United States Court of Appeals
For the First Circuit

No. 12-1430

LAURA RODRIGUEZ-MACHADO
Plaintiff - Appellant

v.

ERIC K. SHINSEKI
Defendants - Appellees

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

BRIEF AND ADDENDUM OF PLAINTIFF-APPELLANT

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FEDERAL CASES

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BASIS FOR SUBJECT MATTER JURISDICTION IN THE DISTRICT COURT

The underlying case was brought in the District Court for Puerto Rico under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621 et seq. ("ADEA"), and the Constitution of the United States of America, in which Plaintiff-Appellant alleged she was the victim of discrimination on the basis of her age and that one or more of her immediate supervisors created against her a hostile work environment. Plaintiff further claimed that she was the victim of retaliation for complaining for filing two complaints with the U.S. Equal Employment Opportunity Commission, San Juan Local Office ("EEOC") and for filing the complaint in the instant case.

Jurisdiction of the US District Court was premised on 28 USC 1331.

STATEMENT OF APPELLATE JURISDICTION

This is an appeal of the US District Court's judgment issued under Rule 56 c) of the Federal Rules of Civil Procedure, granting summary judgment in favor of Defendant and dismissing Plaintiff-Appellant's claims with prejudice. Judgment is final.

The District Court, in is opinion and order, found that Plaintiff failed to establish a prima facie case of age discrimination, that she failed to establish being the victim of hostile work environment, or that VA took retaliation against Plaintiff for her involvement in protected activities. (Addendum

pages 8-26).

We appeal the opinion and judgment issued on February 28th, 2012.

FILING DATES ESTABLISHING TIMELINESS OF THE APPEAL AND ASSERTION THAT APPEAL IS FROM A FINAL JUDGMENT

Judgment was entered in the District Court on February 28th, 2012. The Notice of Appeal was filed on March 17th, 2012 from the above mentioned judgment. Defendant is a US government agency.

The Judgment in this case is final. (See Addendum page 27).

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant desires oral argument in this case as a mean of addressing the complex legal issues presented.

STATEMENTS OF ISSUE PRESENTED FOR REVIEW

Whether the District Court abused its discretion when it issued an opinion based on facts not supported by the record.

Whether the District Court abused its discretion when it did not find disputes of material facts and failed to view the evidence and make inferences in the light most favorable to Appellant.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is a case filed by Plaintiff-Appellant alleging she was the victim of discrimination on the basis of her age and that one or more of her immediate supervisors created against her a hostile work environment. She also alleged that she was the victim of retaliation; and, national origin and sex discrimination when she was placed on a detail that lasted 366 days; when she was removed from her position and her duties were given to a younger employee and treated disparately when compared with another male employee who was not detailed; when she was denied computer access, and , she was not given a performance appraisal during the period of detail.

Plaintiff-Appellant exhausted administrative remedies for her complaints. A Final Agency Decision was issued by defendant on July 14, 2010 and received on July 20, 2010 by Appellant. Once she received the letter allowing her to file a lawsuit, Plaintiff-Appellant filed a civil action against Defendant alleging the foregoing.

After discovery, Defendant filed a motion for summary judgment. Plaintiff-Appellant timely opposed it.

The US District Court granted summary judgment in favor of Defendant. We appeal this decision. (See Addendum pages 8 and 9).

STATEMENT OF FACTS

At the time of her initial EEO complaint Plaintiff -Appellant had worked for Defendant for more than 33 years commencing on a nursing position. She became a victim of harassment under the supervision of Evelyn Ramos. This pattern commenced when on or about July 28, 2008 Ms. Ramos became upset and hostile towards Appellant when the latter informed her that a subordinate was complaining about her Supervisor, Monserrate Leon. The subordinate employee filed an EEO complaint against Ms. Leon and the Agency. Appellant assisted him in resolving his complaint at a lower level. Ms. Ramos commenced to retaliate against Appellant when she intervened. Ms. Ramos became upset during the meeting with Appellant while discussing the MCCF's EEO claim. On August 4, 2008, Ms. Ramos gave Appellant an additional list of projects in a predetermined time frame. Some deadlines were imminent. Appellant felt overwhelmed when she received the longest and most complicated projects, and was not relieved from any of her other prior assignments she had.

Nayda Ramirez and Lavell Velez, Appellant's co-workers, met with her and asked her about her date of retirement. None of these assistants were Appellant's friends and had never requested this information from her before. Appellant's supervisor questioned the use of her leave to attend the Employee Assistance Program.

Appellant's work situation continued to worsen, when Ms. Ramos

accused her of lack of loyalty and stopped talking to her. On September 10, 2008 a meeting was held to discuss the Emergency ICS activation. Both Appellant and her supervisor, Ms. Ramos, attended the meeting. Ms. Ramos showed up at the meeting and before all those who were present yelled at Appellant calling her disloyal. Appellant tried to explain but Ms. Ramos did not hear any of her explanations and ridiculed her.

Subsequently, Ms. Ramos requested that Appellant developed the description for a new position called VERA Coordinator and suggested that she would be perfect for it and should apply.

Appellant requested a meeting with Nancy Reissener, the acting Center Director, to discuss her working conditions and she complained about her workplace harassment. The meeting was held in September, 2008. Appellant informed Ms. Reissener that her health was at risk. Appellant was not relieved of any of the projects she previously had that were assigned by Ms. Ramos. On Friday October 17, 2008, Appellant received notice from Ms. Ramos that she had to attend a Revenue Conference. Appellant commenced to prepare the travel arrangements with the service secretary. Ms. Ramos heard them, and before the secretarial staff, she scolded her for her alleged delay in making reservations.

By December 16, 2008, Appellant was called to the Administrative Executive Board. She arrived after the meeting had commenced. This meeting was chaired by Ms. Ramos. Before all the

attendees, Ms. Ramos told her that she was not required to be present, even though, she had attended all the previous meetings of this board before. Appellant was the only person who was told not to attend anymore and felt that Ms. Ramos could have told her before instead of showing off before all her co-workers. On December 22, 2008, her supervisor banged Appellant's office door and entered her office and requested that she placed a call to a service chief asking him to come to Ms. Ramos's office. Appellant was surprised since all the secretarial staff was present and this was the first time she had been requested to perform clerical duties. She was not informed that there was an emergency to take care of and/or the secretarial staff was absent. Appellant placed the call.

Ms. Ramos made public information personal issues of Appellant that learned during an informal gathering outside the Agency. Ms. Reissener left the Agency on January 22, 2009 without assisting in mediation between Appellant and her supervisor. Ms. Ramos called Appellant to her office and questioned her ability to work under her. Mrs. Ramos kept referring to Appellant as an administrative assistant even though she was staff assistant. The next day, Ms. Ramos sent Appellant an e-mail entitled MEMO OF INSTRUCTIONS advising her that she was going to seek alternative solutions, if Appellant failed to follow her instructions. Appellant understood she was going to be fired. A position was announced with a higher

grade under the Director's office. Appellant applied on November 21st, 2008 for this position. Appellant was prepared a supervisory appraisal by Reissener, who was also the selecting official. Ms. Reissener's supervisory appraisal lowered Appellant's score and Nayda Ramirez, who has a degree in decorative arts, totally unrelated to the medical field was awarded the position. Ms. Reissener left the supervisory appraisal of Appellant in blank and wrote an excellent one for the selectee.

Appellant filed her first EEO complaint at the administrative level. While her first EEO case was processed, she was assigned in February,2009 to assist in the preparation of a working plan and report to the VISN on RME issues. Appellant complied with her assignment. The RME group continued to implement the guidelines and Appellant was assigned other non related duties. In June 2009, Appellant was requested to amend a report on SPD and RME issues. She called some of the members of the RME group and Ruben Sanchez, who was the Chief of Supplies, Processing and Dispatch (SPD) to discuss the draft of the report. She also requested evidence of compliance from Mr. Sanchez, Rafael Giraud and Angel Claudio. She reviewed the evidence and the report was amended. The amended report on SPD and RME issues was sent for review of the SJ VA Medical Center Director, Wanda Mims, and Evelyn Ramos, Appellant's supervisor. On that same week, VISN 8 representatives announced that a site visit to inspect and determine compliance.

Appellant was called to assist Lavell Velez, Quality Manager and Myrna Bermudez, the RME Group Leader, on the preparation of a Center Memorandum to create all RME and SPD issues and guidelines to be followed. Lavell Velez had asked Appellant her date of retirement. Appellant was not part of the RME committee. On July 10, 2009, Appellant was detailed to assist the Chief of Nursing on RME issues based on her organizational abilities. On June 26, 2009, the Agency's EEO Investigator Muriel Alford took the telephonic statement of Appellant's supervisor, Evelyn Ramos. In her statement, Ms. Ramos described Appellant as uncooperative, aggressive and full of disdain. In August 2009, the Office of Inspector General (OIG) conducted an unannounced visit on RME issues. Appellant was assigned to provide documents to the personnel of OIG. After the OIG left, Appellant was requested to prepare issue briefs with some of the Agency's Management Staff.

All the feedback that Appellant was receiving from her supervisor, the Center Director and the Nurse Executive was about her excellent job. She was labeled a fixer with great organizational skills.

An AIB was called by the VISN 8 after the OIG visit to investigate concerns of management related to RME issues. Appellant testified. At all times, Appellant's supervisor was Evelyn Ramos, was in charge of all SPD and RME issues. On September 17, 2009 Appellant's supervisor Evelyn Ramos gave her statement at the AIB.

She retaliated against Appellant by testifying against her and stating that Appellant was the one who called the units to make sure that the procedures were performed and coordinated the visits. Ms. Ramos denied that she was aware of the VISN8 Directive related to the guidelines on RME and the requirement of VA RME Committee, even though, she was one of the persons who received the notice and action item notified on April 16, 2009. She admitted before the AIB members that she was not aware of the RME guidelines.

After Evelyn Ramos' testimony against Appellant before the AIB, she was be detailed under duress to VISN 8 for 60 days to work under the supervision of Dr. Michaela Zbogar, Chief Medical Officer. Appellant was told by the Director of Defendant that the members of the AIB perceived that she was hiding information. Appellant's computer accesses, pen drive and blackberry phone were removed. She also had to return her office key and was only given fifteen minutes to abandon her VA office.

Appellant never received any explanation on the personnel actions taken against her, except for the perception created by her supervisor's wrongful testimony against her. Appellant's detail was extended six (6) times and lasted 366 days.

The agency's SPD Assessment Tool required that the team had to inform in advance any employee of the intent to come and observe him/her during the reprocessing process. Prior notices of visits to inspect and observe had to be announced.

The only other person who was detailed under duress was Sandra Gracia, MD. Even though other hospitals in VISN 8 had similar SME issues only the 2 Puerto Rican female employees were detailed, Sandra Gracia MD and Appellant for allegations risen during the AIB. The only person who testified against Appellant was her supervisor Evelyn Ramos. Appellant filed a second EEO Complaint against Puerto Rico VA employees and VISN 8 employees. During the processing of this second complaint, Appellant was denied the right to mediation. Both Mr. Nevin Weaver and Mr. Porter testified during the EEO Investigation related to Appellant's details, claiming that she was a "key management official in the certification of compliance of the RME process"; and the VA past practice was to detail individuals involved in an investigation in order to avoid interference and/or conflict of interest. However, Appellant was never a key official and there were other Puerto Rican employees involved including Appellant's supervisor, Evelyn Ramos, that were not detailed.

On November 23, 2009 Appellant was allowed to return to Puerto Rico and she reported to her supervisor, Evelyn Ramos who left her waiting three (3) hours while she was having breakfast. She was assigned an office on the Tres Rios building an off site location.

Appellant was told that she was not going to receive a work performance evaluation. Upon her return to work at the San Juan VA, Appellant continued to work for VISN 8 executives. She did not

receive any evaluation, even though her work resulted in $30 M savings to the Agency.

Mr. Ruben Sanchez was part of the RME committee and even though he was involved in the problem he was not detailed out of from Puerto Rico. The chief of surgical service, a male, admitted that the reprocessing procedures were not been performed and he did not receive any disciplinary action. The male supervisor of the Mayaguez clinic admitted that he was not following procedures and he did not receive any disciplinary action. The male Quality Manager representative of the RME Committee did not receive any disciplinary action either.

Without an evaluation, Appellant lost her performance pay. On September 17, 2010 Appellant was informed by Sarita Figueroa, Associate Director that she was going to be given another position as Health Science Specialist. She did not receive a position description. She was assigned to work under the supervision of the Associate Chief of Staff for Primary Care. Appellant was informed that there were no findings against her for the RME issues.

Her new supervisor, Dr. Ramon Guerrido informed Appellant that he had no position description and she was given unclassified duties. From September 27, 2010 to October 4, 2010 Appellant requested the data from her pen drive and the files she had on her computer prior to her details. When her access was restored Appellant was not returned any of the files she previously had.

Appellant met with the IRM Service Chief, Manuel Negron who proceeded to shout at her. On October 26, 2011 Appellant's parking privileges were removed, even though the past practice was to grant better parking spaces to employees with more years of experience.

The more recent allegations of reprisal for reassignment and hostile work environment were processed as a new EEO claim under Case #2001-0672-2011100386. During the process of mediation Defendant's Associate Center Director Sarita Figueroa told Appellant that the internal investigation was over and there were no findings against her. However on December 23, 2010 Ms. Figueroa wrote to Appellant that "it was proven and evidenced that you notified wards and clinics in advance of pending unannounced Quadrad visits. This behavior caused management to lose confidence in your ability to continue service as Staff Assistant to the Associate Director". The AIB findings were otherwise. The findings state as follows:

> 6) Ms. Laura Rodriguez, Staff Assistant to the AD, had profound influence and control over areas outside her scope of responsibilities. Ms. Rodriguez was identified through testimony as the "fixer". Through testimony, it was identified that Ms. Rodriguez notified wards and clinics in advance of pending unannounced Quadrad visits. (Exhibit 31 - Copy of pertinent findings of the AIB).

The SPD Assessment Tool required Appellant to notify the employees involved in the reprocessing of equipment. Appellant merely followed the instructions received from the VISN 8.She never acted beyond the scope of her duties and she was requested by the

Nurse Executive to participate in these issues.

On February 10, 2011 the Agency informed Appellant that her allegations risen under Case #2001-0672-2011100386 were received. On March 16, 2011 Defendant issued a letter finding that the allegations risen under Case #2001-0672-2011100386 were acceptable for inclusion in the overall claim of harassment. The Agency determined that the allegations passed the severe and pervasive test. Appellant was expecting the Agency to investigate her allegations.

On April 1, 2011 the Agency did not continue the investigation of Case #2001-0010-201100173 and Case #2001-0672-2011100386 because it was determined that the allegations risen in this EEO case were part of this lawsuit. The determination was taken by the Agency.

On April 20, 2011 Appellant received separately another Final Agency Decision for Case #2001-0010-201100173.

Appellant has suffered 77 instances of harassment. She recently suffered additional instances of harassment when her position as Staff Assistant was announced and her application was not considered.

SUMMARY OF THE ARGUMENT

Appellant appeals from the judgment issued by the US District Court dismissing her complaint. To sustain this appeal, Appellant contends that the US District Court abused its discretion when it issued an opinion based on facts not supported by the record.

It abused its discretion when it did not find disputes of material facts and actually facts were misstated and failed to view the evidence and make inferences in the light most favorable to Appellant.

ARGUMENT

Whether the District Court abused its discretion when it issued an opinion based on facts not supported by the record.

The opinion of the US District Court does not have a separate set of factual determinations. However, it has erroneous determinations of fact that are unsupported by the record. There is nothing in the record to support that all of Appellant's work experience has been with the Agency in San Juan, Puerto Rico. Appellant commenced to work for the Agency in San Juan, Puerto Rico. In the year 1990 she worked at Boston VA Medical Center for nine months September 1990-June, 1991; Prescott Az, VAMC and Salisbury, NC as Associate Chief Nurse June, 1991- August 1999; and returned to San Juan VAMC August 1999. She became a Health System Specialist in the year 2004. At the time of the events she was a GS-13. There is no evidence on the record to support that Appellant's work experience is limited to the San Juan VAMC.

When the US District Court evaluated the assignment of duties made by Mrs. Ramos, the court concluded erroneously that Mrs. Ramos, Appellant's supervisor, assigned her additional tasks which were the responsibility of an employee that was no longer working under Mrs. Ramos' supervision. This statement is incorrect and not supported by the record. The tasks assigned to Appellant were those of Sarita Figueroa who was under the supervision of the Director of the Facility not Ms Ramos, Appellant's supervisor.

The District Court found that on August 4, 2008 two of Appellant's peers asked her when she was planning to retire. This statement is correct but the date is incorrect. The District Court did not take into account that the event occurred on August 19, 2008, the same day Mrs. Ramos yelled at Appellant after her appointment with EAP. Thus, the factual statement is not totally supported by the record.

The District Court's opinion sustains that Appellant admitted that she requested assistance and that Mrs. Ramos re-distributed the assignments between other members of the staff. The record is void as to the fact that Appellant was never relief of her existing assignments. Appellant was requesting to be taken out of the duties of her position and her supervisor only took one project away.

The District Court's opinion states that on September 2008 Appellant requested a meeting with the Center Director and that both Mrs. Ramos and Mrs. Reissener were surprised. This is false. As of July 2008 Appellant notified Mrs. Reissener, Center Director, of issues with MCCF employees and she provided her with Reports of contact from the employees. Mrs. Reissener received them. Appellant also requested mediation of her issues with Mrs. Ramos, her supervisor. Neither Reissener nor Ramos promoted the mediation. Thus, the statement is unsupported by the record.

The opinion states that around the same time Mrs. Ramos

allegedly sent Appellant an email requesting her assistance in developing the VERA job description and telling her that it was a position she should consider. Appellant provided the District Court with the evidence that this was a statement of fact and not an allegation.

The opinion states that Mrs. Reissener denied having knowledge about Appellant's application for vacant position during her turn as acting director. This statement is false and unsupported by the record, since the record before the US District Court evidences that Ms. Reissener gave both the selectee and Appellant the required written supervisory statement to complete their application and she was the selecting official.

The opinion states that a report of an RME team was prepared and developed in the investigation of 3 members of the team. This statement is completely unsupported by the record. The OIG investigation and the AIB were conducted to investigate the handling of the reusable medical equipment not 3 members of the RME committee. The events were never reduced to an investigation of 3 members of this team. Appellant was not even part of the RME team. She only assisted an already assembled work team in connection with the investigation and resolution of certain complaints regarding RME at VACHS, and the drafting of a report.

In February, 2009 Appellant was asked to assist the RME team on the development of a working plan for findings on the SPD

Assessment that they were performing. During that time other issues such as water capabilities, equipment availability and repair were also identified. Appellant assisted in working with Service Chiefs to address those issues. Evelyn Ramos was the only witness who claimed that Appellant was providing advance notice of visits. She also denied knowledge of a VHA guideline on the RME. The US District Court did not examine the document that was made part of the record by Appellant evidencing that Evelyn Ramos was one of the persons who received VA RME guidelines and was instructed to implement. She was aware of all the SPD and RME issues. However, as a result of the internal investigation only 2 females Appellant and the Chief of Staff were detailed out of the San Juan VA Hospital.

Again, the record does not support the factual determination made by the US District Court that there was an investigation against 3 of Defendant employees.

The opinion provides that Appellant was detailed only in 2 instances. This statement is not supported by the record and is false. Appellant was detailed out of her position in 6 instances for more than 90 days. Her last detail was on September 19 after 365 days out of her position. Then she was detailed to Primary Care with no position description and told to work on certain assignment.

The opinion wrongfully reduces the reprisal events against

Appellant to the taking of the parking space. When the evidence provided by Appellant is that she has suffered more than 77 instances of harassment, which were identified as such by the investigation held by the Agency. Among them, is the fact that prior to her detail Appellant had a staff assistant position that she applied for and her position and her duties were given to another younger employee of the Agency, when she was detailed to Bay Pines, Florida.

The opinion also states that when Appellant was detailed with unspecified duties to primary care the Agency had her computer accesses restored. The evidence provided in the record is that Appellant was never returned her previous account, nor was she returned her flash drive with her data.

The opinion falsely states that Appellant was issued a Performance Appraisal. Appellant provided evidence that Mrs. Wanda Mims, the Center Director, told her that she was holding the appraisal of 2009. For Fiscal year 2010 appraisal she only received a one line e-mail signed by Mr. Pasquith VISN Financial officer that was her supervisor for the whole year. For Fiscal Year 2011 Mrs. Sarita Figueroa did not make any reference to the input provided by Dr. Guerrido while she was detailed in Primary Care.

Thus, most of the factual determinations made by the US District Court are unsupported by the evidence. Appellant provided documents opposing summary judgment that were properly

authenticated. Carmen v Toledo, 215 F3d 124 (1st Cir 2000). Under the Federal Rule of Civil Procedure 56 (e), on summary judgment the parties in their supporting affidavits shall set forth such facts as would be admissible in evidence and must take appropriate steps to have them included in the record. Hoffman v. Applicators Sales and Service, Inc., 439 F 3d 9 (1st Cir 2006).

Appellant in this case provided authenticated evidence to support her allegations but the US District Court found facts that were not even alleged by the movant party in this case. Appellant knew the above referenced facts were material to her allegations and she had to dispute them. Even some facts were never discussed by the movant party but were discussed in the opinion. A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party and if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc. 477 US 242, 248 (1986).

