
4 typical of the workplace (such as tepid jokes, teasing, or
5 aloofness), a reasonable person would not be deterred from such
6 activity. After all, an employee reasonably can expect to encounter
7 such tribulations even if she eschews any involvement in protected
8 activity. On the other hand, severe or pervasive harassment in
9 retaliation for engaging in protected activity threatens to deter due
10 enforcement of the rights conferred by statutes." Noviello, 398 F.3d
11 at 92.

12 Proving retaliatory intent is crucial. Hence, the purpose behind
13 the harassment must be to retaliate for the protected conduct, that
14 is, it must be motivated by plaintiff's exercise of her statutory
15 rights. Carmona-Rivera, 464 F.3d at 20; Quiles-Quiles, 439 F.3d at 9.

16 Causation may be established by the temporal proximity between
17 the harassment and the protected conduct. *See, i.e., id.* 439 F.3d at
18 9 (intensified harassment shortly after filing EEOC complaint).

19 Even though "[t]he existence of a hostile environment is
20 determined by the finder of fact... that does not prevent a court
21 from ruling that a particular set of facts cannot establish a hostile
22 environment as a matter of law in an appropriate case." Billings, 515
23 F.3d at 47 n.7.

24 **E. Plaintiff's Retaliatory Harassment Allegations**

25 Plaintiff alleges that MARRIOTT engaged in retaliatory
26 harassment as a result of both her 2004 and 2005 administrative

2
3 charges. It is axiomatic that the filing of these two charges
4 constitute protected activity within the meaning of 42 U.S.C. §
5 2000e-3(a).

6 We shall begin by examining the purportedly retaliatory
7 incidents which took place after the filing of plaintiff's March 2004
8 discrimination charge and those occurring subsequent to her filing
9 the March 2005 retaliation charge in conjunction with defendants'
10 proffered explanations for these events.

11 **1. Events after March 2004**

12 Plaintiff cites the following events purportedly arising as a
13 result of her initial discrimination claim filed on March 26, 2004,
14 with the P.R. Department of Labor in support of her allegations of
15 retaliation in this action:²⁰ (1) failure to transfer plaintiff to a
16 table games supervisor position; (2) unjustified written warning in
17 October 2004; (3) written warning subsequently changed to "coach and
18 counseling" for taking a break longer than half an hour. Further,
19 plaintiff was accused of fraud whereas no other employee had been
20 charged with fraud under similar circumstances; (4) after the warning
21 for taking a longer break plaintiff was required to announce to
22 surveillance every time she was going to or coming from a break and
23 (5) plaintiff's evaluation score dropped from the consistent maximum

24
25
26 ²⁰ See Plaintiff's Motion in Opposition (docket No. 92-2)
pp. 29-30.

2
3 score of 5 points to 3.5 points, which adversely affected her salary
4 increase.

5 In response thereto, defendant submitted evidence surrounding
6 the circumstances of the events challenged by plaintiff as follows.

7 **a. Failure to Transfer Plaintiff to a Table Games Supervisor
8 Position**

9 The last time plaintiff applied for a Pit Boss position or any
10 other promotion was in March 2004.

11 Around May 2004 plaintiff requested a lateral transfer to a
12 table games supervisor position. Plaintiff was not selected for the
13 position. Plaintiff has no knowledge of the selection process
14 followed, the criteria applied, nor who the decision makers or the
15 applicants for the position were.

16 Late 2004 plaintiff requested a transfer to the table games
17 department as a supervisor. There were two vacancies available which
18 were awarded to JOCELYN LEDREW and ORLANDO VEGA.

19 **b. Written Warning in October 2004.**

20 On September 10, 2004, MILAGROS QUIÑONEZ, a cashier assigned to
21 the Cage Department, complained in writing that plaintiff had
22 informed her that a co-worker had obtained a higher salary increase.

23 On October 5, 2004, DEL VALLE showed plaintiff a warning for
24 inappropriate disclosure of confidential information based on this
25 information. Plaintiff rejected the allegations and indicated that
26 she had no access to the evaluations of the Cage personnel. After
having listened to plaintiff's explanation, DEL VALLE believed that

2
3 the warning was not indicated so he helped her prepare a document
4 explaining her position and delivered it to the Human Resources
5 Department.

6 Plaintiff met with the Human Resources Director ACUÑA and
7 advised him that the allegations contained in the warning were false.
8 ACUÑA asked plaintiff for time to further investigate into the
9 matter. When plaintiff returned to work after her day off, management
10 apologized and plaintiff told that there had been a misunderstanding
11 and that the warning was not supposed to have been given.