The factual determinations made by the US District Court as to the material facts were never risen by the Agency and were falsely construed. If the nonmovant party, Appellant in our facts, generates uncertainty as to the true state of any material fact, the movant's efforts should be deemed unavailing. Suarez v. Pueblo Int'l 229 F3d 49 (1st Cir 2000).

The Court must review the record taken as a whole and may not make credibility determinations or weigh the evidence. Reeves v.

Sanderson Plumbing Products, Inc. 530 US 133 (2000). Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions not those of a judge.

Thus, the US District Court erred in its appreciation of facts and creation of facts that were not even discussed by the movant party in its motion.

Whether the District Court abused its discretion when it did not find disputes of material facts and actually facts were misstated and failed to view the evidence and make inferences in the light most favorable to Appellant.

This Honorable Appeal Court has held that All evidence and the inferences to be drawn must be viewed in the light most favorable to the party opposing the motion. At the summary judgment juncture, the court must examine the facts in the light most favorable to the non-movant, including that party with all possible inferences to be derived from the facts. Rochester Ford Sales, Inc. v. Ford Motor Co. 287 F 3d 32 (1st Cir 2002).

The US District Court rates poorly in this aspect. It has based its legal determinations on case law not applicable to a federal employee. Te standard under ADEA for federal employees is Section 633a of ADEA. This section is a separate, self-contained section of the ADEA and it is the exclusive remedy for Appellant as a federal employee alleging age discrimination. It provides that the federal work place must be "made free from *any* discrimination based on age." Moreover, the federal-sector provision of the ADEA

contains an exclusivity clause, § 633a(f), that precludes reliance on other sections of the ADEA applicable to private-sector employees.

The standard for federal employees is stricter and more favorable to discriminated federal employees. For everybody except Appellant in this case.

The case law cited in the opinion was issued for private sector employee and supported on ADA provisions not ADEA. On the hostile work environment which was preliminary fount to exist by the Agency in its investigation, the US District Court did not give any merit to Appellant's statements, reducing her allegations to a parking issue. The opinion failed to assess all the circumstances Marrero v. Goya of P.R., Inc., 304 F.3d 7, 18 (1st Cir. 2002. The opinion does not apply any of the relevant factors such as the severity of the conduct; its frequency; and whether it unreasonably interfered with the victim's work performance. The opinion failed to comply with the role of the court that is "to distinguish between the ordinary, if occasionally unpleasant, vicissitudes of the workplace and actual harassment." Noviello v. City of Boston, 398 F.3d 76, 92 (1st Cir. 2005).

CONCLUSION

In conclusion, the summary judgment standard was improperly applied and this Honorable Court should reverse the US District Court's judgment granting summary judgment in favor of Defendant;

and conferring all other such relief as is just and equitable.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 24th day of July 2012.

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PROOF OF SERVICE

I hereby certify that a copy of this brief and Addendum have been sent to each of the following attorneys by electronic notice to the following: Nelson Jose Perez Sosa, AUSA, Twelfth Floor, Chardon Tower, 350 Chardon Avenue, San Juan Puerto Rico 00918.

In San Juan, Puerto Rico, this 24th day of July 2012.

S/Elaine Rodriguez-Frank
ELAINE RODRIGUEZ-FRANK

CERTIFICATE OF COMPLIANCE FED. R. APP. P. 32 (A)(7)

I certify under Fed. R. App. P. 32(a)(7) that this brief contains less that 14,000 words according to the word count of the

word-processing system used to prepare this brief, and totals 5,346 words.

July 24th, 2012 S/ELAINE RODRIGUEZ-FRANK

CERTIFICATE OF MEMBERSHIP

I hereby certify that I am a member of the bar of the First Circuit as confirmed with the Office of the First Circuit Clerk on this same date.

July 24th, 2012 S/ELAINE RODRIGUEZ-FRANK

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APPEAL

United States District Court
District of Puerto Rico (San Juan)
CIVIL DOCKET FOR CASE #: 3:10−cv−01980−DRD

Rodriguez−Machado v. Department of Veterans Affairs, et al
Assigned to: Judge Daniel R. Dominguez
Demand: $1,000,000
Case in other court: 12−01430
Cause: 28:1331 Fed. Question: Employment Discrimination

Date Filed: 10/08/2010
Date Terminated: 02/28/2012
Jury Demand: Plaintiff
Nature of Suit: 790 Labor: Other
Jurisdiction: Federal Question

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V.

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ATTORNEY TO BE NOTICED

Date Filed	#	Page	Docket Text
10/08/2010	1		COMPLAINT against All Defendants, filed by Laura Rodriguez−Machado. Service due by 2/8/2011, (Attachments: # 1 Exhibit Appearance Form, # 2 Category Sheet, # 3 Civil Cover Sheet)(Rodriguez−Frank, Elaine) (Entered: 10/08/2010)
10/12/2010	2		NOTICE OF DEFECTIVE ELECTRONIC FILING as to 1 Department of Veteran Affairs COMPLAINT, filed by Laura A Rodriguez Machado re: non−payment of filing fees.Notice of Compliance Deadline due by 10/13/2010. (jla) (Entered: 10/12/2010)
10/12/2010	3		NOTICE OF JUDGE ASSIGNMENT Case has been assigned to Judge Daniel R. Dominguez (Filing Fee $350.00, Receipt Number PRX100002168). (jla) (Entered: 10/12/2010)
10/12/2010	4		Summons Issued as to Department of Veterans Affairs, U.S. District Attorney and U.S. Attorney General. (jla) (Entered: 10/12/2010)
02/14/2011	5		MOTION to Amend/Correct *Complaint and filing summon served* filed by Elaine Rodriguez−Frank on behalf of All Plaintiffs Suggestions in opposition/response due by 3/3/2011 (Attachments: # 1 Exhibit Amended Complaint, # 2 Exhibit Summon Served on Rosa E Rodriguez)(Rodriguez−Frank, Elaine) (Entered: 02/14/2011)
02/14/2011	6		ORDER granting 5 Motion to Amend/Correct Complaint. Plaintiff is granted 10 days to file new summons to be issued by the Clerk, as to all three defendants, as there is no evidence on the docket that all three defendants were properly served when the original complaint was filed. IT IS SO ORDERED. Signed by Judge Daniel R. Dominguez on 2/14/2011. (JAM) (Entered: 02/14/2011)
02/16/2011	7		AMENDED COMPLAINT against All Defendants, filed by Laura Rodriguez−Machado.(Rodriguez−Frank, Elaine) (Entered: 02/16/2011)
02/17/2011	8		

			Summons Issued as to Erik K. Shinseki. (rc) (Entered: 02/17/2011)
04/06/2011	9		***FILED IN ERROR*** INCOMPLETE PDF. SUMMONS Returned Executed by All Plaintiffs upon, SUMMONS Returned Executed by All Plaintiffs upon (Rodriguez−Frank, Elaine) Modified on 4/7/2011 (np). (Entered: 04/06/2011)
04/16/2011	11		SUMMONS Returned Executed by Laura Rodriguez−Machado upon USA, Department of Veterans Affairs served on 3/2/2011, answer due 5/2/2011; Erik K. Shinseki served on 3/2/2011, answer due 5/2/2011. (np) (Entered: 04/25/2011)
04/29/2011	12		MOTION for extension of time until June 3, 2011 to file Answer to Complaint or Plead filed by Isabel Munoz−Acosta on behalf of Erik K. Shinseki Suggestions in opposition/response due by 5/16/2011 (Munoz−Acosta, Isabel) (Entered: 04/29/2011)
04/29/2011	13		ORDER granting 12 Motion for extension of time to answer. IT IS SO ORDERED. Answer deadline due by 6/3/2011. Signed by Judge Daniel R. Dominguez on 4/29/2011. (JAM) (Entered: 04/29/2011)
06/03/2011	14		MOTION for Summary Judgment filed by Isabel Munoz−Acosta on behalf of Department of Veterans Affairs, Erik K. Shinseki Suggestions in Opposition to Summary Judgment due by 6/20/2011. (Munoz−Acosta, Isabel) (Entered: 06/03/2011)
06/03/2011	15		STATEMENT *OF UNCONTESTED MATERIAL FACTS* filed by Department of Veterans Affairs, Erik K. Shinseki re: 14 MOTION for Summary Judgment filed by Department of Veterans Affairs, Erik K. Shinseki. (Attachments: # 1 Exhibit I, # 2 Exhibit II, # 3 Exhibit III, # 4 Exhibit IV, # 5 Exhibit V, # 6 Exhibit VI, # 7 Exhibit VII) (Munoz−Acosta, Isabel) (Entered: 06/03/2011)
06/03/2011	16		Memorandum in Support *Of Motion For Summary Judgment* filed by Department of Veterans Affairs, Erik K. Shinseki Re: 14 MOTION for Summary Judgment filed by Department of Veterans Affairs, Erik K. Shinseki filed by Department of Veterans Affairs, Erik K. Shinseki. (Munoz−Acosta, Isabel) (Entered: 06/03/2011)
06/03/2011	17		***STRICKEN FROM THE RECORD AS PER ORDER #19*** ANSWER to 7 Amended Complaint filed by Ginette L. Milanes on behalf of Defendant Erik K. Shinseki.(Milanes, Ginette)

			Modified on 6/6/2011 (np). (Entered: 06/03/2011)
06/03/2011	18		MOTION to Strike *Answer to Amended Complaint (ECF No. 17) and to Withdraw as Counsel of Record* filed by Ginette L. Milanes on behalf of Erik K. Shinseki Suggestions in opposition/response due by 6/20/2011 (Milanes, Ginette) (Entered: 06/03/2011)
06/03/2011	19		ORDER granting 18 Motion to Strike 17 Answer to Amended Complaint. AUSA Milanes' request to withdraw as attorney of record is granted. IT IS SO ORDERED. Signed by Judge Daniel R. Dominguez on 6/3/2011. (JAM) (Entered: 06/03/2011)
06/14/2011	20		MOTION for extension of time until June 30, 2011 to oppose filed by Elaine Rodriguez−Frank on behalf of All Plaintiffs Suggestions in opposition/response due by 6/30/2011 (Rodriguez−Frank, Elaine) (Entered: 06/14/2011)
06/15/2011	21		ORDER granting 20 Motion for extension of time until June 30, 2011. IT IS SO ORDERED. Signed by Judge Daniel R. Dominguez on 6/15/2011. (JAM) (Entered: 06/15/2011)
06/28/2011	22		Second MOTION for Extension of Time until July 30, 2011 to file opposition and/or conduct discovery filed by Elaine Rodriguez−Frank on behalf of All Plaintiffs Suggestions in opposition/response due by 7/14/2011 (Rodriguez−Frank, Elaine) (Entered: 06/28/2011)
06/29/2011	23		ORDER granting 22 Motion for Extension of Time to File. Plaintiff is granted a final extension of time until August 1, 2011, to reply to defendants' motion for summary judgment. IT IS SO ORDERED. Signed by Judge Daniel R. Dominguez on 6/29/2011. (JAM) (Entered: 06/29/2011)
07/30/2011	24		OPPOSITION to deft's 15 STATEMENT of Uncontested Facts and Opposition to Defendant's Statement of Uncontested Facts with first 3 exhibits filed by Laura Rodriguez−Machado. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3 part1, # 4 Exhibit 3 part 2) (Rodriguez−Frank, Elaine) Modified on 8/2/2011 creating link (np). (Entered: 07/30/2011)
07/30/2011	25		ADDITIONAL Exhibits from 4 to 20 filed by Laura Rodriguez−Machado. (Attachments: # 1 Exhibit 5, # 2 Exhibit 6, # 3 Exhibit 7, # 4 Exhibit 8, # 5 Exhibit 9, # 6 Exhibit 10, # 7 Exhibit 11, # 8 Exhibit 12, # 9 Exhibit 13, # 10 Exhibit 14, # 11 Exhibit 15, # 12

			Exhibit 17, # 13 Exhibit 18, # 14 Exhibit 19, # 15 Exhibit 20) RE: 24 (Rodriguez−Frank, Elaine) Modified on 8/2/2011 correcting title (np). (Entered: 07/30/2011)
07/30/2011	26		ADDITIONAL Exhibits 21 to 40 filed by Laura Rodriguez−Machado. (Attachments: # 1 Exhibit 22, # 2 Exhibit 23, # 3 Exhibit 24, # 4 Exhibit 25, # 5 Exhibit 27, # 6 Exhibit 26, # 7 Exhibit 28, # 8 Exhibit 29, # 9 Exhibit 30, # 10 Exhibit 31, # 11 Exhibit 32, # 12 Exhibit 33, # 13 Exhibit 34, # 14 Exhibit 35, # 15 Exhibit 36, # 16 Exhibit 37, # 17 Exhibit 38, # 18 Exhibit 39, # 19 Exhibit 40) RE: 24 (Rodriguez−Frank, Elaine) Modified on 8/2/2011 correcting title (np). (Entered: 07/30/2011)
07/30/2011	27		RESPONSE in Opposition to Motion for Summary Judgment filed by All Plaintiffs Re: 14 MOTION for Summary Judgment filed by Department of Veterans Affairs, Erik K. Shinseki filed by All Plaintiffs. (Rodriguez−Frank, Elaine) Modified on 9/7/2011 correcting title (np). (Entered: 07/30/2011)
08/05/2011	28		MOTION for leave to file reply filed by Department of Veterans Affairs, Erik K. Shinseki Re: 27 Memorandum in Opposition to Motion filed by Laura Rodriguez−Machado filed by Department of Veterans Affairs, Erik K. Shinseki. (Munoz−Acosta, Isabel) Modified on 8/10/2011 correcting event (np). (Entered: 08/05/2011)
08/10/2011			NOTICE of Docket Text Modification by Deputy Clerk re: 28 MOTION for leave to file reply filed by Department of Veterans Affairs, Erik K. Shinseki Re: 27 Memorandum in Opposition to Motion filed by Laura Rodriguez−Machado filed by Department of Veterans Affairs, Erik K. Shinseki. (Munoz−Acosta, Isabel) Modified on 8/10/2011 correcting event (np). (Entered: 08/05/2011) (np) (Entered: 08/10/2011)
09/06/2011	29		REPLY TO OPPOSITION AND REPLY STATEMENT of Material Facts filed by Department of Veterans Affairs, Erik K. Shinseki re: 14 MOTION for Summary Judgment filed by Department of Veterans Affairs, Erik K. Shinseki. (Attachments: # 1 Reply to Opposition to Defendant's Motion For Summary Judgment) (Munoz−Acosta, Isabel) Modified on 9/7/2011 correcting title (np). (Entered: 09/06/2011)
09/06/2011	30		ORDER granting 28 Motion for Leave to File and extension of time. IT IS SO ORDERED. Signed by Judge Daniel R. Dominguez on 9/6/2011. (JAM)

			(Entered: 09/06/2011)
09/10/2011	31		MOTION for Leave to File Counter reply filed by Elaine Rodriguez−Frank on behalf of All Plaintiffs Suggestions in opposition/response due by 9/26/2011 (Rodriguez−Frank, Elaine). Added MOTION for extension of time until 10/5/11 to reply, on 9/12/2011 (np). (Entered: 09/10/2011)
09/30/2011	32		SURREPLY to Reply to Opposition filed by All Plaintiffs filed by All Plaintiffs. Re: 14 MOTION for Summary Judgment. (Attachments: # 1 Exhibit one and two)(Rodriguez−Frank, Elaine) Modified on 10/3/2011 creating link (np). (Entered: 09/30/2011)
10/06/2011	33		ORDER noted 31 Motion for Leave to File; noted 31 Motion for extension of time. IT IS SO ORDERED. Signed by Judge Daniel R. Dominguez on 10/6/2011. (JAM) (Entered: 10/06/2011)
02/28/2012	34	8	OPINION AND ORDER granting 14 motion for summary judgment and dismissing the case with prejudice. IT IS SO ORDERED. Signed by Judge Daniel R. Dominguez on 2/28/2012. (JR) (Entered: 02/28/2012)
02/28/2012	35	27	JUDGMENT dismissing with prejudice Plaintiff's claims as further described in this Court's Opinion and Order at 34 . IT IS SO ORDERED, ADJUDGED AND DECREED. Signed by Judge Daniel R. Dominguez on 2/28/2012.(JR) (Entered: 02/28/2012)
03/17/2012	36		NOTICE OF APPEAL by Laura Rodriguez−Machado. Re: 35 JUDGMENT. **NOTICE TO COUNSEL: Counsel should register for aFirst Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf/. Counsel should also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/efiling.htm** (Rodriguez−Frank, Elaine) Modified on 3/19/2012 creating link (np). (Entered: 03/17/2012)
04/11/2012	37		Certified and Transmitted Record on Appeal to US Court of Appeals re 36 Notice of Appeal, [Docket Entries 34 − 36](xi) (Entered: 04/11/2012)
04/11/2012	38		USCA Case Number 12−1430 for 36 Notice of Appeal, filed by Laura Rodriguez−Machado. (xi)

			(Entered: 04/11/2012)
04/24/2012			USCA Appeal Fees received $ 455 receipt number PRX100012305 re 36 Notice of Appeal,, filed by Laura Rodriguez−Machado (jla) (Entered: 04/24/2012)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Laura Rodriguez-Machado Plaintiff, v. Department of Veterans Affairs, et al. Defendants.	Civil No. 10-1980 (DRD)

OPINION AND ORDER

Pending before the court is Defendant's Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure (Docket No. 14). For the reasons set forth below, the Motion for Summary Judgment is **GRANTED** and the complaint is hereby **DISMISSED** with prejudice.

I. PROCEDURAL BACKGROUND

On October 8, 2010, Laura Rodríguez-Machado filed a complaint against her employer, the Department of Veterans Affairs and Mr. Erik K. Shinseki, Secretary of the Department of Veterans Affairs[1] (collectively, "VA"), under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621 et seq. ("ADEA"), and the Constitution of the United States of America. (Docket No. 1). The complaint was subsequently amended on February 16, 2011 (Docket No. 7). Plaintiff claims that she was the victim of discrimination on the basis of her age and that one or more of her immediate supervisors created against her a hostile work environment. Plaintiff further claims that she was the victim of retaliation for complaining to VA officials about the age discrimination, for filing two complaints with the U.S. Equal Employment Opportunity Commission, San Juan Local Office ("EEOC") and for filing the complaint in the instant case.

On June 3, 2011, VA filed a Motion for Summary Judgment (Docket No. 14) alleging, in summary, that Plaintiff's allegations do not establish a case of age discrimination or that VA took

[1] The Court notes that Plaintiff does not state whether co-defendant Erik K. Shinseki is sued solely in his official capacity, or in his official and personal capacities. Nonetheless, because there is no personal liability under ADEA or under Title VII, the Court will consider that Mr. Shinseki is sued solely in his official capacity as Secretary of the Department of Veteran's Affairs. *See* Fantini v. Salem State College, 557 F.3d 22, 28-31 (1st Cir. 2009) (no personal liability can be attached to agents under ADEA or Title VII).

retaliatory actions against Plaintiff for engaging in protected activity under ADEA. Further, Defendants argue that Plaintiff failed to exhaust administrative remedies in connection with the retaliatory charges that allegedly occurred between September 16, 2010 and October 4, 2010 because the EEOC complaint filed on account of such allegations was procedurally dismissed as a result of the filing of the instant case. (Docket No. 14).

II. FACTUAL BACKGROUND

Below is a summary of the events that lead to the filing of the instant complaint, as alleged in the parties' statements of uncontested facts and accompanying documents thereto (Docket Nos. 15 and 24).

Plaintiff has been an employee of VA since June of 1976, specifically at the VA Caribbean Healthcare System ("VACHS") in San Juan, Puerto Rico, employed as a staff nurse. At the time the events that give rise to the instant complaint took place, Plaintiff was fifty-six (56) years of age and was working as a Health System Specialist GS-13.

On July 28, 2008, Plaintiff informed Ms. Evelyn Ramos (Plaintiff's immediate supervisor) that an employee of another department had complained to Plaintiff about his own supervisor and that he had requested Plaintiff's assistance in resolving his grievance. According to Plaintiff, Ms. Ramos, who was fifty-seven (57) years old at the time, became upset and hostile toward Plaintiff and instructed her not to entangle herself in such office gossips. *See* Docket No. 24, page 5.

Plaintiff avers that, in retaliation for notifying Ms. Ramos of a fellow employee's complaints, Ms. Ramos assigned Plaintiff additional tasks which were the responsibility of an employee that was no longer working under Ms. Ramos' supervision. This assignment was additional to Plaintiff's regular workload. Although Ms. Ramos distributed all of the tasks among various employees (including two co-workers that were approximately forty (40) years old at the time), Plaintiff claims that she received the longest and most complicated of them and that the tasks she received required immediate action. *See* Docket No. 24, page 6. Notwithstanding, Plaintiff admitted that when she

requested assistance from Ms. Ramos because she was overwhelmed with the workload, Ms. Ramos re-distributed the assignments between other members of the staff. Docket Nos. 15 and 24.

On August 4, 2008, two of Plaintiff's peer co-workers, not decision-makers as to Plaintiff, asked Plaintiff when she was planning on retiring. At the time, both employees were forty (40) years of age. Plaintiff claims that she felt so overwhelmed by the intrusion that she required psychological assistance and that she contacted her partner, Dr. Nieves (who also works at VACHS), to let her know of the situation. Allegedly, Plaintiff left for the rest of the day to seek medical attention at the Employee Assistance Program and asked Dr. Nieves to inform Ms. Ramos of the incident. Upon Plaintiff's return to work the following day, Plaintiff claims that Ms. Ramos yelled at her and questioned her as to failing to notify her absence during the previous day.

Plaintiff further complained that Ms. Ramos had yelled at her on various other occasions, mostly related to administrative matters and miscommunication between the two with regards to the preparation and execution of the Emergency ICS Activation Plan and for Plaintiff's failure to promptly make travel arrangements for a training held overseas. Plaintiff alleges that some of Ms. Ramos' outbursts occurred in the presence of other VA employees and Plaintiff's peers.

On September of 2008, Plaintiff requested a meeting with Ms. Nancy Reissner, Acting Director of VACHS, to complain about Ms. Ramos' alleged hostility against Plaintiff and Plaintiff's mental health condition as a result of such hostility. Both Ms. Ramos and Ms. Reissner were surprised to learn about Plaintiff's complaints of hostile work environment. During the meeting, Ms. Reissner suggested that they mediate Plaintiff's complaint, but Plaintiff admitted that she did not accept mediation. As a result, Plaintiff was assigned to work under the direct supervision of Ms. Reissner. Docket Nos. 15 and 24.

Around the same time, Ms. Ramos allegedly sent Plaintiff an email requesting her assistance in developing the job description for the position "Veteran's Equitable Resource Allocation Coordinator." In the email, Ms. Ramos suggested that Plaintiff apply to such position. Plaintiff was offended by Ms. Ramos' suggestion and interpreted the remark as a signal of Ms. Ramos letting Plaintiff know that she wished Plaintiff out of her current position.

On December 2, 2008, Plaintiff claims to have applied for a higher-grade position within VA. Ms. Reissner was the VA official responsible for selecting the candidate for such position. Plaintiff alleges that the position was awarded to Ms. Nayda Ramírez, whose educational background is in a subject unrelated to medical and/or nursing sciences (i.e. decorative arts). Plaintiff further alleges that Ms. Reissner did not appoint Plaintiff for the position because, in retaliation for Plaintiff's complaint to Ms. Reissner about Ms. Ramos, Ms. Reissner gave Plaintiff a poor performance evaluation in the criteria for "ability to establish and maintain relationships with other employees of the Agency," "ability to communicate" and "ability to supervise, plan and direct the work of subordinate". Furthermore, Plaintiff claims that such evaluation was the result of Ms. Reissner's failure to investigate Plaintiff's complaints of hostile work environment. Ms. Reissner denied Plaintiff's allegations and having knowledge about Plaintiff's application for any vacant positions during Ms. Reissner's term as Acting Director of VACHS.

On December 16, 2008, during a meeting of the VACHS' Administrative Executive Board, Ms. Ramos yelled at Plaintiff before all of the attendees when she stepped into the meeting and asked Plaintiff to leave because her presence was not required. Plaintiff alleges that she felt humiliated and embarrassed by Ms. Ramos' outburst particularly because Plaintiff was a member of the board and she had attended all prior meetings since her appointment to the same.

On December 22, 2008, despite the apparent availability of administrative personnel, Plaintiff alleges that Ms. Ramos violently banged the door at Plaintiff's office to assign Plaintiff secretarial duties that were not within her responsibilities and which could have been performed by the administrative personnel.

On January 22, 2009, Ms. Reissner terminated her employment at VACHS, for which Plaintiff was again under the direct supervision of Ms. Ramos. Ms. Ramos held a meeting with Plaintiff to discuss Plaintiff's thoughts about working under Ms. Ramos' supervision again. The day after such meeting, Ms. Ramos sent Plaintiff an email with a document entitled "Memo of Instructions." In said email, Ms. Ramos allegedly notified Plaintiff that if she was unable to abide by such instructions, Ms.

Ramos would have to look for a solution to their working relationship besides mediation, as Plaintiff had declined to mediate before.

On March 30, 2009, Plaintiff filed a complaint with the EEOC, for alleged discrimination on the basis of her age in violation of ADEA for events that occurred during the period of July 28, 2008 through January 22, 2009 ("First EEOC Complaint").

Around the time of Plaintiff's filing of the First EEOC Complaint, Ms. Ramos requested Plaintiff to provide assistance to an already assembled work team in connection with the investigation and resolution of certain complaints regarding the Reusable Medical Equipment ("RME") at VACHS. On June 9, 2009, the RME team submitted a written report attesting to VACHS' completion of the issues identified and complaints filed regarding the RME. An internal investigation soon developed against three members of the RME team, including Plaintiff, for allegedly failing to report known failures in the implementation of the standardized procedures regarding RME. The investigation of Plaintiff's conduct while assigned to the RME team was related to her allegedly sending advance notices to various areas that were scheduled to receive surprise visits by the Veterans Integrated Service Network management personnel. (Docket No. 15-5, page 5 and Docket No. 27, page 4). The investigation was conducted by the Office of the Inspector General ("OIG") and the Administrative Investigative Board ("AIB") on account of the events and allegations described above. Plaintiff further alleged that only three individuals from the entire RME team were under investigation, that out of those three individuals under investigation, only two were detailed to jobs outside of VACHS, which happened to be female.[2] However, Plaintiff only provided evidence of her own detail, thereby failing to provide evidence that another employee that was subject to the referenced investigation was placed on detail related to age.

[2] Despite Plaintiff's allegation insinuating discrimination on the basis of race, sex, and national origin, the record shows that the RME team members included individuals who were also Hispanic females that were not subject to the referenced investigation. Also, no allegation was made or evidence provided as to any of such individual's ages. *See* Docket No. 15-5.

On September 18, 2009, Plaintiff was detailed[3] to work at the VA facilities of Bay Pines, Florida, pending the results of the referenced investigation. The detail was originally scheduled to last sixty (60) days, which would end by November 23, 2009, but it was twice extended (on December 1, and again on January 15, 2010)[4] until the OIG and AIB submitted the results of their investigation.[5] Notwithstanding the two extensions of her detail, Plaintiff returned to Puerto Rico by November of 2009 (after the original 60-day period), and was allowed to work remotely from Puerto Rico to complete her Florida detail in consideration for Plaintiff's health conditions and doctor's appointments in Puerto Rico. Plaintiff further alleges in support of her retaliation charges that she was notified that she would not be subject to a performance evaluation for the work performed while she was on detail and that the evaluation would be on hold until the investigation was finalized.[6] *See* Docket No. 15-5. As a result of Plaintiff's assignment to Florida, Plaintiff alleges that she had to relocate, return the keys to her office in Puerto Rico and her parking privileges were terminated.[7] Also, the network access to her computer, pen drive and smart phone were removed while she was on assignment in Florida. While the computer access was restored around October of 2010, Plaintiff's parking privileges were never restored.

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[3] According to the "Guide to Processing Personnel Actions," a "detail" is a temporary assignment of an employee to a different position for a specified period, with the employee returning to his or her regular duties at the end of the assignment. An employee who is on detail is considered for pay and strength count purposes to be permanently occupying his or her regular position. *See* U.S. Office of Personnel Management, Guide to Processing Personnel Actions (Update 56, dated 1/01/2012), available at http://www.opm.gov/feddata/gppa/gppa.asp.

[4] As referenced in the record, the VA followed the procedure indicated in their VA Handbook 5005, in 5 C.F.R. Part 300 and in 5 U.S.C. §3341. *See* Docket No. 15-5, page 9.

The Court takes judicial notice of the procedure included in Part III, Chapter 4, Paragraphs 12 and 13 of the VA Handbook 5005/13 in connection with the facility Director's authority to detail employees to various positions within their facilities for a period not to exceed 90 days, and to extend such detail in 90-day increments when the circumstances warrant such extensions.

[5] Plaintiff was later notified by the Associate Director of the Primary Care Unit that the investigation report had no findings of wrongdoing by Plaintiff.

[6] The record shows that Plaintiff received a copy of her performance evaluation for the tasks performed while on detail at Florida almost one year after the detail had concluded **because her evaluator had retired**. *See* Docket No. 26-18.

[7] As the record shows in a thread of email messages, Plaintiff's parking privileges were terminated effective on October 27, 2010, almost one year after she returned from her detail in Florida. *See* Docket No. 26-7.

On January 29, 2010, Plaintiff filed another complaint with the EEOC alleging that she was the victim of retaliatory activities for the filing of the First EEOC Complaint ("Second EEOC Complaint"). In the Second EEOC Complaint, Plaintiff alleged that the retaliation consisted on her detail to Florida on September 18, 2009, the subsequent extensions on December 1, 2009 and January 15, 2010, and the notification that she would not be subject to performance evaluation despite having received positive feedback for her work.[8]

On July 14, 2010, the EEOC issued its final decision and corresponding right-to-sue letter in connection with the First EEOC Complaint, whereby the administrative judge found that Plaintiff failed to demonstrate that VA engaged in any discriminatory conduct against Plaintiff on the basis of her age.[9] *See* Docket No. 15-3.

On September 16, 2010, Plaintiff was reassigned to work as a Health Science Specialist at the Primary Care Unit of VACHS under the supervision of Dr. Ramón Guerrido. She further alleges that Dr. Guerrido assigned her "unclassified duties" because he was not provided with a job description for Plaintiff. *See* Docket No. 24, ¶ 69. Although there are no allegations as to the duration of Dr. Guerrido's supervision of Plaintiff, the record shows that the assignment of "unclassified duties" would be temporary until her job description was prepared and that until such time, the "unclassified duties" would consist on the "Development of Performance Improvement Plan for Compensation and Pension Unit: Evaluation of processes, efficiency, capacity and demand, etc." *See* Docket No. 26-6.

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[8] The Court notes that EEOC's investigative report of August 5, 2010, issued in connection with the Second EEOC Complaint, indicates that Plaintiff's charges were brought on the basis of Plaintiff's race, sex, and national origin because, of the entire RME team, only three individuals were investigated, that all three were Hispanic, and that of those three, only the two females were detailed while the investigation came to an end. However, the record shows that among the individuals of the RME team, there are other Hispanic males and females that were not subject to AIB's and OIG's investigation. *See* Docket No. 15-5. The Court notes that these allegations are incongruous with Plaintiff's allegations in the instant complaint because the instant case was brought on allegations of age discrimination. Plaintiff did not include any charges or allegations on the basis of race, sex, or national origin in her original complaint, as she did in the Second EEOC Complaint.

[9] Administrative Judge Ana V. González expressly stated in her *Decision Without a Hearing* that "there was no evidence of any similarly situated employees that were treated differently than the Complainant." Docket No. 15-3, page 11.

On October 8, 2010, Plaintiff timely filed the complaint in the instant case alleging that she had been the victim of employment discrimination based on her age, hostile work environment, and retaliation in violation of ADEA for the filing of the First EEOC Complaint. Plaintiff amended the complaint on February 16, 2011 to add that the retaliation activities were also based on the filing of the Second EEOC Complaint and the filing of the instant case.

On April 20, 2011, the EEOC issued its final decision and corresponding right-to-sue letter in connection with the Second EEOC Complaint dismissing the complaint procedurally on the basis of a pending civil action in the U. S. District Court (i.e., the instant case). The final decision does not include any findings of fact concerning Plaintiff's allegations because, since "[Plaintiff] filed a civil action concerning the same matters in an appropriate U.S. [D]istrict Court", the Second EEOC Complaint was dismissed on procedural grounds. *See* Docket No. 15-7.

On June 3, 2011, VA filed a Motion for Summary Judgment (Docket No. 14). VA contends that Plaintiff's allegations do not establish a case of age discrimination under ADEA, or that VA took retaliatory actions against Plaintiff for engaging in protected activity under ADEA. Further, Defendants argue that Plaintiff failed to exhaust administrative remedies in connection with the retaliatory charges included in the Second EEOC Complaint because it was procedurally dismissed on account of the filing of the instant case. (Docket No. 14).

III. SUMMARY JUDGMENT

A motion for summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure, which entitles a party to judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "A dispute is 'genuine' if the evidence about the fact is such that a reasonable jury could resolve the point in favor of the non-moving party." *See* Prescott v. Higgins, 538 F.3d 32, 40 (1st Cir. 2008) (citing Thompson v. Coca–Cola Co., 522 F.3d 168, 175 (1st Cir. 2008)); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-250 (1986); Calero–Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004) (stating that an issue is genuine if it can be resolved in favor

of either party). In order for a disputed fact to be considered "material" it must have the potential "to affect the outcome of the suit under governing law." Sands v. Ridefilm Corp., 212 F.3d 657, 660–661 (citing Liberty Lobby, Inc., 477 U.S. at 247–248); Prescott, 538 F.3d at 40 (citing Maymí v. P.R. Ports Auth., 515 F.3d 20, 25 (1st Cir. 2008)).

The principle of the summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997) (citing Fed.R.Civ.P. 56(e) advisory committee note to the 1963 Amendment). The moving party must demonstrate the absence of a genuine issue as to any outcome-determinative fact on the record. Shalala, 124 F.3d at 306. Upon a showing by the moving party of an absence of a genuine issue of material fact, the burden shifts to the nonmoving party to demonstrate that a trier of fact could reasonably find in his favor. Id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The non-movant may not defeat a "properly focused motion for summary judgment by relying upon mere allegations," but rather through definite and competent evidence. Maldonado–Denis v. Castillo Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994). The non-movant's burden thus encompasses a showing of "at least one fact issue which is both 'genuine' and 'material.'" Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990); *see also* Suarez v. Pueblo Int'l., 229 F.3d 49, 53 (1st Cir. 2000) (stating that a non-movant may shut down a summary judgment motion only upon a showing that a trial-worthy issue exists). As a result, the mere existence of "some alleged factual dispute between the parties will not affect an otherwise properly supported motion for summary judgment." Liberty Lobby, Inc., 477 U.S. at 247–248. Similarly, "summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

When considering a motion for summary judgment, the Court must examine the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor in order to conclude whether or not there is sufficient evidence in favor of the non-movant for a jury to return a verdict in its favor. Rochester Ford Sales, Inc. v. Ford Motor Co., 287 F.3d 32, 38 (1st Cir. 2002). The Court must review the record as a whole and refrain from engaging in an assessment of

credibility or weigh the evidence presented. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 135 (2000). The burden placed upon the non-movant is one of production rather than persuasion. In other words, in weighing a non-movant's opposition to summary judgment the Court should not engage in jury-like functions related to the determination of credibility.

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Reeves v. Sanderson Plumbing Prod., 530 U.S. 133, 150 (2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250–251 (1986)). Summary judgment is inappropriate where there are issues of motive and intent as related to material facts. *See* Poller v. Columbia Broad. Sys., 368 U.S. 464, 473 (1962) (summary judgment is to be issued "sparingly" in litigation "where motive and intent play leading roles"); *see also* Pullman–Standard v. Swint, 456 U.S. 273, 288 (1982) ("[F]indings as to design, motive and intent with which men act [are] peculiarly factual issues for the trier of fact."); Dominguez–Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 433 (1st Cir. 2000) (finding that "determinations of motive and intent ... are questions better suited for the jury").

Conversely, summary judgment is appropriate where the nonmoving party rests solely upon "conclusory allegations, improbable inferences and unsupported speculation." Ayala–Gerena v. Bristol Myers–Squibb Co., 95 F.3d 86, 95 (1st Cir. 1996).

IV. DISCUSSION AND ANALYSIS

A. Age Discrimination: Elements for a Prima Facie Case Under ADEA

ADEA prohibits discrimination in public and private employment against individuals who are at least 40 years of age. 29 USC §§ 621-634. ADEA violations may be established by proving either disparate treatment or disparate impact. Smith v. City of Jackson, Miss., 544 U.S. 228 (2005). Plaintiffs often allege claims under both theories. *See* Pottenger v. Potlatch Corp., 329 F. 3d 740, 749 (9th Cir. 2003) and Byrnie v. Town of Cromwell Bd. Of Educ., 243 F.3d 93 (2d Cir. 2001).

Disparate treatment claims under ADEA may be based on direct or circumstantial evidence, as set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805

(1973). Under *McDonnell Douglas*, a prima facie case of intentional age discrimination may be established by demonstrating that: (1) plaintiff is a member of the protected age group (i.e. was at least forty (40) years of age); (2) plaintiff was qualified for the position in question; (3) despite being qualified, plaintiff was adversely affected; and (4) someone younger, with similar or lesser qualifications, was treated more favorably.

The claims of the instant case are consistent with allegations of disparate treatment. Consequently, the Court must determine whether there is direct or circumstantial evidence proving the elements of *McDonnell Douglas* of intentional age discrimination. In this case, there is no doubt that Plaintiff meets the first and the second elements of the prima facie case for age discrimination. It also appears that Plaintiff met the last element, which requires that plaintiffs prove that the employer must have discriminated against plaintiff in favor of someone younger when Plaintiff alleged that she received longer and more complex tasks than those assigned to two of her co-workers that were approximately sixteen (16) years younger than Plaintiff, but notwithstanding, such co-workers were 40 years old. Nonetheless, Plaintiff proffered no evidence that such younger employees were at a more advantageous position than Plaintiff, that they did not receive tasks in addition to those of their regular workload, or that they were not treated by Ms. Ramos in the same fashion as Ms. Ramos treated Plaintiff.[10] But, the question remains as to whether Plaintiff meets the third element – adverse employment action.

An employment action is considered "adverse" when it "'results in some tangible, negative effect on the plaintiff's employment' through 'a serious and material change in the terms, conditions or privileges of employment ...' as viewed by a reasonable person in the circumstances." Belt v. Alabama Historical Commission, 181 Fed. Appx. 763 (11th Cir. 2006) (citing Shotz v. City of Plantation, Fla., 344 F.3d 1161, 1181-82 (11th Cir. 2003)). In determining whether an adverse employment action has occurred, courts must consider the totality of the allegations. *See* Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

[10] Approximately eighteen months prior to this Court's Opinion and Order, the EEOC's administrative judge reached the same conclusion based on EEOC's investigation. *See* note 9, *supra*.

In connection with the adverse employment action, the record shows that Plaintiff continues to be employed at VA; that she has not been demoted from her position; and that Plaintiff's salary has not been decreased in any manner. The record also shows that Plaintiff has been reassigned to various departments within the VA to work with different supervisors; that she was once transferred from Puerto Rico to Florida for a two-month period on a detail; that during the internal investigation related to the RME incident, her computer access was terminated; and that her parking privileges were removed almost one year after Plaintiff's return to Puerto Rico from her detail. Further, Plaintiff alleged that she was denied a higher-grade position to which she applied on December of 2008 in retaliation for her complaints about her immediate supervisor.

As the record shows, Plaintiff's reassignments were mostly caused and handled pursuant to regulations of the VA, as indicated at notes 3 and 4, to accommodate Plaintiff when she refused mediation of her complaints related to her immediate supervisor at the time. Plaintiff was then assigned to work directly under the supervision of Ms. Reissner in another area. When VA decided to assign Plaintiff to work directly with different supervisors and/or in different departments within VACHS, VA did so to accommodate Plaintiff's complaints of age discrimination pursuant to VA regulations. As for Plaintiff's Florida detail, the record shows that it was only temporary as a precaution until an internal investigation initiated by OIG and AIB (on a matter related to the RME incident, explained on page 5 of this opinion) came to an end; that during Plaintiff's relocation to Florida, VA authorized Plaintiff's requests for medical leave to attend her doctor's appointments in Puerto Rico; and that Plaintiff returned to work in Puerto Rico at the same location at the time the detail was initially scheduled to end (despite two consecutive extensions of the same, which Plaintiff finalized from Puerto Rico). In terms of her computer accesses, they were reestablished when she returned to work in Puerto Rico.

Plaintiff's loss of parking privileges and denial of a higher-grade job position may, at first glance, seem an adverse employment action. Nonetheless, to rise to such level, Plaintiff should have submitted evidence demonstrating that the revocation of her parking privilege was a "serious and material change" in the terms and conditions of her employment at VA. Belt v. Alabama

Historical Commission, *supra*. Moreover, Plaintiff has not established that age was **the** motivating factor for VA's alleged actions, as required under ADEA, 29 U.S.C. § 623(a)(1). To do so, Plaintiff had to "prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action," as held by the United States Supreme Court in Gross v. FBL Financial Services, Inc., 557 U.S. 167, 129 S. Ct. 2343, 2352 (2009). For example, Plaintiff failed to provide details about (1) Ms. Ramos' specific conduct and behavior that constituted the alleged age discrimination; (2) that Ms. Ramos made comments or remarks with respect to Plaintiff's age when Ms. Ramos yelled at Plaintiff, when Ms. Ramos completed Plaintiff's evaluation, or when Ms. Ramos requested Plaintiff perform administrative tasks or other tasks that were the responsibility of other personnel at VACHS; or (3) that Ms. Ramos' alleged favoritism of Plaintiff's peers was on the basis of their relative youth. Plaintiff did not proffer such evidence and rested only on conclusory allegations of age discrimination. It is critical to the Court that the two persons that asked Plaintiff about her retirement date were co-workers not decision-makers within VA and that there is no proof on the record that the question as to her retirement date was conceived or connected to Ms. Ramos or to a decision-maker.

For the reasons stated above, and after examining the facts in the light most favorable to Plaintiff and drawing all reasonable inferences in her favor, **Plaintiff's claims, viewed individually or collectively, do not amount to adverse employment action**. Consequently, she has failed to establish a prima facie case of discrimination on the basis of age under ADEA.

B. Hostile Work Environment Claim

To establish a hostile work environment in the context of a Title VII claim, a plaintiff must show that her workplace was "permeated with discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the conditions of ... [her] employment and create an abusive working environment." Colón Fontanez v. Mun of San Juan, 660 F. 3d 17, *43-44 (1st Cir. 2011) (quoting Quiles–Quiles v. Henderson, 439 F.3d 1, 7 (1st Cir. 2006) (alterations in original) and Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)) (internal quotation mark omitted).