12 The warning, as well as all references to the incident, were
13 removed from plaintiff's personnel file.

14 **c. Excessive Meal Period**

15 All Casino employees have a thirty minute meal period. On
16 January 13, 2005, plaintiff took a ninety minute meal period. That
17 is, a full one hour in excess of the meal period allowed to all
18 Casino employees. As a result thereof, DEL VALLE gave her a written
19 warning. She was given the warning because (1) she exceeded the
20 allotted time by a full hour and (2) because she failed to inform her
21 supervisor that she would take a longer meal period.

22 DEL VALLE had previously advised plaintiff that he could
23 understand if she needed additional time for her meal period but that
24 she had to give him advance notice.

25 Plaintiff contacted CARLOS CARTAYA, a corporate Human Resources
26 executive at the regional offices, to complain about the written

2
3 warning. Plaintiff argued to CARTAYA that another employee also took
4 an excessive meal period and she only received a "coaching and
5 counseling" not a written warning.

6 CARTAYA asked plaintiff to e-mail all the pertinent information
7 so he could investigate the incident. He told plaintiff not to be
8 concerned about the matter and that he would make all the necessary
9 inquires to solve the situation. On February 17, 2005, plaintiff sent
10 CARTAYA a letter dated February 14, 2005, wherein she related her
11 position regarding the matter.

12 Shortly thereafter, CARTAYA visited Puerto Rico and met with
13 plaintiff. During the meeting CARTAYA informed plaintiff that his
14 investigation revealed that her allegations were correct and that he
15 would reduce the written warning to a "coaching and counseling".

16 A "coaching and counseling" is not considered a disciplinary
17 measure.

18 During plaintiff's review of her personnel file she confirmed
19 that the warning had been crossed out.

20 CARTAYA advised plaintiff that he was available should she need
21 to contact him in the future. Plaintiff never contacted him again.

22 **d. Need to Give Advance Notice to Casino Surveillance**

23 Plaintiff alleges that after the incident involving her
24 excessive meal period she had to inform the Casino surveillance
25 department whenever she took her meal periods. However, during her
26 shift, plaintiff was the highest managerial employee in the Slot

2
3 Department. That is, she was in charge of the complete operation of
4 the Slot Department. Thus, plaintiff informed Casino surveillance
5 when she took her meal periods because during that time the Slot
6 Department had no managerial employees.

7 **e. The 2004 evaluation**

8 Plaintiff's performance evaluation corresponding to calendar
9 year 2004 which was completed and handed to her in March 2005 was
10 prepared by DEL VALLE. Plaintiff disagreed with each and every aspect
11 of that evaluation.

12 The performance evaluation form has three levels of performance
13 ratings: Level 1: Key Contributor; Level 2: Solid Performer, and
14 level 3: Sub-performer. Levels 1 and 2 have three tiers each with
15 different salary increases. The evaluation covers various areas of
16 the employee's performance. The evaluator rates each aspect and can
17 comment on each one of them. Then, a global rating is obtained.

18 Plaintiff received an overall rating of Level 2: Solid Performer
19 and a 3.5% salary increase. Her salary increase for the previous year
20 (2003) had been 4%.

21 Even though plaintiff claims that she received a poor evaluation
22 in retaliation for her March 2004 discrimination charge, her score
23 was in the upper tier of Level 2. Further, the evaluation was
24 prepared by DEL VALLE who was not involved in the selection process
25 for the Pit Boss vacancy in 2004.
26

2
3 **2. Events after March 2005**

4 Additionally, plaintiff alleges that the following events
5 resulted from her retaliation charge filed on March 24, 2005:²¹ (1)
6 plaintiff was suspended from work for allegedly destroying hotel
7 property, i.e., tore pages from a log book; (2) plaintiff received a
8 low evaluation partly because of lack of training despite her
9 requests for training; (3) in December 2005 one of her supervisors
10 embarrassed plaintiff for not kissing him as a greeting gesture and
11 thereafter required that she greet him daily after a change in
12 shifts; (4) the same supervisor attempted to intimidate plaintiff by
13 approaching her in the enclosed vault space.

14 In response thereto, defendant submitted evidence surrounding
15 the circumstances of the events challenged by plaintiff as follows.

16 **a. Logbook Incident**

17 As with other departments, the Slot Department has a hard-bound
18 "logbook" wherein supervisors make notes of the most important events
19 that take place during their shifts. The logbook is used as a
20 commendation tool among supervisors working different shifts.