An assessment of whether the work environment is hostile or abusive "must be answered by reference to all the circumstances. See Marrero v. Goya of P.R., Inc., 304 F.3d 7, 18 (1st Cir. 2002) (quoting Harris, 510 U.S. at 23). While "'[t]here is no mathematically precise test to determine whether [a plaintiff] presented sufficient evidence' that she was subjected to a severely or pervasively hostile work environment," Pomales v. Celulares Telefónica, Inc., 447 F.3d 79, 83 (1st Cir. 2006) (second alteration in original), courts have recognized the following factors, among others, as relevant in order to detect sufficient pervasiveness to reach the required threshold: (1) the severity of the conduct; (2) its frequency; and (3) whether it unreasonably interfered with the victim's work performance. Id.; *see also* Ríos-Jiménez v. Principi, 520 F.3d 31, 43 (1st Cir. 2008).

The jurisprudence is clear that "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'" to establish an objectively hostile or abusive work environment. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

Under ADEA, in order to prevail in a hostile work environment claim, a plaintiff must show evidence demonstrating that: (1) she is a member of the class protected by the ADEA; (2) she was subjected to unwelcome harassment; (3) **the harassment was based on age**; (4) the harassment was sufficiently pervasive or severe so as to alter the conditions of the plaintiff's employment and create an abusive work environment; (5) the objectionable behavior was both subjectively and objectively offensive such that a reasonable person would find it hostile or abusive; (6) that the plaintiff found it hostile or abusive; and (7) some basis for employer liability has been established. *See* Gutiérrez-Lines v. Puerto Rico Elec. and Power Authority, 751 F. Supp. 2d 327, 341-342 (D.P.R. 2010) (citing Marquez v. Drugs Unlimited, Inc., 2010 WL 1133808 at *8 (D.P.R. 2010) and O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001)); *see also* Rodriguez-Torres v. Gov't Dev. Bank of Puerto Rico, 704 F.Supp.2d 81, 100 (D.P.R. 2010). The Court typically looks to the totality of the circumstances, analyzing "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it

unreasonably interferes with an employee's work performance" in order to determine whether a hostile work environment exists. O'Rourke, 235 F.3d at 728–29 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 787–88 (1998)).

To support the hostile work environment claim, Plaintiff alleged that Ms. Ramos: (1) called her a gossiper when Plaintiff notified Ms. Ramos about a co-worker's complaint against his own supervisor; (2) yelled at Plaintiff before Plaintiff's peers and other VACHS personnel during meetings; (3) called Plaintiff "unloyal" after an alleged miscommunication during the planning and execution of the Emergency ICS Activation Plan; (4) emailed Plaintiff a document of instructions for Plaintiff to follow after being reassigned under Ms. Ramos' supervision; and (5) suggested that Plaintiff apply for another position within VACHS that would not be under Ms. Ramos' supervision. None of these facts constitute behavior so offensive that a reasonable person would find hostile or abusive within the context of a person's work environment. Further, there is no evidence connecting the harassment in the workplace to Plaintiff's age or a threat to discipline her whatsoever.

Viewing the record in the light most favorable to Plaintiff and drawing all inferences in her favor, this Court finds that, first, there is **no proof as to "harassment based on age,"** and second, that **Plaintiff's allegations fail to rise to the level of severity or pervasiveness that this Court has recognized as indicative of a hostile or abusive work environment**. Although Ms. Ramos' interactions with Plaintiff may be described as harsh, ill-mannered and even impolite, this Court notes that "a supervisor's unprofessional managerial approach and accompanying efforts to assert her authority are not the focus of the discrimination laws." Colón Fontanez, 660 F. 3d at 44-45 (quoting Lee-Crespo v. Schering-Plough Del Caribe, Inc., 354 F.3d 34, 46-47 (1st Cir. 2003). Further, Plaintiff's alleged workplace injustices do not rise to the level of an actionable violation under ADEA. "The workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins – thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world." Suárez v. Pueblo Int'l, Inc., 229 F.3d 49, 54 (1st Cir. 2000). "Federal laws banning [discrimination] 'do[] not set forth a general civility code for the American workplace,' and an employee may not base a valid [discrimination] claim on 'petty slights

or minor annoyances that often take place at work and that all employees experience.'" Gómez-Pérez v. Potter, 2011 WL 6445569, 2011 U.S. App. LEXIS 25456, 114 Fair Empl. Prac. Cas. (BNA) 191 (1st Cir. 2011) (quoting Burlington N. & Santana Fe Ry. v. White, 548 U.S. 53, 68 (2006)) (internal citation and quotation marks omitted). Even construing the facts in Plaintiff's favor, as we are required to do under the standard for summary judgment, the evidence does not support a claim of hostile work environment.

C. Retaliatory Acts

In a retaliation claim under ADEA, a plaintiff must show that she engaged in a protected activity, that she suffered an adverse employment action as a result of her participation in said activity, and that there is a causal connection between those two elements. *See* Hernández Torres v. Intercontinental Trading, Inc., 158 F. 3d 43, 47 (1st Cir. 1998). Courts may also consider other elements, such as the employer's knowledge of the protected activity and the temporal proximity between the alleged retaliation and the employer's adverse action. Colón Fontánez, 660 F.3d at 37 (quoting Wyatt v. City of Boston, 35 F.3d 13, 16 (1st Cir.1994)).

With respect to Plaintiff's retaliation charges, Plaintiff alleged that she filed two complaints with the EEOC – the First EEOC Complaint, on the basis of age discrimination, and the Second EEOC Complaint, on the basis of retaliatory activities.[11] Plaintiff further alleges that the retaliatory activities consisted on her detail to Florida on September of 2009, the two subsequent extensions of the duration of such assignment, and that she would not be subject to performance evaluation for the work performed while on the Florida detail. (Docket No. 7).

In response, VA contends that: (1) the internal investigation initiated by OIG and AIB was related to Plaintiff's conduct while assigned to the RME team when she allegedly failed to report known failures in the implementation of the standardized procedures regarding RME and also sent advance notices to various areas that were scheduled to receive surprise visits by the Veterans

[11] *See* note 8, *supra*.

Integrated Service Network management personnel; (2) Plaintiff's detail to the VA facilities of Bay Pines, Florida was precautionary and authorized under VA regulations when handling details attributed to reasons related to Plaintiff's RME investigation; (3) personnel from OIG and AIB recommended her detail to Florida until they submitted their final report and recommendations; and (4) Plaintiff's immediate supervisors in Florida were unaware of any of Plaintiff's filings with the EEOC. Hence, the OIG and AIB matter is not related at all with Plaintiff's EEOC complaints.

Further, in connection with Plaintiff's allegations, the record shows that although Plaintiff's Florida detail was twice extended, she was able to return to Puerto Rico after the 60-day original duration period in consideration of Plaintiff's health conditions and doctor's appointments in Puerto Rico. Moreover, the original duration of the Florida detail and the extensions thereof were made in compliance with the applicable VA Handbook (*see* note 4, *supra*). With respect to Plaintiff's performance evaluation for her work while on detail, Plaintiff received a copy of her performance evaluation for the Florida detail on December 10, 2010 almost one year after she ended the Florida detail only because the evaluator had retired (Docket No. 26-18). Lastly, the person responsible for authorizing Plaintiff's detail at Florida and the two subsequent extensions had no prior knowledge of Plaintiff's EEOC filing history (*see* Docket No. 15-5, page 9).

Based on the examination of the record, the only activities that this Court has recognized as indicative of retaliation are Plaintiff's Florida detail, Plaintiff's loss of parking privileges on October of 2010, and Plaintiff's detail of "unclassified duties" while under the supervision of Dr. Guerrido. Nonetheless, Plaintiff did not proffer evidence that these activities were related to her age or that there are material issues as to motive and intent that would preclude summary judgment. Particularly so when Plaintiff's loss of parking privileges was effective one year after her return from the Florida detail, and nineteen (19) months after the cause of the alleged retaliatory activities took place. Also, Plaintiff failed to proffer proof of the duration of her assignment to work under Dr. Guerrido's supervision and of the "unclassified duties." Instead, the record shows a letter of Dr. Guerrido to Plaintiff providing a general description of the "unclassified duties" and that the reason for the same was his lack of a job description for Plaintiff. *See* Docket No. 26-6. Absent any proof of

the duration of said assignment, this Court cannot make a determination that the assignment was so severe and pervasive as to be considered an adverse employment action for purposes of the retaliation charge.

While Plaintiff's filing with the EEOC is considered a protected activity, **Plaintiff cannot demonstrate that she suffered an adverse employment action**, as discussed herein and in Section IV.A, *supra*, or that any of the alleged retaliatory activities were based on Plaintiff's age. Consequently, Plaintiff's retaliation claim is also dismissed.

D. Exhaustion of Administrative Remedies

VA contends in its motion requesting summary judgment that Plaintiff failed to exhaust administrative remedies in connection with the retaliation charges and that this Court should dismiss Plaintiff's retaliation charges for such reason. Specifically, VA proffered proof of the timeline of the filing of the EEOC complaints, issuance of the right-to-sue letters, the dismissal of the Second EEOC Complaint, and the grounds for such dismissal. Docket No. 15 and exhibits thereto. Particularly, VA contends that Plaintiff filed the instant complaint before receiving the right-to-sue letter on account of the Second EEOC Complaint (which is the complaint that includes the retaliation charges) and that the EEOC dismissed the complaint because of the filing of the instant case without even concluding its investigation. Docket No. 15-7.

In this case, this Court dismissed Plaintiff's retaliation charges on different grounds than those proposed by VA. For such reason, this Court will not address whether Plaintiff satisfied the exhaustion requirement of ADEA in connection with the retaliation charges.[12]

[12] Nonetheless, the Court reminds Defendants that in Clockedile v. New Hampshire Dept. of Corrections, 245 F.3d 1 (1st Cir. 2001), the First Circuit abandoned the long-standing "scope of the investigation" test that various circuits (including the First Circuit) had been following in connection with the charges that may be included in a lawsuit in order to comply with the administrative exhaustion requirement of Title VII and ADEA. Under the "scope of the investigation" rationale, plaintiffs may include in their lawsuits charges that would have been uncovered by the EEOC in a reasonable investigation of the charges brought in the administrative complaint. Nonetheless, and based on the specific facts and sequence of events at Clockedile, the First Circuit adopted a new rule, whereby "retaliation claims are preserved [in a lawsuit] so long **as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency** – e.g., the retaliation is for filing the agency complaint itself." Clockedile, 245 F.3d, at 6. (Our emphasis).

V. CONCLUSION

Having found that Plaintiff failed to establish a prima facie case of age discrimination, that she failed to establish being the victim of hostile work environment, or that VA took retaliation against Plaintiff for her involvement in protected activities, VA's motion for summary judgment is granted and the complaint is dismissed with prejudice. Judgment will be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico this 28th day of February, 2012.

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

Consequently, if the retaliation charges pleaded by a plaintiff in his or her lawsuit are reasonably related to the discriminatory acts included in his or her complaint to the EEOC, or if such charges grow out of the discriminatory acts alleged therein, the retaliation charges may be preserved in the lawsuit even though they were not part of the EEOC complaint.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Laura Rodriguez-Machado Plaintiff, v. Department of Veterans Affairs, et al. Defendants.	Civil No. 10-1980 (DRD)

JUDGMENT

Pursuant to the Court's *Opinion and Order* of February 28, 2011 (Docket No. 34) the Court hereby GRANT'S Defendant's motion for summary judgment and enters a final judgment **DISMISSING WITH PREJUDICE** Plaintiff's federal causes of action under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621 et seq. ("ADEA"), and the Constitution of the United States of America.

THIS CASE IS NOW CLOSED FOR ALL ADMINISTRATIVE AND STATISTICAL PURPOSES.

IT IS SO ORDERED, ADJUDGED AND DECREED.

In San Juan, Puerto Rico this 28th day of February, 2012.

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

United States Court of Appeals
For the First Circuit

No. 12-1430

LAURA RODRIGUEZ-MACHADO

Plaintiff - Appellant

v.

ERIC K. SHINSEKI, Secretary, United States Department of Veterans Affairs

Defendant - Appellee

APPELLEE'S BRIEFING NOTICE

Issued: July 24, 2012

Appellee's brief must be filed by **August 27, 2012**.

The deadline for filing appellant's reply brief will run from service of appellee's brief in accordance with Fed. R. App. P. 31 and 1st Cir. R. 31.0. Parties are advised that extensions of time are not normally allowed without timely motion for good cause shown.

Presently, it appears that this case may be ready for argument or submission at the coming **November, 2012** session.

The First Circuit Rulebook, which contains the Federal Rules of Appellate Procedure, First Circuit Local Rules and First Circuit Internal Operating Procedures, is available on the court's website at www.ca1.uscourts.gov. Please note that the court's website also contains tips on filing briefs, including a checklist of what your brief must contain.

Failure to file a brief in compliance with the federal and local rules will result in the issuance of an order directing the party to file a conforming brief and could result in the appellee not being heard at oral argument. See 1st Cir. R. 3 and 45.

Margaret Carter, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
John Joseph Moakley
United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210
Case Manager: Todd Smith - (617) 748-4273

cc:
Isabel Munoz-Acosta
Nelson Jose Perez-Sosa
Elaine Rodriguez-Frank

United States Court of Appeals
For the First Circuit

No. 12-1430

LAURA RODRIGUEZ-MACHADO
Plaintiff - Appellant

v.

ERIC K. SHINSEKI
Defendants - Appellees

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

PLAINTIFF-APPELLANT'S RESPONSE AND REPLY BRIEF

Elaine Rodriguez-Frank
Attorney for Plaintiff-Appellant
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San Juan Puerto Rico 00919-4799
(787) 250-8592

COMES NOW Plaintiff-Appellant and respectfully submits her response to the Agency's brief.

Initially, we notice that the Agency's brief has a total 56 pages. Pursuant to FRAP 28 the length of the Agency's brief is limited to 35 pages. Thus, there is an excess of 21 pages.

Plaintiff's arguments had to be painstakingly reduced in order to comply with our page limitation and we cannot understand why the Agency failed to do so in its brief.

In page 17 of the Agency's brief, the Agency mistakenly identifies the signatory of the RME document known as the deep dive. This document was signed by the Agency's Director, Wanda Mimms. The leader of the RME team did not sign this document.

In page 18 of the Agency's brief sustains correctly that Ramos was not forthright, and was hiding information.

It incorrectly concludes that Plaintiff had secretly alerted wards and clinics prior to unannounced

inspections, Plaintiff provided evidence that she was instructed to announce the visits and inspections. (Appendix 449).

The Agency bases its arguments on the statement written by Sarita Figueroa (Appendix 492). Figueroa was not working for the Agency when the events occurred and she did not participate in any of the actions related to the Reusable Medical Equipment. (Appendix 522). What the investigation concluded was that Plaintiff was the fixer and had profound influence and control over areas outside her scope of responsibilities. Her supervisor was Ramos at all times. Ramos lied to the investigators trying to make her look as a liar to undermine Plaintiff's credibility. Ramos was not candid with the investigator when she denied knowing the existence of the RME team. (Appendix 493,522). We attach Exhibit 17 of Plaintiff's opposition to Defendant's Motion for Summary Judgment, which is a copy of the memorandum issued by the VISN8 action items on the RME issues. Evelyn Ramos was one of the recipients of the document.

Witness Katherine Collins testified that Plaintiff was assigned to perform RME duties team. (Appendix 409) Plaintiff was acting within the duties of her position.

Plaintiff also clarifies that Ramos was never detailed. PLAINTIFF WAS DETAILED even though she was the problem fixer based on the lies testified by Ramos before the AIB.

The AIB never recommended any disciplinary actions against Plaintiff. (Appendix 493). The Agency claims that the details were recommended and 2 other individuals were detailed among them Ruben Sanchez. Mr. Sanchez was removed from his position and was allowed to stay in Puerto Rico. The 2 females were detailed outside of Puerto Rico. The male employee was given a different treatment, even though, he was the chief of the service that was failing to perform the guidelines on RME. The 2 females were sent to Florida.

Nevin Weaver was the person who signed the detail letter and subsequent extensions. The Agency alleges that Nevin Weaver was unaware of Plaintiff's EEO

complaints based on Plaintiff's testimony without taking into consideration that pursuant to Weaver's own testimony he merely signed the detail letters that were prepared by Malcolm Potter. Mr. Potter was aware of all of Plaintiff's EEO activity since he was the HR and VISN 8 EEO Manager. (Appendix 459 - 460).

Next, we object the timeline prepared by the Agency as outlined in page 47 of its brief. The timeline and analysis evidences a total lack of knowledge of the processing of EEO claims by Federal Agencies.

Plaintiff first EEO complaint was filed in February 2009 and was a claim of age discrimination and hostile work environment for the treatment she received from her supervisor, Evelyn Ramos. After the filing of this claim the Agency spent more than 180 days investigating. Plaintiff was notified of the results of the investigation and she requested a hearing before an administrative judge.

While the first case was under the Agency's investigation, Plaintiff filed a second EEO complaint

in October 2009 when she was detailed to Florida. The first EEO complaint was still in process. The second claim was based on the detail. Plaintiff was detailed in six instances. (This case was amended every time she was detailed).

Plaintiff filed her complaint on October 8, 2009, before the (could be: completion of the first EEO complaint report)filing of the EEO complaint. The third EEO complaint was filed on October 26, 2010 when Plaintiff returned to Puerto Rico and she was taken out of her position. Plaintiff mediated this case before it went formal. (Appendix 489).

The Agency took the decision to dismiss Plaintiff's EEO third complaint. Plaintiff received the letter of dismissal and had to amend her civil lawsuit in February 2011 to include the dismiss allegations of the third EEO administrative complaint.

Thus, the Agency's timeline is not correct and misguides this Honorable Appellate Court.

Finally, we address the non-selection allegation made by Plaintiff in her first EEO complaint. Contrary to the Agency's contentions Plaintiff's concerns arose out of the actions taken by the Agency's acting director Nancy Reissener. Ms. Reissener was the supervisor of both Plaintiff and the selectee at the time they applied for the position. Ms. Reissener was aware that Plaintiff had written to her raising pre-selection. Plaintiff wrote to Reissener claiming that there was going to be a pre-selection. (Appendix 257). This report was sent to Reissener before the announcement of the position.

Reissener prepared the supervisory appraisal for both Plaintiff and the selectee. Reissener did not write anything on behalf of Plaintiff and gave the selectee raving reviews. She even wrote that the selectee had more preparation than Plaintiff. She selected Nayda Ramirez.(Appendix 364-368).

Reissener later on denied having any knowledge of Plaintiff's application for a new position. (Appendix

372-373).

CONCLUSION

In conclusion, we repeat the remedy requested in our original brief, that this Honorable Court reverse the US District Court's judgment.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 15th day of October 2012.

S/Elaine Rodriguez-Frank
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00919-4799
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PROOF OF SERVICE

I hereby certify that a copy of this brief and Addendum have been sent to each of the following attorneys by electronic notice to the following: Nelson Jose Perez Sosa, AUSA, Twelfth Floor, Chardon Tower, 350 Chardon Avenue, San Juan Puerto Rico 00918.

In San Juan, Puerto Rico, this 15th day of October 2012.

S/Elaine Rodriguez-Frank
ELAINE RODRIGUEZ-FRANK

CERTIFICATE OF COMPLIANCE FED. R. APP. P. 32 (A)(7)

I certify under Fed. R. App. P. 32(a)(7) that this reply contains less that 14,000 words according to the word count of the word-processing system used to prepare this brief, and totals 1,152 words.

October 15th, 2012 S/ELAINE RODRIGUEZ-FRANK

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Rodriguez, Laura

From:
Sent: Thursday, April 16, 2009 11:14 AM
To: VISN 8 ACTION ITEMS
Cc: Gipson, George A.; McGuire, James B. (VISN 8); Zbogar, Michela (VISN8); Figueroa, Sarita; Mattingly, Deborah; Richardson, Verana E.; Ramirez, Nayda; Bentz, Emma; Ramos, Evelyn; Cintron, Aileen; Bermudez, Myrna; Sanchez-Ruiz,Ruben
Subject: FW: VHA Directive 2009-004 Use and Reprocessing of Reusable Medical Equipment in VHA Facilities **Due 04/17/09** ACTION ITEM #0903310536
Importance: High

his is the response from the VA Caribbean Healthcare System.

Enclosed find the response of above action taken:

2) Establish a organizational structure consisting of the below positions and provide the names of the personnel assigned:

a) Chief of SPD	Mr. Ruben Sanchez
b) Quality & Risk Management Representative Mr. Angel Claudio	Ms. Lavell Velez, Quality Manager &
c) Nursing Service Representative Manager	Ms. Ileana Fernandez, Nurse
d) Infection Control Professional	Mr. Rafael Colon
e) Patient Safety Manager Giraud	Ms. Aida Rodriguez & Mr. Rafael
f) Bio-Medical Representative	Mr. Jose L. Rivera

From: VISN 8 ACTION ITEMS
Sent: Tuesday, March 31, 2009 8:26:12 AM
To: VISN 8 DIRECTORS
Cc: Zbogar, Michela (VISN8); McGuire, James B. (VISN 8); Gipson, George A.; Figueroa, Sarita; Mattingly, Deborah; Richardson, Verana E.
Subject: VHA Directive 2009-004 Use and Reprocessing of Reusable Medical Equipment in VHA Facilities **Due 04/17/09** ACTION ITEM #0903310536
Auto forwarded by a Rule

ACTION ITEM COVER SHEET

PAGE 1

5/3/2010

Exhibit 17

Item Number: 0903310536

Subject: VHA Directive 2009-004 Use and Reprocessing of Reusable Medical Equipment in VHA Facilities

Due Date: April 17, 2009

Forward Responses To: VISN 8 Action Items
Cc: George Gipson; James McGuire; Michela Zbogar; Sarita Figueroa

Point of Contact: George Gipson, Network Materiel Manager and James B. McGuire (JB), Network Patient Safety Officer.

Comments: The VHA Directive 2009-004, Use and Reprocessing of Reusable Medical Equipment (RME) in VHA Facilities provides procedures for the design and implementation of a systematic approach for the set up, proper use, reprocessing, and maintenance of all reusable medical equipment (RME) used in VHA facilities. This requires, but is not limited to: initial training of personnel on the proper setup, use, and reprocessing for each piece of equipment; an annual validation of the competency of the staff involved; and quality oversight. To ensure adherence to this directive facilities are required to complete the below instructions and submit response to the Network office no later than COB April 17, 2009.

Instructions:

1) Review VHA Directive 2009-004 and provide the Network with any questions or concerns which may prevent compliance.
2) Establish a organizational structure consisting of the below positions and provide the names of the personnel assigned:

    a) Chief of SPD
    b) Quality & Risk Management Representative
    c) Nursing Service Representative
    d) Infection Control Professional
    e) Patient Safety Manager
    f) Bio-Medical Representative

3) Ensure the organizational structure reports to the Executive Committee of Medical Staff.

Inquiries should be addressed to George Gipson at George.Gipson2@va.gov and James B. McGuire at James.Mcguire3@va.gov

Thank you,

Nevin M. Weaver, FACHE
Network Director - VISN 8

PAGE 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO. 12-1430

LAURA RODRIGUEZ-MACHADO
Plaintiff - Appellant

v.

ERIC K. SHINSEKI, Secretary,
United States Department of Veterans Affairs
Defendant - Appellee

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

BRIEF FOR APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO. 12-1430

LAURA RODRIGUEZ-MACHADO
Plaintiff - Appellant

v.

ERIC K. SHINSEKI, Secretary,
United States Department of Veterans Affairs
Defendant - Appellee

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

BRIEF FOR APPELLEE

TO THE HONORABLE COURT:

COMES NOW, the United States of America herein represented through the undersigned attorneys, and very respectfully submits the following Brief for Appellee:

JURISDICTIONAL STATEMENT

In this employment discrimination case, the district court granted summary judgment in favor of the employer, the Department of Veterans Affairs (the "VA") on February 28, 2012, and dismissed plaintiff-appellant Laura Rodríguez-Machado's ("Plaintiff") civil action in its entirety.[1] *Rodríguez-Machado* v. *Department of Veterans Affairs*, 845 F. Supp. 2d 429, 444 (D.P.R. 2012). On March 17, 2012, Plaintiff filed a timely notice of appeal (D.E. No. 36). *See* Fed. R. App. P. 4. The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

1. References to the record will be as follows: D.E. (Docket Entry or Entries); p. (page); pp. (pages); No. (Number); par. (paragraph or paragraphs).

STATEMENT OF THE ISSUES

Whether the district court properly granted summary judgment in favor of the VA, which requires that this Court determine the following:

A. Whether summary judgment was proper regarding Plaintiff's claims of discrimination and hostile work environment based on age, where, e.g., (1) Plaintiff's allegations of excess work and rudeness by her supervisor did not constitute adverse employment actions, (2) the job promotion that Plaintiff alleges was unlawfully denied from her was given to a female co-worker -- of roughly similar age as Plaintiff -- after an objective panel found that co-worker to be a superior candidate, and (3) there was no evidence that any supposedly harassing conduct was based on Plaintiff's age.

B. Whether summary judgment was proper regarding Plaintiff's claims of retaliation for prior Equal Employment Opportunity ("EEO") protected activities, where, e.g., (1) the supposedly retaliatory Florida detail to which Plaintiff was assigned in September 2009 was performed in accordance with department regulations and recommendations of the Office of Inspector General ("OIG") and an independent administrative investigative board ("AIB"), (2) there was no evidence that the OIB, AIB, or management official who ordered that detail, had any knowledge of Plaintiff's prior EEO activities, (3) Plaintiff's reassignment to primary care in September 2010 did not rise to the level of adverse employment action, and (4) Plaintiff's salary, grade, and benefits have not been affected.

C. Whether Plaintiff exhausted administrative remedies with regards to the abovementioned retaliation claims, taking into account that Plaintiff filed two EEO administrative complaints alleging such claims and then, without allowing the adjudicative agency to resolve them, subsequently amended the judicial complaint in this appeal to include the events underlying said EEO complaints, which caused the adjudicative agency to procedurally dismiss both complaints prior to issuing a decision on the merits.

STATEMENT OF THE CASE

This is an appeal from the district court's grant of summary judgment under Rule 56 of the Federal Rules of Civil Procedure dismissing Plaintiff's civil complaint, which alleged discrimination and hostile work environment based on age, along with purported retaliation for prior Equal Employment Opportunity ("EEO") protected activities. *Rodriguez-Machado*, 845 F. Supp. 2d at 444. (*See also* D.E. No. 36).

STATEMENT OF THE FACTS

As an initial matter, the government notes that Plaintiff's opening brief violates Federal Rule of Appellate Procedure 28(a)(7) and (e) by providing a statement of the facts without **any** citations to the record. Fed. R. App. P. 28(a)(7) ("The appellant's brief must contain . . . a statement of facts . . . with appropriate references to the record (see Rule 28(e)) . . . ."). That practice, which is consistent with Plaintiff's approach at the district court level (*see* D.E. No. 29-1, pp. 2-4, Appendix, pp. 541-43), has made it more difficult both for the government and this Court to ascertain the veracity of her assertions and respond accordingly. Therefore, this Court should, in its discretion, either disregard Plaintiff's statement of facts or, at least, "resolve any ambiguities against [her]." *See Fryar* v. *Curtis*, 485 F.3d 179, 182 n.1 (1st Cir. 2007) (where appellant's statement of facts failed to include "**appropriate references to the record**," the court held: "[b]ecause . . . appellant has failed to provide a compliant statement of facts, we resolve any ambiguities against him" (emphasis in original)). *See generally* Wright & Miller, 16AA *Fed. Prac. & Proc. Juris.* § 3974 (4th ed.).

A. Although Plaintiff and Evelyn Ramos had an admittedly "excellent" relationship, a rift begins to develop between the two in June 2008 after Ramos was placed on detail as acting associate director, and thus became Plaintiff's direct supervisor.

Plaintiff is an employee of the Department of Veterans Affairs ("VA") working at the VA Caribbean Health Care System in Puerto Rico ("VA Puerto Rico"). (Appendix, p. 111). She was born in 1952 and her position at the time of the relevant events was that of staff assistant to the associate director, with a grade of GS-13. (*Id.*). Evelyn Ramos ("Ramos"), on the other hand, was a fellow employee, who is approximately four months **older** than Plaintiff (Appendix, p. 265), and with whom Plaintiff had an admittedly "excellent" relationship after sharing many activities together at the hospital throughout the years. (Appendix, pp. 116-17, 268-69).

In or around June 2008, the associate director position became open when the previous associate director (i.e., Mrs. Helen Nuncie) got "detailed"[2] to work at the VA Sunshine Healthcare Network ("VISN 8" or "VISN") in Florida, because of an investigation involving her activities. (Appendix, pp. 269, 274). Management filled the position temporarily by detailing Ramos as the acting associate director. (Appendix, p. 268). Accordingly, because Plaintiff was the staff assistant to the associate director, in June 2008 Ramos became the Plaintiff's immediate supervisor. (Appendix, p. 112). Their relationship began to sour soon

2. As the district court noted, a "detail" is a "temporary assignment of an employee to a different position for a specified period, with the employee returning to his or her regular duties at the end of the assignment. An employee who is on detail is considered for pay and strength count purposes to be permanently occupying his or her regular position." *Rodriguez-Machado* v. *Dep't of Veterans Affairs*, 845 F.Supp.2d 429, 436 n.3 (D.P.R. 2012).

thereafter as a result of miscommunication and mutually unfulfilled work expectations. (*See e.g.*, Appendix, p. 117, 270-74 (recounting an incident in or around June 2008 in which Plaintiff notified Ramos of a meeting only by e-mail, causing Ramos to be unprepared)).

Towards the end of July 2008, another documented instance of friction and unfulfilled expectations occurred between Plaintiff and Ramos. On that occasion, Plaintiff was working on a detail -- to which she was assigned by her previous supervisor (Nuncie) -- that involved working off-site at the VA Puerto Rico Tres Ríos facility exploring efficiencies for the medical care cost fund ("MCCF") operations. (Appendix, pp. 270, 276, 282-83). During her time at Tres Ríos, an employee from the MCCF program shared with Plaintiff his harassment complaints regarding his own supervisor (i.e., Monserrate León, the manager of the MCCF program). (Appendix, pp. 120-121, 276-77). Following that conversation, Plaintiff approached Ramos and urged that Ramos take matters into her own hands and contact the disgruntled MCCF employee. (Appendix, pp. 119-24, 276-83). Ramos, however, declined to get involved in the situation, because she did not supervise Mrs. León, who instead was under the supervision of the service chief for fiscal. (Appendix, p. 278). Accordingly, Ramos informed Plaintiff that the MCCF employee should put his complaints in writing and go through the proper channels, or otherwise the whole situation might be construed as office gossip.

(Appendix, pp. 119-24, 276-83). After a dialogue in which Plaintiff alleges that Ramos became upset (Complaint; Appendix, p. 3, par. 10-11), the conversation ended with Plaintiff asking that Ramos remove her from the MCCF detail, something Ramos was unable to do. (Appendix, p. 125).

In August 2008, an individual from VISN Florida (i.e., Sarita Figueroa), who had been working on detail in Puerto Rico as an assistant to the then acting director (Nancy Reissener), concluded that detail. (Appendix, pp. 138-40, 284-85). As a result, management had to divide Mrs. Figueroa's pending projects amongst other assistants, including Plaintiff. (*Id*.). Plaintiff alleged that those projects were divided amongst (1) Nayda Ramírez (staff assistant to the director; grade GS-13; age 51), (2) Plaintiff (staff assistant to the associate director; grade GS-13; age 56), and (3) Lisa Morales (health planner; grade GS-13; age 51). (Appendix, pp.140-41, 289). (*See also* Addendum to United States' Brief, p. 1).[3] Plaintiff admits that she did not inform Ramos at the time that she believed the work assignments constituted harassment. (Appendix, pp. 144-47). Nevertheless, Plaintiff later claimed to the EEO investigator that the distribution supposedly discriminated based on age, because Lisa Morales, who is only five years younger than Plaintiff, "got less projects to manage," as compared to Nayda Ramírez and

3. The record is unclear as to whether Myrna Bermúdez (program staffing; grade GS-12; age 47) and Sarvelle Reyes also received some projects. (*Compare* Appendix p. 140-41 *with* pp. 289-90).

herself. (Appendix, p. 144). Neither Nayda Ramírez nor any of the other employees complained about the assignments. (Appendix, p. 291).

Plaintiff contends that subsequently in August 2008, she was approached by two co-workers who casually asked Plaintiff when she was planning to retire. (Appendix, p. 157). Those co-workers, Plaintiff alleges, were Lavell Vélez (age 52) and Nayda Ramírez (age 51). Both of these co-workers were at the same grade level as Plaintiff and had no supervisory or decision-making authority over Plaintiff. (Appendix, p. 289). Moreover, Plaintiff admits that she did not report that retirement-age conversation to Ramos or management. (Appendix, p. 158). Additionally, Plaintiff does not allege and there is no evidence suggesting that these employees acted in concert with other individuals. (*See e.g.*, Appendix, p. 37, 45). (*See also* Complaint; Appendix, p. 10-11, par. 15-16).

Plaintiff further alleges that she was taken by her companion (i.e., Dr. Nieves) to seek psychological assistance at the Employee Assistance Program as a result of that retirement-age question. (Complaint; Appendix, pp. 10-11, par. 15-16). In addition, she avers that, upon returning to work from her appointment, Ramos yelled at her for not having previously informed Ramos of her whereabouts. (Complaint; Appendix, p. 11, par. 17). Plaintiff asserts that such conduct was uncalled for and constituted harassment, because Dr. Nieves had told Ramos that Plaintiff would be taken to a psychologist. (Appendix, pp. 162-63).

Plaintiff admits, however, that she did not witness the conversation between Dr. Nieves and Ramos. (*Id.*). Moreover, Ramos later explained to the EEO investigator that, although Dr. Nieves did tell her that Plaintiff would be taken to a psychologist, neither Dr. Nieves nor Plaintiff told Ramos that Plaintiff would go to the Employee Assistance Program. (Appendix, pp. 296-299).

That same day, after returning to work from the Employee Assistance Program, Plaintiff informed Ramos that she was under stress and wished to be removed from a detail she was working on and to be relieved of the projects she had been given. (Appendix, pp. 166-67). In this regard, Plaintiff later admitted -- in response to the EEO investigator's probing questions -- that, although Ramos did not remove her from the detail, Ramos did ease Plaintiff's workload by removing half of the projects that had been assigned to her:

> Q. So she [Ramos] did as you [Plaintiff] asked her to do; is that correct? She removed you from the detail and she removed you from those extra duties; is that correct?
>
> A. No, ma'am
>
> Q. Go ahead, tell me.
>
> A. She [Ramos] did not. She told me [Plaintiff] she was going to do it, but she did not.
>
> Q. She [Ramos] did not remove you [Plaintiff] from the detail or from the extra duties?
>
> A. That's correct.

> Q. And how did Ms. Bermudez come into the situation?
>
> A. Well, she [Ms. Bermúdez] -- she actually took one of the projects I was given, because when we look at the prior -- there were two priors and she [Ramos] gave her [Ms. Bermúdez] one of those projects.
>
> Q. **So she [Ramos] did remove . . . projects from you [Plaintiff]?**
>
> A. She [Ramos] removed one project from me, yes.
>
> . . .
>
> Q. **She [Ramos] removed half of the projects?**
>
> A. **Yeah.**
>
> Q. How many projects were there?
>
> A. . . . there were really two big projects, so that's why I say half of the projects.

(Telephonic Statement of Laura Rodríguez, Appendix, pp. 166-67 (emphasis added)). *See also* Decision without a Hearing, U.S. Equal Employment Opportunity Commission, EEOC No. 510-2009-00318X (July 1, 2010), located at Appendix, p. 37 and D.E. No. 15-3, p. 5 ("Although Complainant [Laura Rodríguez] stated that she did not believe that Ms. Ramos was listening to her needs the fact is that Ms. Ramos re-assigned some of Complainant's work to another employee.").

Plaintiff alleges that several other incidents occurred thereafter. For example, she avers that in September 2008, Ramos yelled at Plaintiff after the

latter failed to remind Ramos of an emergency drill. (Appendix, pp. 178-81). Ramos, however, denies that the incident occurred. (Appendix, pp. 314-15). In addition, in September 2008, Plaintiff purportedly took offense to an e-mail sent by Ramos (Appendix, p. 255) asking Plaintiff to develop a position description for a Veterans Equitable Resource Allocation ("VERA") coordinator position, and suggesting that Plaintiff could consider applying for it. (Complaint; Appendix, p. 11, par. 21). Ramos later explained to the EEO investigator that she made that suggestion in an effort to find a position of equal grade for Plaintiff (i.e., GS-13); since Plaintiff had already made it known that she did not want to work with Ramos. (Appendix, p. 321).

B. Plaintiff has a conversation with Ramos' supervisor, i.e., Nancy Reissener (medical center director), in which Plaintiff complains about Ramos; Reissener's solution is to reassign Plaintiff to work directly under Reissener.

Towards the end of September 2008, Plaintiff had a conversation with Ramos' supervisor, Nancy Reissener ("Reissener"), who came originally from VISN in Florida and was on detail at the time working as the director of VA Puerto Rico. (Appendix, p. 284). Plaintiff avers that she made the following statements pertaining to Ramos:

> I told [Reissener] that I felt that for the previous year [Ramos] show[ed] many capabilities and that I admire her at that time, but as an executive career field candidate she was showing lack of control in

> the way she was handling the pressure[] the position of the detail ha[d] put on her. I told Mrs. Reissener that I felt at that time that she wasn't maintaining her objectivity by the way she was treating me.

(Appendix, p. 194). Plaintiff also allegedly told Reissener that she believed that her work environment had become hostile, citing *inter alia* an incident where Ramos purportedly accused Plaintiff of being "erratic." (Appendix. pp. 194-95). There is no indication, however, of Plaintiff having expressed to Reissener that any purported hostility by Ramos (who is older than Plaintiff) was because of Plaintiff's age. (*Id*.)

As a result of that conversation, in September 2008, Reissener removed Plaintiff from Ramos' supervision and reassigned Plaintiff to report directly to Reissener. (Appendix, pp. 316-18; Complaint; Appendix, p. 12, par. 22-24). Nevertheless, Plaintiff maintains that a few more isolated incidents later occurred between Ramos and herself. For example, towards the end of October 2008, Ramos allegedly asked Plaintiff to make a change with regards to certain reservations for a revenue conference meeting. (Complaint; Appendix, p. 12, par. 25-28). Specifically, Ramos requested that Plaintiff change the reservations because it would be Plaintiff who would attend the meeting and not Ramos, contrary to the original plans. (*Id*.). In this regard, Plaintiff avers that Ramos yelled at her the following week upon learning that Plaintiff had still not made the changes. (*Id*. *See also* Appendix, pp. 328-32).

Thereafter, in December 2008, the medical center's administrative executive board meeting took place. (Appendix, p. 332). Plaintiff had previously been a member of this board, because of her position as staff assistant to the associate director (i.e., assistant to Ramos). (Appendix, pp. 332-38). Nevertheless, because Plaintiff had been reassigned to work directly as an assistant to the director, i.e., Reissener, and was no longer Ramos' staff assistant, Ramos determined that Plaintiff's presence at the meeting was not required. (*Id*.). Upon Plaintiff arriving late to the December 2008, Ramos informed her of that decision and stated that Plaintiff did not need to be at the meeting. (*Id*.). Allegedly, Plaintiff was offended by the news. (Complaint; Appendix, p. 13, par. 32).

Plaintiff also alleges an instance of apparent rudeness occurring later in December 2008. Specifically, she complains of a purported event where Ramos knocked loudly at Plaintiff's door and asked her to make a phone call to a service chief. (Complaint; Appendix, p. 13, par. 33-34).

C. Plaintiff applies for a promotion, but the position is given to another candidate in accordance with the recommendations of an objective panel of three members.

In December 2008, Plaintiff applied for a promotion to a higher grade position, i.e., "Supervisor, Health System Specialist," grade GS-14. (Complaint; Appendix, p. 14, par. 42-45). (*See also* Addendum to United States' Brief, p. 8).

An objective three-member panel was convened to interview the candidates and formulate a recommendation. (Addendum to United States' Brief, p. 7). The panel was comprised of Kathleen Collins (Associate Director Nursing Service), Dr. Doris Toro (Chief Medical Service), and Myriam Zayas (Chief HBAS). (*Id*.). Pursuant to the recommendations of that panel, management appointed Nayda Ramírez (51 years old), who until that time had worked as the staff assistant to the director, Reissener. (*Id*. at p. 7).

Plaintiff alleges that Reissener, who was the one who prepared the performance evaluations for both Plaintiff and Nayda Ramírez in 2008, intentionally lowered Plaintiff's score so that Nayda Ramírez would later get the position. (Complaint; Appendix, p. 14, par. 45). That allegation, however, is belied by the record, which shows that the decision to promote Nayda Ramírez was made in accordance to the recommendations of an objective panel (Addendum to United States' Brief, p. 7), and Plaintiff does not allege that those panel members had any age-based discriminatory or retaliatory animus against her. Additionally, the record shows that even if Plaintiff had received the maximum value of 20 points on the "Supervisory Appraisal" for employee promotion category, she would have received a total score of 88.4, and would still be ranked second to the candidate recommended by the panel (i.e., Nayda Ramírez). (Addendum to United States' Brief, p. 7).

D. Reissener's detail as acting director of the medical center concludes; Plaintiff goes back to her previous position as staff assistant to Ramos.

On January 22, 2009, Reissener concluded her detail as acting director of VA Puerto Rico and left the facility. (Appendix, p. 40). As a result, Plaintiff went back to her previous position as staff assistant to the associate director (Ramos). (*Id*.). Wanda Mims became the medical center's director after Reissener's exit.

A day later, on January 23, 2009, Ramos and Plaintiff had a conversation about their working relationship. (*Id*.). Ramos felt she had to document that conversation and sent Plaintiff a memo of instructions (Appendix, pp. 357-58) memorializing their discussions during that conversation. (Appendix, pp. 347-53). In that memo, Ramos stated that "if [Plaintiff's] working with [Ramos] during [Ramos'] detail presents a disruption to the effectiveness and efficiency of this healthcare system, alternate solutions will be sought." (Appendix, p. 358). Ramos later explained that the message to Plaintiff was that if Plaintiff could not work as Ramos' assistant, then they would have to look for alternatives, such as having Plaintiff "reassigned to another position of equal grade." (Appendix, p. 351). Apparently unsatisfied with Ramos' approach, Plaintiff filed a complaint at the Equal Employment Opportunity Commission ("EEOC").