21 On October 12, 2005, plaintiff was suspended from Thursday
22 October 13 until Monday, October 17, 2005, pending investigation
23 after she was caught on Casino surveillance video tearing apart eight
24 pages of the Slot Department logbook the day before. Regional

25 ²¹ Plaintiff's Motion in Opposition (docket No. 92-2) p. 30-31.
26

2
3 Security Director RIVERA conducted an investigation into the incident
4 reviewing the video and the logbook and taking statements from
5 several employees. The video revealed that plaintiff tore off several
6 pages of the logbook.

7 As part of the investigation RIVERA interviewed plaintiff. She
8 admitted that she had ripped up the pages but alleged there was
9 nothing wrong with it. In a written statement plaintiff admitted that
10 she tore apart a page of the logbook after she accidentally tore it.

11 Based on the video and plaintiff's statement, RIVERA suspended
12 plaintiff pending investigation into the contents of the pages
13 destroyed.

14 After completing the investigation, RIVERA advised plaintiff
15 that in consideration of her years of service with the Company she
16 would not be terminated but would receive a written warning instead.

17 Plaintiff returned to her position on October 18, 2005 and was
18 paid her full salary retroactively for the duration of the
19 suspension.

20 Plaintiff appealed the written warning using the Company's "Peer
21 Review" process.

22 The "Peer Review" process consists of a panel of employees, or
23 the General manager if so chosen by the employee, which take part in
24 the revision of a disciplinary action upon an employee's request.
25 When an employee requests a Peer Review, he or she is provided with
26 two boxes that contain pieces of paper one with the names of the

2 hourly employees available to be panelists and the other has the
3 names of the managerial employees available as panelists. The
4 employee takes six names from the hourly employees' box and chooses
5 three whom he or she prefers. Then, the employee takes four names
6 from the managerial employees' box and selects the two managerial
7 employees of his or her preference. Those five individuals comprise
8 the Peer Review panel for that particular case. At a meeting, the
9 employee is given the opportunity to provide his or her version of
10 the facts that led to the disciplinary measure. The manager who
11 applied the discipline then has the opportunity to explain the basis
12 for his or her action. If any one of them wishes to call a witness
13 they may do so. The panelists analyze all the facts and decide
14 whether the disciplinary measure should stand, or whether it should
15 be reduced or eliminated altogether. The panelists' decision is final
16 and binding on the parties.

17
18 During the Peer Review, plaintiff had the opportunity to present
19 her version of the events that led to the written warning. As part of
20 her allegations, plaintiff claimed that there was, or should have
21 been, a videotape that would show that she "accidentally" dropped the
22 logbook. ACUÑA informed plaintiff that not only there was no such
23 video but that the video available showed otherwise. However, for
24 purposes of the Peer Review process they would take her contention
25 that the logbook "accidentally fell" as true.

2
3 Despite plaintiff's allegations the Peer Review panel upheld the
4 written warning.

5 **b. The 2005 Evaluation and Lack of Training**

6 Plaintiff's performance evaluation corresponding to calendar
7 year 2005 which was completed and handed to her in March 2006 was
8 prepared by DEL VALLE. As with the 2004 evaluation, plaintiff alleges
9 that the performance rating given to her was in retaliation for her
10 filing the discrimination charge in March 2004.

11 Plaintiff's overall rating was Level 2: Solid Performer. Again
12 she received a 3.5% salary increase.

13 Even though plaintiff claims that she received a "poor" in
14 retaliation for her filing of the March 2004 discrimination charge,
15 her score was comparable to her prior performance evaluation.

16 On March 27, 2006, plaintiff met with LEVENE to discuss her
17 evaluation. LEVENE agreed with some of plaintiff's allegations and
18 increased her score in two areas.

19 In April 2005 the Casino was changing its Slot Machines system.
20 Accordingly, some employees were trained on the new system. The idea
21 was to have some employees take the training and have them in turn
22 train the remaining ones.

23 DEL VALLE selected JANICE CASIANO and LUIS PADILLA for the
24 training. Plaintiff was not selected because it was offered during
25 the latter part of her work shift and there was no one available to
26 cover her position. Allowing her to take the training would have left

2
3 the Slot Department with no managerial supervision for a prolonged
4 period of time.

5 Similarly, other employees such as JAVIER MALDONADO, RITA
6 MIRANDA and RAMON CRUZ did not attend the training because they were
7 working while the training was being offered.

8 Plaintiff complained that she did not receive training on the
9 new Slot Machines and that the trained employees did not teach her
10 the new system as planned. However, she admitted that CASIANO and
11 PADILLA were not able to train her because they did not work in her
12 same shift and she never made arrangements with either them or DEL
13 VALLE for her to come to the Casino earlier or stay after her shift
14 to meet either of them for the training.