E. Plaintiff files a complaint at the EEOC alleging discrimination and hostile work environment based on age.

After complaining informally to an EEO counselor in February 6, 2009 (Appendix, p. 101), Plaintiff filed a formal complaint on March 27, 2009, before the EEOC alleging age-based discrimination and hostile work environment (the "**1st EEOC Complaint**"), VA Case No. 2001-0672-id09101582, EEOC Case No. 510-2009-00318X. (Appendix, p. 28, 34). Plaintiff nevertheless continued to work under Ramos' supervision during this time.

F. Plaintiff becomes involved in a detail to assist the reusable medical equipment (RME) team.

In February 2009, Ramos assigned Plaintiff to assist the reusable medical equipment ("RME") team with different matters. (Appendix, pp.53, 379). In mid-March, the RME team signed a memorandum for VISN Florida specifying that the San Juan facility was in compliance with the issues regarding reusable medical equipment. (Appendix, p. 379). That same day, Plaintiff took sick leave to have foot surgery. (*Id*.). Upon returning to the facility in July 2009, Plaintiff continued to assist the RME team with respect to a follow up report. (*Id*.).

Afterwards, at the end of August 2009, an employee from the VA San Juan facility complained to the Office of Inspector General regarding the manner in which reusable medical equipment was being handled at the facility. (Appendix, p. 380). The Office of Inspector General soon ordered an investigation and convened an independent administrative investigative board (the "Investigative Board" or

"AIB") to conduct that investigation. (*Id*.). The board visited the facility in September 2009 to perform the investigation, which involved, among other things, interviewing relevant employees. (*Id*. at p. 381-82).

As a result of its investigation, the Investigative Board found that Plaintiff was not forthright and was hiding information. (Appendix, p. 382 (Plaintiff: "And she told me that according to the board's findings they perceive -- they perceive I [Plaintiff] was hiding information."). To that effect, Plaintiff recounted that during her interview, "[Investigative Board members] were very strong asking [her] why [she] didn't report or prepare an issue brief." (Appendix, p. 381).

In addition, the Investigative Board found that Plaintiff had secretly alerted wards and clinics prior to unannounced inspections, to make sure that they would follow procedures during those inspections. (Appendix, pp. 443, 492).

G. Plaintiff gets detailed to VISN in Florida for 60 days, in accordance with the recommendations of the Office of Inspector General and the Investigative Board; thereafter, Plaintiff continues that detail while working from a VA facility in Puerto Rico.

In September 2009, with the Investigative Board investigation of the facility's reusable-medical-equipment practices still ongoing, higher management decided to detail Plaintiff for 60 days to VISN in Bay Pines, Florida. (Appendix, pp. 56-57). That detail was ordered by Nevin Weaver (VISN Director), and was performed in accordance with the recommendations of the Office of Inspector

General and the Investigative Board. (Appendix, p. 455). Neither Plaintiff's salary, grade level, nor her benefits were affected by the detail. (Appendix, pp. 57-58).

In addition to Plaintiff, two other individuals, i.e., Dr. Sandra Gracia (Chief of Staff) and Rubén Sánchez (Chief of Supply Processing and Dispatch), were detailed to other positions as a result of the reusable-medical-equipment investigations. (Appendix, pp. 54-55). While Dr. Gracia was detailed to VISN in Bay Pines, Florida, Rubén Sánchez was detailed in Puerto Rico. (*Id*.) Also, allegedly as a result of those investigations, Mrs. Ramos (Plaintiff's former supervisor) retired. (Complaint, par. 74, Appendix, p. 11).

In November 2009, management extended Plaintiff's detail for 60 more days, but granted Plaintiff's request that she be allowed to perform her duties from Puerto Rico. (Appendix, pp. 57-58). Plaintiff's VISN detail was thereafter extended in 60-day intervals on a number of occasions, but always working from a VA facility in Puerto Rico. (*Id*.). Thus, except for the first 60 days of her VISN detail (i.e., from mid-September 2009 to mid-November 2009), Plaintiff performed that detail from a VA facility in Puerto Rico.

The detail extensions, all of which were approved by Nevin Weaver (VISN Director), responded to the fact that management was waiting for disciplinary action review and final determination by VA Central Office (VACO). (Appendix,

p. 57-58). Notably, Plaintiff admitted to the EEO investigator that she did **not** know whether, at the time of the detail (and its extensions), Mr. Weaver had any knowledge of Plaintiff's prior EEO activities. (Appendix, p. 376).

Furthermore, the district court found that the detail and its extensions were performed in accordance with agency regulations. *Rodriguez-Machado*, 845 F. Supp. 2d at 443. *See also* Appendix, p. 475. Specifically, the court noted that the employer followed the procedure indicated in VA Handbook 5005, Chapter 2, paragraph 13; 5 C.F.R. Part 300; 5 U.S.C. § 3341, *Rodriguez-Machado*, 845 F. Supp. 2d at 436 n.4, and found that "the original duration of the Florida detail and the extensions thereof were made in compliance with the applicable VA Handbook." *Rodriguez-Machado*, 845 F. Supp. 2d at 443. On appeal, **Plaintiff does not contest that finding**.

H. Plaintiff files a second complaint before the EEOC, this time alleging reprisal for having filed the 1st EEOC Complaint.

In January 29, 2010, Plaintiff filed a second complaint before the EEOC (the "**2nd EEOC Complaint**"), VA Case No. 200I-0010-2010100173, EEOC Case No. 510-2010-00422X. (Appendix, p. 47). In it, Plaintiff alleged that her 60-day detail to VISN Florida in September 2009 -- and its subsequent extensions in Puerto Rico -- constituted retaliation for having filed the 1st EEOC Complaint in January 2008. (*Id*.). Plaintiff later amended the 2nd EEOC Complaint on various

occasions in order to include allegations that her VISN detail and its extensions were motivated by her sex, race and national origin. (Appendix, p. 51).

I. The Office of Employment Discrimination Complaint Adjudication issues a final order regarding Plaintiff's 1st EEOC Complaint, granting summary judgment in favor of the VA; Plaintiff then files a federal civil action.

In July 14, 2010, the Office of Employment Discrimination Complaint Adjudication issued a final order on Plaintiff's 1st EEOC Complaint, granting summary judgment in favor of the VA. (Appendix, pp. 29-45). In so doing, the administrative judge found, among other things, that Plaintiff's allegations were "insufficient to justify a hostile work environment" and that there was "nothing in the record to even suggest that any of the incidents described by Complainant [were] in any way related to Complainant's age." (Appendix, p. 45).

On October 8, 2010, Plaintiff filed a judicial complaint based on the events underlying the 1st EEOC Complaint, and alleged "that she ha[d] suffered age discrimination and retaliatory harassment under the employ[ment] of defendant." (D.E. No. 1, p. 1).

J. After finishing the VISN detail, Plaintiff is reassigned to Primary Care at VA Puerto Rico.

In or around September 2010, management reassigned Plaintiff to primary care at VA Puerto Rico. (Appendix, p. 483). Plaintiff alleged that she was

reassigned to primary care effective September 27, 2010. (Appendix, p. 503). While her "position description" was being developed, Plaintiff was asked to work on "unclassified duties," like, for example, developing a performance improvement plan for the compensation and pension unit, and evaluating processes to achieve efficiencies. (Appendix, p. 483). Notably, **neither Plaintiff's grade nor her salary were affected**. (*Id.*).

Plaintiff subsequently challenged management's decision to reassign her to primary care, apparently proposing that she should return to her previous position of staff assistant to the associate director. (Appendix, p. 492). Management, however, rejected that proposal, explaining that the Investigative Board's finding that Plaintiff had secretly notified wards and clinics in advance of pending unannounced inspections had "caused management to lose confidence in [her] ability to continue service as Staff Assistant to the Associate Director." (Appendix, p. 492).

K. Plaintiff files a third complaint before the EEOC, this time alleging mainly that her reassignment to primary care constituted discriminatory hostile work environment and retaliation for prior EEO activity.

On February 6, 2011, Plaintiff filed a third complaint before the EEOC (the "**3rd EEOC Complaint**"), Case No. 200I-0672-2011100386. (Appendix, p. 503, 509). In it, Plaintiff challenged management's decision to reassign her to primary

care, and complained about miscellaneous aspects that came with that reassignment, such as loss of parking privileges. (*Id*.).

L. Plaintiff amends her federal judicial complaint to include the events underlying the 2nd EEOC Complaint and 3rd EEOC Complaint, causing the adjudicative agency to procedurally dismiss said administrative complaints.

Ten days later, on February 16, 2011, Plaintiff amended the judicial complaint related to this appeal to add most of the events underlying the 2nd EEOC Complaint (which alleged that the September-2009-VISN-Florida detail was retaliation for filing the 1st EEOC Complaint) and the 3rd EEOC Complaint (which alleged that Plaintiff's reassignment to primary care in September 2010 was also retaliation for prior EEO activities). (*See* Complaint, par. 47-78, Appendix, p. 8-11). Thereafter, in April 2011, after learning of said amendment, the adjudicative agency procedurally dismissed both complaints without issuing a decision on the merits. (Appendix, p. 509. *See also* Appendix, pp. 64-66). That dismissal was premised on "EEOC regulations provid[ing] that EEO discrimination complaints that are the basis of a pending civil action in a United States District Court in which the complainant is a party . . . must cease immediately." (Letter from the Office of Resolution Management, Appendix, p. 509 (citing 29 C.F.R. § 1614.107(a)(3)). (*See also* Appendix, pp. 64-67).

M. The district court grants summary judgment in favor of the VA, and this appeal ensues.

About ten months later, on February 28, 2012, the district court granted summary judgment in favor of the VA and dismissed Plaintiff's complaint in its entirety. *Rodriguez-Machado*, 845 F. Supp. 2d at 444. This appeal ensued.

SUMMARY OF THE ARGUMENT

The record, viewed in the light most favorable to Plaintiff, reveals no genuine issue of material fact and demonstrates that Plaintiff's claims of age-based discrimination, age-based discriminatorily hostile work environment, and retaliation for prior EEO activities lack merit.

Significantly, Plaintiff failed to present any evidence from which a reasonable trier of fact could conclude that the alleged adverse employment actions were caused at least in part by her age, much less that age was the "but for" cause (as required by ADEA). In addition, her allegations of excess work and rudeness by her supervisor do not come close to establishing adverse employment actions or a hostile work environment. Likewise, Plaintiff failed to demonstrate that the VA's failure to promote her to a higher grade position was sufficient to establish a prima facie case of discrimination, given that, among other things, the five-year age gap between Plaintiff and the co-worker ultimately promoted was insufficient to fairly suggest age-based discrimination, and she failed to allege that the objective panel convened to recommend a candidate had any discriminatory animus against her.

In addition, as the district court properly found, Plaintiff's 60-day VISN detail in Florida and its subsequent extensions in Puerto Rico were unrelated to any prior EEO activities by Plaintiff, but rather were made in accordance with agency

regulations and the recommendations of the Office of Inspector General and an independent administrative investigative board. In fact, Plaintiff admitted that she did not know whether the official who ordered the detail had any prior knowledge of her EEO activities. Because Plaintiff cannot defeat summary judgment on mere rank speculation, her retaliation claim also fails. Moreover, none of the other miscellaneous acts alleged by Plaintiff constituted adverse employment actions or were shown to have been causally connected to Plaintiff's prior EEO activities.

Lastly, Plaintiff failed to exhaust administrative remedies, *inter alia*, with respect to her allegation that her reassignment to primary care in September 2010 was retaliatory. Notably, after filing an EEOC complaint on February 6, 2011, making that allegation, Plaintiff then amended her judicial complaint ten days later to include the same claim. Nevertheless, as the district court properly found, such claim failed to survive summary judgment on the merits.

ARGUMENT

Plaintiff's Claims:

Plaintiff alleges in her judicial complaint "that she has suffered age discrimination and retaliatory harassment," and "reprisal after the filing of this Complaint." (Complaint, introduction, Appendix, p. 8). She also makes two loose references to a purported hostile work environment when referring to her relationship with Ramos. (Complaint, par. 10 and 43, Appendix, pp. 10, 14).

Thus, the question on appeal is whether the district court properly dismissed (on summary judgment) Plaintiff's claims of (1) age-based discrimination, (2) age-based discriminatorily hostile work environment, and (3) retaliation for engaging in EEO protected activities.[4] As explained below, none of these claims have any merit.

Standard of Review:

Plaintiff asserts that this Court should review the district court's judgment under an abuse of discretion lens. (Appellant's Brief, p. 8). Although that standard would be more favorable for the VA, we note that the proper standard of review is *de novo*. *Velázquez-Ortiz* v. *Vilsack*, 657 F.3d 64, 70 (1st Cir. 2011). To

[4] Although Plaintiff amended her 2nd EEOC Complaint to include claims of discrimination based on her race, sex, and national origin under Title VII of the Civil Rights Act of 1964, as amended (Appendix p. 51), the judicial complaint underlying this appeal contains no specific allegations of discrimination based on those grounds. We focus our discussion accordingly.

that effect, this Court "review[s] the district court's entry of summary judgment de novo and affirm[s] if the record, viewed in the light most favorable to the appellant, reveals no genuine issue of material fact and demonstrates that the movant is entitled to judgment as a matter of law." *Id*. "Although the appellant is entitled to the benefit of all reasonable inferences, she cannot defeat summary judgment with conclusory allegations, improbable inferences, periphrastic circumlocutions, or rank speculation." *Id*. (quotations omitted).

Discussion:

A. The district court properly granted summary judgment in favor of the VA on Plaintiff's claims of discrimination and hostile work environment based on age.

1. *Overview of Applicable Law.*

"The Age Discrimination in Employment Act ("ADEA") makes it unlawful for certain federal employers to discriminate based on age when making any 'personnel actions affecting employees . . . who are at least 40 years of age.' " *Velázquez-Ortiz*, 657 F.3d at 73 (citing 29 U.S.C. § 633a(a)).

Where, as here, there is no "smoking gun" evidence of age-discrimination, ADEA plaintiffs in this Circuit may nonetheless prove their cases by using the three-stage burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp*. v. *Green*, 411 U.S. 792 (1973), which works by shifting the burden of **producing** evidence, but mindful that the **burden of persuading the**

trier of facts always remains with the plaintiff. *Velez* v. *Thermo King de P.R., Inc.*, 585 F.3d 441, 446-447, 129 S.Ct. 2343, 2348 (1st Cir. 2009). *See also Gross* v. *FBL Fin. Servs.*, 557 U.S. 167, 173 (2009). *See generally* 8-135 *Larson on Employment Discrimination* § 135.02. Under this framework, the plaintiff must first establish a prima facie case of age discrimination. Second, if the plaintiff succeeds with the first step, "the burden of production shifts to the employer to come forward with a legitimate, nondiscriminatory reason for its action." *Gomez-Gonzalez* v. *Rural Opportunities, Inc.*, 626 F.3d 654, 662 (1st Cir. 2010). Finally, "[i]f the employer does so, the focus shifts back to the plaintiff, who must then show, by a preponderance of the evidence, that the employer's articulated reason for the adverse employment action is pretextual and that the true reason for the adverse action is discriminatory." *Id*. "Ultimately, [an ADEA] plaintiff's burden is to prove that age was the 'but-for' cause of the employer's adverse action." *Thermo King*, 585 F.3d at 448 (citing *Gross*, 129 S.Ct. at 2351).

In order to establish a prima facie case of age discrimination, a plaintiff must adduce evidence that (1) she was at least forty years of age, (2) her job performance met the employer's legitimate job expectations, (3) the employer subjected her to an adverse employment action, e.g., a discharge or failure to promote, and (4) someone younger of similar or lesser qualifications was treated more favorably, which, in the case of an alleged failure to promote, means that the

employer "filled the position with a younger person of similar qualifications." *Arroyo-Audifred* v. *Verizon Wireless, Inc.*, 527 F.3d 215, 219 (1st Cir. 2008). *See also Cordero-Soto* v. *Island Finance, Inc.*, 418 F.3d 114, 119 (1st Cir. 2005).

As explained below, the district court correctly found that Plaintiff's case collapsed at the outset by failing to prove a prima facie case of age-discrimination. Moreover, Plaintiff has presented no evidence from which a reasonable trier of facts could conclude that the alleged adverse employment actions were based on her age. *See Thermo King*, 585 F.3d at 448 (citing *Gross*, 129 S.Ct. at 2351).

2. *The district court properly dismissed Plaintiff's claim of age-based discrimination.*

a) Under ADEA, federal employees must prove that age was the "but for" cause of the adverse employment action.

We begin by first clarifying the law with regards to the proper causation standard required to establish a claim of age-based discrimination under ADEA. The matter is relevant because, regardless of whether a plaintiff relies on the *McDonnell-Douglas* burden-shifting framework to prove her case, her ultimate task under ADEA is to establish that age was the cause of an adverse employment action. *See* 29 U.S.C. § 623(a) (ADEA's anti-discrimination provision for the private employment sector); 29 U.S.C. § 633a(a) (ADEA's anti-discrimination provision for federal employees). *See also Thermo King*, 585 F.3d at 448.

Plaintiff, who is a federal employee, argues that the district court erred in applying to her case the ADEA-causation standard recognized by the Supreme Court in *Gross*, a case brought under ADEA's private-sector anti-discrimination provision, i.e., 29 U.S.C. § 623(a). *See Gross*, 557 U.S. at 180 ("We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action"). Specifically, she contends that *Gross*' principles do not govern the interpretation of ADEA's anti-discrimination provision for federal employees, i.e., 29 U.S.C. § 633a(a).

Although this Circuit has previously noted the legal question presented by Plaintiff, it has not had the need to resolve it. *Palmquist* v. *Shinseki*, 689 F.3d 66 (1st Cir. 2012), *Velázquez-Ortiz*, 657 F.3d at 74 (declining to decide whether ADEA imposes the same "but for" burden in the federal sector as it does in the private sector, because federal-employee-plaintiff's claim failed even under the less rigorous "mixed-motive" standard for which the plaintiff advocated). This Court also does not have to conclusively resolve that question in the present case, because Plaintiff has proffered no proof that the challenged actions were "caused at least in part" by an age-based animus, much less that age was the "but for" cause. *Velázquez-Ortiz*, 657 F.3d at 74. In any event, as explained below, a careful

review of the reasoning behind *Gross* and its construction of ADEA make clear that *Gross'* principles are fully applicable here.

In finding that § 623(a) established a burden to prove that age was the "but for" cause of discrimination, the *Gross* Court relied heavily on the ordinary meaning of the statute's language, which provided, in relevant part: "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** such individual's age." *Gross*, 557 U.S. at 175-176 (alteration and emphasis in original) (citing 29 U.S.C. § 623(a)(1)). In so doing, the Court construed "**because of**" as the operative phrase establishing the **requisite nexus** or causation standard between

(1) the list of adverse decisions subject to the statute, i.e., "to fail or refuse to hire . . . or otherwise discriminate against any individual with respect to his compensation . . . or privileges of employment," and

(2) the protected basis, i.e., the "individual's age."

See Gross, 557 U.S. at 176-177. See also 29 U.S.C. § 623(a)(1).

The Court then interpreted the phrase "because of" and found that it was tantamount to requiring that age be the "but for" cause of the challenged adverse decisions. *Gross*, 557 U.S. at 176-177. As explained below, an application of these principles to 29 U.S.C. § 633a(a) leads to the conclusion that the "but for" causation standard applies equally to federal-employee suits under ADEA.

The construction of § 633a(a) is similar to that of its private-sector counterpart, i.e., § 623(a), with only minor differences. The federal sector provision establishes as follows, in relevant part: "[a]ll personnel actions affecting employees . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). The main difference between the two provisions is that that the private sector provision is expressed negatively (as a prohibition), while the federal sector provision is expressed in positive terms (as a command the federal government must follow). Another difference is that Congress chose in § 623(a)(1) to list specific prohibited employment actions rather than, as in § 633a(a), to use the shorthand and inclusive phrase "any discrimination." But these are differences in form rather than substance. Thus, if § 623(a)(1) is stripped of its list of specific discriminatory acts, a side-by-side comparison of the two provisions becomes even more revealing:

- Section 623(a)(1): "It shall be unlawful for an employer . . . to . . . discriminate against any individual . . . **because of** such individual's age." (emphasis added).

- Section 633a(a): "All personnel actions affecting employees . . . shall be made free from any discrimination **based on** age." (emphasis added).

The above comparison illustrates that, similar to § 623(a)(1), the relevant mandate of § 633a(a) is constructed in three parts. First, § 633a(a) identifies the adverse decisions subject to the statute, i.e, "[a]ll personnel actions" where there is

"any discrimination." 29 U.S.C. § 633a(a). Second, it sets forth the requisite causation standard (i.e., "based on") between the adverse decisions covered and the protected basis. *Id*. Finally, § 633a(a) specifies the protected basis, i.e., "age." *Id*.

Therefore, with respect to the first part of the edifice, while § 623(a) provides a specific list of adverse decisions covered ("to fail or refuse to hire . . . or otherwise discriminate"), § 633a(a) uses an inclusive formulation to define the adverse decisions within its scope (i.e, "all personnel actions" where there is "any discrimination"). In this regard, the Supreme Court has noted that § 633a(a) is broader than § 623(a), because § 633a(a)'s uses the more inclusive phrase "any discrimination," as opposed to providing a specific list of adverse decisions covered, as does § 623(a). *See Gómez-Pérez* v. *Potter*, 553 U.S. 474, 486-487 (2008).

On the other hand, with respect to the second part of the edifice (i.e., the requisite causation standard), the provisions are practically the same. Namely, while § 623(a) requires that the discrimination be "because of" age, § 633a(a) requires that the discrimination be "based on" age. Significantly for present purposes, the *Gross* Court supported its interpretation of the phrase "because of" by quoting its opinion in *Safe Safeco Ins. Co. of America* v. *Burr*, 551 U.S. 47, 63-64, and n.14 (2007) and providing the following explanatory parenthetical of that opinion: "observing that in common talk, the phrase '**based on**' **indicates** a

but-for causal relationship and thus a necessary logical condition and that the **statutory phrase**, '**based on**,' **has** the **same meaning as** the phrase, '**because of.**'" *Gross*, 557 U.S. at 176-177 (emphasis added).

Therefore, under the principles of *Gross*, the requisite causation standard utilized in § 633a(a) (i.e., "based on") has the same meaning as the one use used in § 623(a)(1) (i.e., "because of"). *See Id*. Consequently, it is necessary to conclude that both sections require a "but for causal relationship" between the adverse employment decision and the plaintiff's age. *See Id*.

Nevertheless, we note that a divided panel from the D.C. Circuit reached the opposite conclusion in *Ford* v. *Mabus*, 629 F.3d 198, 204-06 (D.C. Cir. 2010). A review of that opinion, however, illustrates that it was based on a flawed construction of § 633a(a). Specifically, the majority opinion misinterpreted the Supreme Court's decision in *Gómez-Pérez* and the "sweeping language" used by § 633a(a) to describe the type of adverse decisions covered therein, i.e., the first part of § 633a(a)'s edifice under the foregoing discussion. *Ford*, 629 F.3d 204-06. That language, however, was irrelevant for purposes of construing the requisite causal relationship set forth in § 633a(a). Judge Henderson's concurrence alluded to this by noting that, "[a]s the U.S. Supreme Court explained in [*Gómez-Pérez*], section 633a is sweeping only in the sense that it 'contains a broad prohibition of 'discrimination,' rather than a list of specific prohibited practices.'" *Ford*, 629

F.3d at 208 (Henderson, J., concurring). Thus, the Ford majority lost track of the operative phrase that governs the requisite causal relationship in § 633a(a) (i.e., "based on"). It is unclear what operative phrase the *Ford* majority identified for that purpose.

Furthermore, on a more global level, as Judge Henderson alluded to in his concurrence, the majority in *Ford* failed to provide any satisfactory explanation as to why Congress would have intended to establish so different a framework for federal employees as opposed to those in the private sector. *Ford*, 629 F.3d at 208 (Henderson, J., concurring) ("I am reluctant to agree that the Congress intended, simply by dint of section 633a's different phrasing, to set up a legal framework for the federal government so totally at odds with that for a private employer and, if so, why."). The *Ford* majority opinion is therefore of little to no persuasive value.

Moreover, although *Gross* did not involve § 633a(a), the Court's broad language strongly implied that its ruling therein covered all ADEA cases:

> The question presented by the petitioner in this case is whether a plaintiff must present direct evidence of age discrimination in order to obtain a **mixed-motives jury instruction** in a suit brought under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq. Because we hold that such a jury instruction is **never proper in an ADEA case**, we vacate the decision below.

Gross, 557 U.S. 169-170 (emphasis added). Notably, after citing **all** ADEA provisions (i.e., 29 U.S.C. § 621 et seq.), the Court held that "mixed-motives" causation analysis was "never proper in an ADEA case." *Id*.

Based on the foregoing, this Court should hold that the "but for" causation standard recognized by the Supreme Court in *Gross* applies to all ADEA suits, including suits brought by federal employees under 29 U.S.C. § 633a(a). With that established, we now proceed to analyze Plaintiff's other claims.

b) The district court properly dismissed Plaintiff's claims of age-based discrimination.

A review of the facts in this appeal demonstrates, among other things, that Plaintiff clearly failed to establish that any of the challenged actions were **based on her age**. Therefore, this Court could, for expediency purposes, bypass the *McDonnell-Douglas* evidence-production-burden-shifting framework and start with that ultimate requirement, affirming the district court's dismissal of Plaintiff's discrimination and hostile environment claims. *See Gomez-Gonzalez* v. *Rural Opportunities, Inc.*, 626 F.3d 654, 662 (1st Cir. 2010) (permitting this approach on summary judgment). Nevertheless, because the district court analyzed Plaintiff's age-discrimination claim under a burden-shifting-framework, we follow that lead in our discussion.

As previously mentioned, to establish a prima facie case of age discrimination, Plaintiff had to adduce evidence that (1) she was forty years of age, (2) her job performance met the employer's legitimate work expectations, (3) the employer subjected her to an adverse employment action, e.g., failure to promote, and (4) someone younger of similar or lesser qualifications was treated more favorably, e.g., someone of similar qualifications was promoted. *See Arroyo-Audifred*, 527 F.3d at 219. Plaintiff, however, was only able to establish the first prong.

First, with respect to her claim that management's failure to promote her in January 2009 was discriminatory, Plaintiff failed to establish that the position was awarded to someone of similar qualifications or that the decision was in any way based on her age. That position was awarded to Nayda Ramírez ("Ramírez"), who was approximately 51 years of age at the time (i.e., only 5 years younger than Plaintiff). (Addendum to United States' Brief, p. 1). That age difference is not sufficient to establish a prima facie case of age discrimination. *See Bush* v. *Dictaphone Corp.*, 161 F.3d 363, 368 (6th Cir. 1998) (five year age difference is not "substantially younger"); *Schiltz* v. *Burlington N. R.R.*, 115 F.3d 1407, 1413 (8th Cir. 1997) (same), cited with approval in *Williams* v. *Raytheon Co.*, 220 F.3d 16, 20 (1st Cir. 2000). In addition, Ramírez had superior qualifications as compared to Plaintiff. Specifically, although both Plaintiff and Ramírez were at

the GS-13 grade level, Ramírez had performed with excellence at a position more prominent than that of Plaintiff's. Namely, while Plaintiff was the staff assistant to the associate director (Ramos), Ramírez was the staff assistant to the associate director's supervisor, i.e., the director (Reissener). In addition, the decision to appoint Plaintiff was made pursuant to the recommendations of an objective panel, the members of which Plaintiff has not alleged had any discriminatory animus against her. (Addendum to United States' Brief, p. 7). Moreover, as previously mentioned, although the panel's methodology for selecting a candidate relied in part on the candidate's performance evaluations, which Reissener prepared for both candidates in 2008, even a perfect evaluation from Reissener would not have elevated Plaintiff past Ramírez in terms of who was the superior candidate, as discussed previously. (*Id*.).

Second, Plaintiff failed to establish a prima facie case of discrimination with respect to her detail to VISN Florida and the subsequent reassignment to primary care. Clearly, the Investigative Board's finding that Plaintiff secretly alerted wards and clinics prior to unannounced inspections (Appendix, pp. 443, 492) is inconsistent with any assertion that she met the employer's legitimate expectations. Moreover, the assignments themselves did not constitute adverse employment actions because, among other things, her salary, grade and benefits were not affected. *Morales-Vallellanes* v. *Potter*, 605 F.3d 27, 35 (1st Cir. 2010) (quoting

Burlington Northern and Santa Fe Ry. Co. v. *White*, 548 U.S. 53, 61-62 (2006)) (noting in the context of Title VII that "[a]n adverse employment action is one that affects employment or alters the conditions of the workplace, and typically involves discrete changes in the terms of employment, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." (citations, quotations and alterations omitted)). *See also Gómez-Pérez* v. *Potter*, 452 Fed. Appx. 3, 7 (1st Cir. 2011) (unpublished) (noting that ADEA's federal sector provision was modeled on the federal sector provision of Title VII" and "and we may use standards and precedent regarding claims under Title VII to inform our analysis of an ADEA claim under an analogous provision"). When viewed objectively, Plaintiff's 60-day VISN Florida detail and its ensuing extensions in Puerto Rico, along with her subsequent reassignment to primary care constituted mere inconveniences and alterations of her job responsibilities. Accordingly, they do not constitute adverse employment actions. *Morales-Vallellanes* v. *Potter*, 605 F.3d at 35 (noting that whether an employment action is materially adverse "is gauged by an objective standard" and that a "materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities" (quotation omitted)).

Third, Plaintiff complained that she did not receive a performance evaluation in 2009 while she was carrying out the VISN detail. Nevertheless, the record shows that Plaintiff received a summary appraisal of her performance duties during the 2010 period, and that such practice was consistent with the requirements of the agency's regulations in these type of cases. (Appendix, pp. 515-16). Moreover, on appeal, Plaintiff has not presented any evidence to rebut this explanation. In any event, Plaintiff provided no evidence that she was treated less favorably than younger employees. Also, the receipt of a summary evaluation, as opposed to a full evaluation, does not constitute a material adverse employment action. *See Morales-Vallellanes*, 605 F.3d at 35.

Likewise, **none** of the other purported actions complained of by Plaintiff are sufficient either individually or in the aggregate to establish a prima facie case of age discrimination. For example, Plaintiff complained (1) that her supervisor supposedly yelled at her on various occasions, (2) that her supervisor assigned to her more projects than others, although she later admitted that her supervisor listened to her request and removed half of the projects assigned to her (Appendix pp. 166-67), (3) that her supervisor suggested she should apply for the new VERA position, (4) that she was told to make a phone call while there were secretaries available to do so, (5) that she was supposedly scolded for failure to make immediate changes to certain reservations, (6) that she allegedly lost parking

privileges upon being reassigned to primary care, and (7) that, following her return from the VISN detail, management failed to grant her access to her old account and return her former pen drive. As with her other allegations, these purported events constitute no more than mere inconveniences or changes in job responsibilities. As such, they are insufficient both individually and in the aggregate to establish materially adverse employment actions. *Morales-Vallellanes*, 605 F.3d at 35 ("Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action"). Additionally, Plaintiff presented no evidence that a similarly situated younger individual was treated more favorably in these alleged incidents.

Furthermore, there is nothing in the record that would even fairly suggest that age played any role in the actions complained of by Plaintiff, much less that it was the "but for" cause. In fact, the only allegation made by Plaintiff that arguably responded to an age-based animus was the question made by her co-workers about Plaintiff's retirement age. (Complaint, par. 14, Appendix, p. 10). As previously mentioned, however, the question was made by fellow employees who had no supervisory or decision-making authority over Plaintiff, and Plaintiff never alleged that these employees acted other than alone. Thus, Plaintiff cannot demonstrate discrimination on account of that retirement question. *See Ramírez-Rodríguez* v.

Boehringer Ingelheim Pharmaceuticals, Inc., 425 F.3d 67, 81 (1st Cir. 2005) ("Statements made either by nondecisionmakers, or by decisionmakers not involved in the decisional process, normally are insufficient, standing alone, to establish either pretext or the requisite discriminatory animus." (alterations omitted)).

Moreover, in her appellate brief, Plaintiff pointed to no evidence that could lead a reasonable trier of facts to an opposite conclusion. Rather, most of the argumentation section of her brief merely listed, without any references to the record, supposed factual errors -- many of which are belied in the statement of facts section of this brief -- made by the district court, and provided no discussion or explanation as to how those purported factual errors change any of the district court's legal conclusions. Similarly, she alludes to supposedly "77 instances of harassment," but provides no support for that assertion. (Appellant's Brief, p.25).

Based on the above, this Court should affirm the district court's dismissal of Plaintiff's age-based discrimination claim.

3. *Plaintiff's claim of age-based discriminatorily hostile work environment cannot stand.*

This Court has recognized hostile work environment claims under the ADEA. *See Collazo* v. *Nicholson*, 535 F.3d 41, 43 (1st Cir. 2008) (citing *Rivera-Rodríguez* v. *Frito Lay Snacks Caribbean*, 265 F.3d 15, 24 (1st Cir. 2001)). To

prove an age-based discriminatorily hostile work environment under ADEA, "a plaintiff must provide sufficient evidence from which a reasonable jury could conclude that the offensive conduct is severe and pervasive enough to create an objectively hostile or abusive work environment and is subjectively perceived by the victim as abusive" *Rivera-Rodríguez*, 265 F.3d at 24. "When assessing whether a workplace is a hostile environment, courts look to the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is threatening or humiliating, or merely an offensive utterance; and whether it unreasonably interferes with the employee's work performance." *Id*.

In the present case, Plaintiff's claim under ADEA that she was subjected to an age-based discriminatorily hostile work environment fails for much the same reasons as her age-discrimination claim. Namely, as discussed in the previous section, she has failed to present sufficient evidence from which a trier of fact could reasonably conclude that any of the challenged actions were based on her age. Additionally, as the district court correctly found and explained in its opinion, "none of the facts alleged by plaintiff constitute behavior so offensive that a reasonable person would find hostile or abusive within the context of a person's work environment." *Rodriguez-Machado,* 845 F. Supp. 2d at 442.

Therefore, Plaintiff's ADEA hostile-work-environment claim fails to pass muster.

B. The district court correctly dismissed Plaintiff's claim of age-based retaliation for prior EEO protected activities

The Supreme Court has recognized that 29 U.S.C. § 633a(a) of ADEA prohibits retaliation against federal-sector employees. *Gómez-Pérez*, 553 U.S. at 489 ("[O]ur holding that the ADEA prohibits retaliation against federal-sector employees . . . is based squarely on § 633a(a) itself."). Similar to the framework discussed in the preceding section in the context of age-based discrimination, a plaintiff who does not have direct evidence of retaliation may nevertheless prove her claim using the *McDonnell-Douglas* evidence-production-burden-shifting framework. *Gómez-Pérez* v. *Potter*, 452 Fed. Appx. 3, 7 (1st Cir. 2011) (unpublished). In the context of a retaliation claim, this framework requires that the employee first demonstrate a prima facie case by "establishing three elements: (1) the employee engaged in protected activity; (2) the employee suffered a materially adverse employment action, 'causing harm, either inside or outside of the workplace'; and (3) the adverse action was causally connected to the protected activity." *Id*. at 7-8 (citing *Mariani-Colón* v. *Dep't of Homeland Sec. ex rel. Chertoff*, 511 F.3d 216, 223 (1st Cir. 2007)). "The employer can then overcome the prima facie case by providing evidence of a non-retaliatory reason for the employment action, but if the employee provides 'evidence sufficient to raise a material issue of fact as to whether retaliation was in fact a cause of the adverse

action,' summary judgment may be defeated." *Id*. at 8 (citing *Rivera-Colón* v. *Mills*, 635 F.3d 9, 10 (1st Cir. 2011)).

As the district court properly found, Plaintiff's retaliation claim is doomed at the outset, as she has failed to establish a prima facie case of retaliation. Specifically, she failed to establish prongs two and three, i.e., a materially adverse employment action and a causal connection between such an action and a protected activity.

1. *There is no causal connection between Plaintiff's protected activities and the alleged adverse employment actions.*

In analyzing whether there is a causal connection between a protected activity and an allegedly retaliatory adverse employment action, courts may consider elements such as the employer's knowledge of the protected activity and the temporal proximity between the alleged retaliation and the employer's adverse action. *See Colon-Fontánez* v. *Municipality of San Juan*, 660 F.3d 17, 37 (2011).

The government agrees that Plaintiff's filing of her administrative complaints before the EEOC, and the judicial complaint underlying this appeal, may constitute protected activities under ADEA. Nevertheless, as explained below, Plaintiff failed to demonstrate any causal connection between those protected activities and any alleged adverse employment action.

The following timeline illustrates that the temporal proximity between the protected activities and the alleged adverse actions is too remote to fairly suggest a causal nexus:

- 1st EEOC Complaint (filed March 27, 2009)
    - VISN Florida detail and Puerto Rico extensions thereof (beginning from mid-September 2009)
- 2nd EEOC Complaint (filed January 29, 2010)
    - Reassignment to primary care and assignment of "unclassified duties" (Sept. 27, 2010 - October 4, 2010) (Appendix, pp. 483, 503)
    - Loss of parking privileges (allegedly on October 26, 2010)
- Judicial Complaint (on March 2, 2011, summons was served on defendant, *see* D.E. No. 11, p. 2) (complaint filed on October 8, 2010)
- 3rd EEOC Complaint (February 6, 2011)

As noted above, the temporal proximity between the VISN Florida detail and the earlier protected activity (i.e., filing the 1st EEOC Complaint) was approximately **six months**. Meanwhile, the gap between Plaintiff's reassignment to primary care and the earlier protected activity (i.e, filing the 2nd EEOC Complaint) was **eight months**. These gaps between the protected activities and the supposedly adverse actions are insufficient to fairly suggest a causal connection between the relevant events. *See Ramírez-Rodríguez* v. *Boehringer Ingelheim Pharm., Inc.*, 425 F.3d 67, 84 (1st Cir.2005) (finding that a two-month temporal

gap, standing alone, was insufficient to establish a causal connection). *See also Muñoz* v. S*ociedad Española de Auxilio Mutuo y Beneficiencia de Puerto Rico*, 671 F.3d 49, 56 (1st Cir. 2012) ("Absent special circumstances . . . an adverse employment decision that predates a protected activity cannot be caused by that activity."); *Clark Cnty. Sch. Dist.* v. *Breeden*, 532 U.S. 268, 272 (2001) ("Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.").

Moreover, the record demonstrates that both the 60-day VISN Florida detail (along with its extension in Puerto Rico) and Plaintiff's reassignment to primary care after completing the VISN detail responded to the findings of an investigation performed by an independent administrative board and ordered by the Office of Inspector General. (Appendix, pp. 443, 492). Therefore, the VISN detail and her reassignment to primary care had nothing to do with any protected activities. Moreover, as the district court properly found, the person responsible for authorizing the VISN Florida detail and its extensions in Puerto Rico (i.e., Nevin Weaver) "had no prior knowledge of Plaintiff's EEOC filing history." *Rodriguez-Machado*, 845 F. Supp. 2d at 443. Moreover, Plaintiff has not contested the district

court's finding that the VISN detail and its extensions were performed in accordance with applicable agency regulations. *Id*.

Plaintiffs attempt to establish a causal connection between a protected activity and her alleged loss of parking privileges fairs no better. Specifically, Plaintiff's alleged loss of parking privileges occurred approximately **ten months** from the 2d EEOC Complaint. In addition, although the introduction section of her complaint references the filing of her judicial complaint as a protected activity, she has never specifically alleged that her purported loss of parking privileges was in retaliation to the filing of her judicial complaint. Thus, the district court understandably analyzed the loss of parking privileges by analyzing the temporal gap between that alleged action and the filing of the 1st EEOC Complaint in March 2009. *Rodriguez-Machado*, 845 F. Supp. 2d at 443 (noting that the purported loss of parking privileges occurred "nineteen (19) months after the cause of the alleged retaliatory activities"). Accordingly, even if Plaintiff were to allege now that the parking-privileges incident was retaliation for filing the judicial complaint, something Plaintiff also failed to do in her appeal brief, the possible argument would be waived. *Colón-Fontánez*, 660 F.3d at 45-46 ("We have warned parties before that trial judges are not mind readers, and that if claims are merely insinuated rather than actually articulated, courts are not required to make determinations on them." (quotations and alterations omitted)).

In any event, a careful review of the record shows that, while Plaintiff filed the judicial complaint on October 8, 2010, summons was not served on the defendant until March 2, 2011, (*see* D.E. No. 11, p. 2). Also, Plaintiff has not alleged that defendant became aware of the judicial complaint prior to summons being served. Thus, there is no evidence that the relevant decisionmakers knew about such protected activity as of the time of the alleged parking-privileges incident in October 26, 2010. Accordingly, no causal connection can reasonably be established here.

Based on the above, Plaintiff has failed to establish a causal connection between her protected activities and the purportedly adverse employment actions. She therefore failed to establish a prima facie case of retaliation. Furthermore, as explained below, she also failed to demonstrate any materially adverse employment actions.

2. *In any event, none of the allegedly retaliatory actions were materially adverse.*

To demonstrate that she was subject to a materially adverse employment action, Plaintiff "must show that a reasonable employee would have found a challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Gómez-Pérez*, 452 Fed. Appx. at 8 (citing *Billings* v. *Town of*

Grafton, 515 F.3d 39, 52 (1st Cir. 2008) (quoting *Burlington N. & Santa Fe Ry.* v. *White* (Burlington Northern), 548 U.S. 53, 68 (2006))). The standard is "objective" and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Colón-Fontánez*, 660 F.3d at 37. Furthermore, "[n]either extreme supervision and snubbing, nor increased criticism, will satisfy the adverse employment action prong." *Gómez-Pérez*, 452 Fed. Appx. at 8 (quotations and citations omitted). "Examples of adverse employment actions in the retaliation context include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Morales-Vallellanes*, 605 F.3d at 36 (quotations omitted). "Minor disruptions in the workplace, including 'petty slights, minor annoyances, and simple lack of good manners,' fail to qualify." *Id*. (quoting *Burlington Northern*, 548 U.S. at 68).

The actions challenged by the Plaintiff were not materially adverse. As noted by the district court, Plaintiff alleged that her reassignment to primary care -- which required her to temporarily perform "unclassified duties" -- and her VISN detail were materially adverse. Nonetheless, Plaintiff failed to proffer evidence of the nature and duration of the "unclassified duties" that she complained of; thus precluding the court from making a determination as to whether they were

sufficiently severe or pervasive to be considered an adverse employment action. *Rodriguez-Machado*, 845 F. Supp. 2d at 443. Plaintiff has not attempted to supplement that gap on appeal, nor can she.