15 In fact, plaintiff - an exempt employee - had insisted many
16 times that she not be required to attend meetings outside her work
17 schedule.

18 **c. Embarrassment Caused by Supervisor for not Kissing Him and**
19 **Requirement that She Greet Him Daily after Change in**
20 **Shifts.**

21 Plaintiff met MALDONADO in December 1994 when the Casino first
22 opened. Even though MALDONADO was plaintiff's direct supervisor, she
23 seldom saw him as they had different work schedules. In fact, by
24 December 2005 a year had elapsed without them interacting.

25 In December 2005, before a supervisors' meeting commenced,
26 MALDONADO approached plaintiff to greet her with a kiss on the cheek
as they sometimes did. Plaintiff instead extended her hand to shake

2 MALDONADO's. Plaintiff claims that MALDONADO became upset and asked
3 her "what's wrong with you." Plaintiff also claims that MALDONADO's
4 comment was harassing because he addressed her "aggressively" during
5 the supervisors' meeting.

6 After the December 2005 supervisors' meeting plaintiff did not
7 interact again with MALDONADO until late March 2006, two years after
8 her ADU charge, when he had to work a night shift. When plaintiff
9 arrived to work at 4:00 a.m. she went about her usual routine without
10 informing MALDONADO that she had arrived.

11 MALDONADO gave plaintiff a "coaching and counseling" for her
12 failure to inform him that she had arrived. Plaintiff requested DEL
13 VALLE to eliminate it which DEL VALLE did.

14 **d. The Vault Incident**

15 On June 8, 2006, MALDONADO entered the Slot Department Vault
16 where plaintiff was at the time. MALDONADO went in to pick up
17 documents for a training as well as the associates' checks.

18 Plaintiff claims that MALDONADO got close to her and rubbed her
19 jacket with his. However, she admits that the vault is a very small
20 room and that he did not talk to her. Plaintiff's Statement of
21 Uncontested Facts ¶ 113 p. 24 (docket No. 82-3). Moreover, the Casino
22 surveillance video clearly shows that MALDONADO did not touch
23 plaintiff, did not rub his jacket with hers nor had any type of
24 contact with plaintiff.

25

26

2 **3. Conclusion**

3 We begin by examining the events which transpired subsequent to
4 the March 2004 discrimination charge to determine whether, either
5 individually or collectively, they may be deemed sufficiently adverse
6 to meet plaintiff's *McDonnell Douglas* burden. Further, whether these
7 were causally connected to the protected activity. Lastly, assuming
8 a prima facie case of retaliation can be derived from the facts as
9 presented, whether defendants' proffered legitimate non-
10 discriminatory reasons for the challenged events have been adequately
11 challenged as pretextual.

12 Plaintiff's petitions for transfer to the table games supervisor
13 position were not requests for promotions but rather lateral
14 transfers. The first request was in March 2004 and the other in late
15 2004. We have no admissible evidence before us to establish how these
16 denials were in any way materially adverse to plaintiff nor how they
17 could have been deemed retaliatory.

18 The warning issued in October 2004 responded to a written
19 complaint by plaintiff's co-worker. The allegations were serious
20 enough to warrant some personnel action inasmuch as they entailed
21 inappropriate disclosure of confidential information. It is important
22 to note that DEL VALLE himself assisted plaintiff in preparing a
23 document for the Human Resources Department to revisit the matter and
24 that the warning as well as all references thereto were removed from
25 plaintiff's personnel file.
26

2 Additionally, faced with the undisputed evidence before us, even
3 assuming plaintiff had met her initial prima facie burden,
4 defendants' non-retaliatory reasons for having issued the warning
5 stand unchallenged.

6 The written warning prompted by plaintiff having taken a full
7 one hour in excess of her authorized meal period was issued not only
8 because plaintiff exceeded the time allowed but also because she
9 failed to notify her supervisor of her absence. Plaintiff was the
10 highest managerial employee at the Slot Department and in charge of
11 the complete operation. Hence, her absence raised important
12 management considerations which also explain why she was required to
13 subsequently inform the Casino surveillance when she took her meal
14 periods. Apart from the fact that this incident took place on January
15 13, 2005, that is, close to a year after plaintiff's discrimination
16 charge, defendants' proffered non-retaliatory grounds for their
17 actions stand undisputed.

18 The difference in plaintiff's 2004 evaluation was not remarkable
19 in comparison with the previous year. Her score was in the upper tier
20 of Level 2 and she received a 3.5% salary increase rather than a 4%.
21 Additionally, there is no evidence in the record of a causal
22 connection between the protected conduct and the evaluation.

23 With respect to the events subsequent to March 2005, the
24 incident involving the destruction of several log book pages was a
25 serious matter. It was well-documented, including a video, and
26

2 culminated in a Peer Review process which upheld the written warning.
3 There is no evidence in the record of retaliatory animus nor of
4 pretext for MARRIOTT's decision.

5 Again, in the evaluation for the 2005 calendar year plaintiff's
6 overall rating was Level 2: Solid Performer and she received a 3.5%
7 salary increase. Further, defendants submitted ample non-retaliatory
8 grounds justifying plaintiff's lack of training in the new slot
9 machines system which have not been disputed.

10 The greeting incident involving MALDONADO as well as the
11 "coaching and counseling" due to plaintiff having failed to advise
12 him that she had arrived at work took place close to a year after the
13 retaliation charge had been filed. The record is devoid of any
14 evidence to reflect a causal connection between the events complained
15 of and the protected conduct.

16 Similarly, the vault incident - which was recorded in the Casino
17 surveillance video - does not evince any type of physical contact nor
18 was there any words exchanged between plaintiff and MALDONADO during
19 the time they shared the constrained area. MALDONADO had a valid non-
20 retaliatory reason for entering the premises, i.e., pick up training
21 documents and the associates' checks. Additionally, we do not find,
22 based on the evidence on record, that the challenged events are
23 objectively and subjectively offensive. There is no indication that
24 they were part of a severe or pervasive retaliatory harassment
25
26

2 pattern which altered plaintiff's conditions of employment so as to
3 amount to a hostile work environment.

4 Even though the court must review the record in the light most
5 favorable to plaintiff, we find that she failed to establish the
6 existence of material issues of fact regarding her retaliation claim
7 which require resolution at trial. Based on the uncontested evidence
8 presented, no reasonable jury could find that the challenged events
9 were geared to retaliate against plaintiff for having filed the two
10 charges.

11 Accordingly, the retaliation claim must be **DISMISSED** as a matter
12 of law.

13 IX. SUPPLEMENTAL CLAIMS

14 The court having denied the request for dismissal of the Title
15 VII discrimination claim due to plaintiff's non-selection to the Pit
16 Boss position in March 2004 it may, in its discretion, entertain the
17 state-based claim under its supplemental jurisdiction pursuant to 28
18 U.S.C. § 1367(a).

19 Thus, defendants' request to dismiss the supplemental claims
20 asserted in the complaint are **DENIED**.

21 X. CONCLUSION

22 Based on the foregoing, defendants' Motion for Summary Judgment
23 (docket No. **82**)²² is disposed of as follows:

24
25 ²² See Plaintiff's Motion in Opposition (docket No. **92**); Reply
26 (docket No. **105**) and Plaintiff's Sur-Reply (docket No. **120**).

Plaintiff is alerted to the fact that translations of the

- 2 - Plaintiff's discrimination pattern and practice claim is
3 **DISMISSED** for failure to state a claim. Judgment shall be
4 entered accordingly.
- 5 - Plaintiff's discrimination claim based on her non-selection
6 for the Pit Boss positions during the years **1996, 1997** and
7 **1999** is **DISMISSED** as untimely. Judgment shall be entered
8 accordingly.
- 9 - Defendants' request to dismiss plaintiff's Title VII sex
10 discrimination claim based on her non-selection to the Pit
11 Boss position in **March of 2004** is **DENIED**.
- 12 - Plaintiff's Title VII retaliation claim is **DISMISSED**.
13 Judgment shall be entered accordingly.
- 14 - Defendants' request to dismiss plaintiff's supplemental
15 claims is **DENIED**.

16 IT IS SO ORDERED.

17 San Juan, Puerto Rico, this 22nd day of December, 2008.

18
19
20 S/Raymond L. Acosta
RAYMOND L. ACOSTA
21 United States District Judge

22
23 deposition transcript excerpts for: (1) CARLOS OTERO MAESTRE (docket
24 No. 100-9), (2) MARIO CRUZ (docket No. 100-10) and (3) NESTOR DEL
25 VALLE (docket No. 100-11) must be submitted. See Frederique-Alexandre
26 v. Dep't of Natural and Env't'l Res. Puerto Rico, 478 F.3d 433, 438
(1st Cir. 2007) ("[t]he law incontrovertibly demands that federal
litigation in Puerto Rico be conducted in English, and that
untranslated documents are not part of the record on appeal.")
(citation and internal quotation marks omitted).