In any event, the reassignment to primary care and the VISN detail were not sufficiently severe or pervasive to constitute a material adverse employment action. Notably, only 60 days of the VISN detail took place in Florida, while the rest took place at a VA facility in Puerto Rico. Furthermore, as illustrated in the statement of facts section of this brief, Plaintiff's position as staff assistant to the associate director inherently involved managing different projects at a time, and constantly being assigned to different details off-site. For example, Plaintiff had to work off-site during different periods of 2008 as a result of being detailed to MCCF by her previous supervisor (Mrs. Nuncie), and then in 2009 was detailed to assist the reusable-medical-equipment team. Thus, details and ever-changing projects were the "bread and butter" of her work and that of her co-workers, who faced that same reality. For example, (1) her former supervisor (Mrs. Nuncie) was placed on detail at VISN Florida in 2008, (2) Plaintiff's ensuing supervisor (Ramos) worked as associate director as part of a detail, and (3) the acting director (Reissener) was on detail in Puerto Rico from VISN Florida. Accordingly, Plaintiff's detail to work for only 60-days in VISN Florida and then continuing that detail from a VA facility in Puerto Rico was not that different to what she was accustomed to. Such

changes were not sufficiently severe or pervasive, when considering all the circumstances, to constitute a materially adverse employment action.

The same can be said for Plaintiff's alleged loss of parking privileges, an argument which she failed to develop fully. Specifically, Plaintiff failed to proffer evidence (both at the district court level and on appeal) as to how such incident affected her. For example, she presented no evidence of whether she needed that parking spot, what became of her parking situation, and how it affected her. Thus, Plaintiff chose to rely on a blank allegation and left the court to speculate as to whether the purported parking incident was sufficiently severe or pervasive to constitute a materially adverse employment action. Accordingly, Plaintiff failed to demonstrate the third prong of the test to establish a prima facie case of retaliation. *Velázquez-Ortiz*, 657 F.3d at 70 (noting that a plaintiff cannot rely on "conclusory allegations, improbable inferences, periphrastic circumlocutions, or rank speculation" to defeat summary judgment).

Based on the foregoing, the district court properly found that Plaintiff failed to establish any materially adverse employment actions.

C. The Plaintiff did not exhaust administrative remedies with respect to the claims brought forth in the 3rd EEOC Complaint.

In ADEA, "Congress provided dual means of enforcement for federal workers and left the choice between them to the claimant." *Rossiter* v. *Potter*, 357 F.3d 26, 29 (1st Cir. 2004). "On the one hand, a federal employee may invoke the EEOC's administrative process and thereafter file suit if he or she is dissatisfied with the administrative outcome." *Id*. (citing 29 U.S.C. § 633a(b)-(c); *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 5 (1991)). "On the other hand, a federal employee may bypass the administrative process altogether and file a civil action directly in the federal district court." *Id*. (citing 29 U.S.C. § 633a(c)-(d); *Stevens*, 500 U.S. at 6)). In the present case, Plaintiff chose the first route and invoked the EEOC's administrative process.

Where, as here, an employee chooses to invoke the EEOC's administrative process, "the employee must timely exhaust the administrative remedies at his disposal." *Belgrave* v. *Pena*, 254 F.3d 384, 386 (2d Cir. 2001) (quotations omitted). "Failure to do so can be asserted by the government as an affirmative defense." *Id*. Therefore, after initiating the EEOC process, the employee must generally follow that process to its fruition. *Id*. Specifically, after filing a formal EEO complaint, "[t]he employee may then file a civil action (i) within 90 days of notice of a final agency decision on his or her EEO complaint, or (ii) after 180 days

from the filing of the EEO complaint if the agency has not yet rendered a decision." *Id.*

In the instant case, Plaintiff failed to exhaust administrative remedies at least with regards to the claims set forth in the 3rd EEOC Complaint, namely, that her reassignment to primary care in September 2010 and certain other alleged events occurring from this date onward constituted retaliation for prior EEO activities. (Complaint, par. 74-78, Appendix, p. 11). (*See also* Appendix, p. 503, for claims alleged in 3rd EEOC Complaint). Notably, after filing the 3rd EEOC Complaint on February 6, 2011, the Plaintiff waited **ten days** (i.e., until February 16, 2011) and then filed an amended complaint in the instant case (D.E. No. 7) that included, among other things, the events underlying the allegations in the 3rd EEOC Complaint. As a result, the EEOC dismissed the 3rd EEOC Complaint without reaching a decision on the merits. (Appendix, p. 509).

In sum, Plaintiff filed a civil action without affording the agency at least 180 days to resolve the 3rd EEOC Complaint. Accordingly, she failed to exhaust administrative remedies with respect to the allegations set forth in that administrative complaint. *See Belgrave*, 254 F.3d at 386. Therefore, Plaintiff's claims of discrimination and reprisal for the events alleged in the 3rd EEOC Complaint (mainly, reassignment to primary care and the related loss of parking privileges) are subject to dismissal on procedural grounds. The district court,

however, did not reach the issue of exhaustion of remedies, finding that Plaintiff's claims failed on the merits. *Rodriguez-Machado*, 845 F. Supp. 2d at 444. As discussed in the preceding sections, the district court's judgment to that effect should be affirmed.

CONCLUSION

For the foregoing reasons and authorities, the district court's grant of summary judgment, dismissing Plaintiff's complaint in its entirety, should be affirmed.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 1st day of October, 2012.

ROSA EMILIA RODRÍGUEZ-VÉLEZ
United States Attorney

/s/ Nelson Pérez-Sosa
Assistant United States Attorney
Chief, Appellate Division
United States Attorney's Office
Torre Chardón, Room 1201
350 Carlos Chardón Avenue
San Juan, Puerto Rico 00918
Tel. (787) 766-5656
Fax (787) 772-3976

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND LENGTH LIMITATIONS

APPEAL NO. 12-1430 **LAURA RODRIGUEZ-MACHADO**
Plaintiff - Appellant

v.

ERIC K. SHINSEKI, SECRETARY,
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS
Defendant - Appellee

1. This brief has been prepared using (SELECT AND COMPLETE ONLY ONE):

__X__ 14 point, proportionally spaced, serif typeface (such as CG Times or Times New Roman).Specify software Name and version, typeface name, and point size below (for example, WordPerfect 8, CG Times, 14 point): MS Word 2010, Times New Roman, 14 point.

_____ 12 point, monospaced typeface (such as Courier or Courier New). Specify software name and version, typeface name, and characters per inch below (for example, WordPerfect 8, Courier, 12 point): _____

2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of citations; addendum; and the certificate of service, the brief contains (SELECT AND COMPLETE ONLY ONE):

_____ Pages (give specific number of pages; may not exceed **30** pages for opening or answering brief or **15** pages for reply brief); **OR**

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_____ Lines of Monospaced Type (give specific number of lines; may not exceed **1,300** lines for opening or answering brief or **650** for reply brief; may be used ONLY for briefs prepared in monospaced type such as Courier or Courier New).

I understand that a material misrepresentation can result in the Court striking the brief or imposing sanctions. If the Court so directs, I will provide a copy of the word or line print-out.

/s/ Nelson Pérez-Sosa
Signature of Filing Party

Date: October 1, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

/s/ Nelson Pérez-Sosa
Assistant United States Attorney
Chief, Appellate Division

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO. 12-1430

LAURA RODRIGUEZ-MACHADO
Plaintiff - Appellant

v.

ERIC K. SHINSEKI, Secretary,
United States Department of Veterans Affairs
Defendant - Appellee

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

APPENDIX

TABLE OF CONTENTS

Exh. 4

Department of
Veterans Affairs

Memorandum
VAMC San Juan

DATE: January 21, 2010

FROM: Human Resources Manager (05)

SUBJ: Certification for EEOC Case – Age Discrimination

TO: Ana M. Margarida-Julia, Office of the Regional Counsel

This is to certify the year of birth for the following employees, per your request.

Bermudez, Myrna - 1961
Morales, Maria Elisa (Lisa) - 1957
Ramos, Evelyn - 1952
Ramirez, Nayda - 1957
Velez, Lavell - 1956

for DAMARIS TOSADO-QUIÑONES, MPA, MA

EXH-O

DECLARATION

1. On December 12, 2008, Dr. Doris H. Toro, Ms. Katheleen Collins, and Ms. Myriam Zayas were appointed by Ms Nancy Reissener, Acting Director, to the panel for the interview and recommendation on the position of Chief, Planning and Evaluation Service.

2. The Human Resources Office sent the following documents for consideration and evaluation by the three person panel: a) list of qualified candidates for evaluation, b) the Vacancy Announcement, c) the position description, d) Employee Supplemental Qualification Statement e) the employee's Application for Promotion and reassignment and f) Supervisory Appraisal of Employee for Promotion.

3. The Panel members did not receive information on the date of birth or age for any one of the candidates under consideration. In addition, age was not addressed by any one of the interview questions since the focus was experience and competency.

4. As member of the Panel, we all have received training and participated in several Performance Based Interviews in the past.

5. The Panel members met with the Chairperson that in this case was Ms. Collins, to define the questions that we would address and the aspects that would be considered in the final score.

6. The Performance Based Interview (PBI) consisted of ten (10) core competency questions (Personal Mastery to organizational stewardship) obtained from the

available PBI library. Each question was then rated by the Panel using a predetermined rating maximum score of ten points.

7. In addition to the interview (PBI) that represented 60% of the total score, we rated the Employee Supplemental Qualification Statement and Supervisory Appraisal of Employee for Promotion each representing 20% of the total score.

8. The Employee Supplementary Statement consisted of the candidate's narrative addressing the nine elements required by the Vacancy Announcement involving Selective Placement Factors and Job Related Ranking Elements, from which the Panel took into consideration only the Job Related Ranking Elements.

9. The Supervisory Appraisal of Employee for Promotion provided by the candidate's supervisor was the same for all employees, that is, maximum value of 5 points could be given to each of the six questions

10. The mechanism for evaluation were fully designed and planned by the Panel members that received no outside guidance or influence from external sources.

11. After the Panel considered all the parameters for evaluation, Ms Laura Rodriguez ranked second to the candidate finally selected for the position.

I, Doris H. Toro, physician, in my capacity as Chief Medical Service, hereby declare under penalty of perjury, pursuant to 29 U.S.C. Section 1746, that the foregoing is true and correct. On January 19th of 2010, in San Juan, Puerto Rico.

Doris H. Toro

I, Myriam Zayas, in my capacity as, Chief Health Administration Service, hereby declare under penalty of perjury, pursuant to 29 U.S.C. Section 1746, that the foregoing is true and correct. On January 19 of 2010, in San Juan, Puerto Rico.

Myriam Zayas

I, KatheleenCollins, in my capacity as Associate Director for Patient Care Service, hereby declare under penalty of perjury, pursuant to 29 U.S.C. Section 1746, that the foregoing is true and correct. On January ___ of 2010, in San Juan, Puerto Rico.

Katheleen Collins

DECLARATION

1. On December 12, 2008, Dr. Doris H. Toro, Ms. Katheleen Collins, and Ms. Myriam Zayas were appointed by Ms. Nancy Reissener, Acting Director, to the panel for the interview and recommendation on the position of Chief, Planning and Evaluation Service.

2. The Human Resources Office sent the following documents for consideration and evaluation by the three person panel: a) list of qualified candidates for evaluation, b) the Vacancy Announcement, c) the position description, d) Employee Supplemental Qualification Statement e) the employee's Application for Promotion and reassignment and f) Supervisory Appraisal of Employee for Promotion.

3. The Panel members did not receive information on the date of birth or age for any one of the candidates under consideration. In addition, age was not addressed by any one of the interview questions since the focus was experience and competency.

4. As member of the Panel, we all have received training and participated in several Performance Based Interviews in the past.

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10. The mechanism for evaluation were fully designed and planned by the Panel members that received no outside guidance or influence from external sources.

11. After the Panel considered all the parameters for evaluation, Ms Laura Rodriguez ranked second to the candidate finally selected for the position.

I, KatheleenCollins, in my capacity as Associate Director for Patient Care Service, hereby declare under penalty of perjury, pursuant to 29 U.S.C. Section 1746, that the foregoing is true and correct. On January 20 of 2010, in San Juan, Puerto Rico.

Katheleen Collins

VA Caribbean Healthcare System

MEMORANDUM

DATE: January 13, 2009

FROM: Associate Director Nursing Service (118)

SUBJ: **Chief, Planning & Evaluation Service**

TO: Acting, Director (00)

1. This is to inform you that PBI interviews were held on January 12, 2009 with the three candidates, by the panel composed of:

   Kathleen Collins, Associate Director Nursing Service
   Dr. Doris Toro, Chief Medical Service
   Myriam Zayas, Chief, HBAS

2. Also reviewed and scored were the supplemental qualifications input by candidates and the supervisory appraisal of employee for promotion.

3. In the case of Lisa Morales, this last form was not given to her supervisor for input. However, no matter the supervisor input, the ranking of this candidate would not change.

Candidate	Nayda Ramírez	Laura Rodríguez	Lisa Morales
PBI	57.8	50	39.4
Supplemental Qualifications	19.6	18.4	19.2
Subtotal Score	77.4	68.4	58.6
Supervisory Appraisal	20	14.4	None available
Total Score:	97.4	82.8	

4. Thank you for this opportunity.

Kathleen Collins
KATHLEEN COLLINS, RN

mr

RECEIVED 1/14/09

DEPARTMENT OF VETERANS AFFAIRS
VA Caribbean Healthcare System
San Juan, PR

REFERRAL CERTIFICATE

Part I– To Be Completed by Human Resources Office

1. TO: Medical Center Director (00)

2. ANNOUNCEMENT NO.: 2008-132

3. POSITION TO BE FILLED: (Title, series, grade, organization and location) *[Provide one certificate per grade level.]*

Supervisor, Health System Specialist (Chief, Planning and Evaluation Service)
GS-671-14 (1 vacancy position)
Office of the Director
VACHS, San Juan, PR

4. BEST QUALIFIED CANDIDATES DETERMINED BY (Check applicable box) :

☐ Human Resources Specialist ☐ Subject Matter Expert ☐ Rating and Ranking Panel
☐ Recommending Official(s) ☑ Selecting Official

5. QUALIFIED CANDIDATES: In accordance with the procedures of the Merit Promotion Plan, the following candidates, listed in alphabetical order, have been determined to be qualified for this position: Employment applications and/or Professional/Technical Resumes (as appropriate), Supervisory Reference and Qualifications Analysis Forms and Narrative Qualification Statements for KSAO's for each of the qualified candidates are furnished for your review and consideration. After evaluating the credentials of each qualified candidate, please distinguish the best qualified candidates by annotating BQ beside their name. Selection may only be made from among the BQ candidates. Please indicate the name of the candidate you have selected in Part II below:

MERIT PROMOTION CANDIDATES		NON-COMPETITIVE CANDIDATES	
Name(s)	Grade Level(s) For Which Referred	Name(s)	Grade Level(s) For Which Referred
Maria Morales	GS-14		
Nayda Ramírez	GS-14		
Laura Rodríguez	GS-14		

Ana Luz González
ANA LUZ GONZALEZ, MPA (787) 641-7582, Ext. 13164
Human Resources Specialist

12/11/08
Signature and Date

Part II– To Be Completed by Requesting Office

TO THE HUMAN RESOURCES MANAGEMENT SERVICE (05B):

I have considered each of the Best Qualified candidates and evaluated their credentials relative to quality ranking and/or selective placement factors specified in the merit promotion announcement. Based upon this review:

☑ I have selected Nayda Ramirez for the following specific reasons: Based on results of panel review and recommendations

☐ I did not make a selection. (state reasons for non-selection and, if applicable, the further recruitment action(s) desired.

Manuel Reisenauer
Selecting Official (Name, Title, and Phone No.)

1/13/09
Signature Date

DRWS 1/14/2009

Revised: November 12, 2008

DUEDATE: 11/21/08

Department of Veterans Affairs

SUPERVISORY APPRAISAL OF EMPLOYEE FOR PROMOTION

SPECIALIZED CATEGORY APPRAISAL WITH NARRATIVE

NAME OF EMPLOYEE	PRESENT POSITION AND GRADE	CURRENT ORGANIZATION
RODRIGUEZ LAURA A	STAFF ASSISTANT GS 03	001
ANNOUNCEMENT NO.	**POSITION APPLIED FOR** *(Title and grade)*	**ORGANIZATION LOCATION OF POSITION**
2008-132	Supv. Health System Spec (Chief, Planning & Evaluation Svc) GS-671-14	Office of the Director

INSTRUCTIONS: This information furnished on this form will be important in determining the degree to which the employee possess the Knowledge, Skills, Abilities, and Other characteristics (KSAO's) which are required for performance in the position being filled. In Column II below, the supervisor and/or reviewer will indicate beside the Rating Factor (KSAO) or Job Element listed in Column I, the number of the Category Rating (0 to 5) which best describes the employee's performance with respect to the Rating Factor (KSAO) or Job Element. If the employee's current job does not include any of the KSAO's in the Rating Factor or Job Element and, therefore, performance in them has not been observed, mark "O". In Column III, for each Rating Factor or Job Element, give specific examples which show how the employee's performance justifies the Category Rating assigned. If more space is required, use additional sheets of paper and include the name of the supervisor at the top of each sheet and identify the appropriate Rating Factor or Job Element. NOTE: This form may be used for comments by the supervisor followed by those of the reviewer or separate forms may be used for each. If separate forms are used for the supervisor and the reviewer, the supervisor's appraisal should be made available to the reviewer during the review processes.

CATEGORY RATINGS

5 Employee's performance exceeds expectations to such an extent that it warrants special mention for placement considerations.

4 Employee has demonstrated the Rating Factor (KSAO) or Job Element to a degree that is clearly above that expected of a fully competent employee and you would expect the employee to display the same degree of ability in the position applied for.

3 Employee has demonstrated the Rating Factor (KSAO) or Job Element to the full extent expected of a thoroughly competent employee and you would recommend the employee with confidence for another position in which the Rating Factor (KSAO) or Job Element is important.

2 Employee's performance relative to the Rating Factor (KSAO) or Job Element is acceptable but you would have some reservations about recommending the employee for another position in which the Rating Factor (KSAO) or Job Element is important.

1 Employee's performance relative to the Rating Factor (KSAO) or Job Element exhibits some definite weaknesses.

0 Unable to appraise. (When this category is used, cite reasons - *e.g., current job does not include the KSAO's in this Rating Factor or Job Element.*)

COLUMN I RATING FACTOR (KSAO) OR JOB ELEMENT	COLUMN II CATEGORY	COLUMN III NARRATIVE: Specific examples of what the employee has or has not done to cause me to ward this rating.
JOB RELATED RANKING ELEMENTS: 1) Ability to establish and maintain relationships with field managers, headquarter managers, consultants, contractors, business executives, and internal or external program officials to implement findings & recommendations on program effectiveness.	3	
2) Skills to communicate both orally and in writing with people from different background which includes, tact, good judgment, empathy, flexibility, and a good sense of humor to work with the diversity of patients, family, and staff.	3	

2006 DEC -3 AM 8:06

COLUMN I RATING FACTOR (KSAO) OR JOB ELEMENT	COLUMN II CATEGORY RATING	COLUMN III NARRATIVE: Specific examples of what the employee has or has not done to cause me to ward this rating.
3) Knowledge and ability to develop strategies, alternatives or recommendations to meet short and long range projection relating to the assigned areas.	5	
4) Ability to supervise, plan, and direct the work of a subordinate staff.	0	
5) Knowledge of various Public Laws, VHA regulations and standards as well as the Privacy Act Freedom of Information Act, Advance Directives Act, HIPAA Law, JCAHO, CARF, OSHA, and others pertains to planning and evaluation programs.	5	
6) Must have strong knowledge in administrative matters and background in planning and implementing projects related to workflow; space utilization, space assignment movements, purchase, and installation equipment and furniture for major and minor construction projects, strategic planning, capital assets for projects, major construction and business action items in order to improve organizational performance, accountability, and efficiency.	5	

SIGNATURE OF SUPERVISOR Nancy Reisenen	DATE 12/2/08	TOTAL TIME YOU SUPERVISED EMPLOYEE FROM March / July TO 2008
SIGNATURE OF REVIEWER	DATE	TOTAL TIME EMPLOYEE UNDER YOUR DIRECT OR INDIRECT SUPERVISION FROM TO
SIGNATURE OF EMPLOYEE *(If appropriate)*		DATE

Automated **VA Form 5-4667b**

11/28/08

Department of Veterans Affairs

SUPERVISORY APPRAISAL OF EMPLOYEE FOR PROMOTION
SPECIALIZED CATEGORY APPRAISAL WITH NARRATIVE

NAME OF EMPLOYEE	PRESENT POSITION AND GRADE	CURRENT ORGANIZATION
NAYDA RAMIREZ	STAFF ASSISTANT GS-13	OFFICE OF THE DIRECTOR
ANNOUNCEMENT NO.	**POSITION APPLIED FOR** *(Title and grade)*	**ORGANIZATION LOCATION OF POSITION**
2008-132	Supv. Health System Spec (Chief, Planning & Evaluation Svc) GS-671-14	Office of the Director

INSTRUCTIONS: This information furnished on this form will be important in determining the degree to which the employee possess the Knowledge, Skills, Abilities, and Other characteristics (KSAO's) which are required for performance in the position being filled. In Column II below, the supervisor and/or reviewer will indicate beside the Rating Factor (KSAO) or Job Element listed in Column I, the number of the Category Rating (0 to 5) which best describes the employee's performance with respect to the Rating Factor (KSAO) or Job Element. If the employee's current job does not include any of the KSAO's in the Rating Factor or Job Element and, therefore, performance in them has not been observed, mark "O". In Column III, for each Rating Factor or Job Element, give specific examples which show how the employee's performance justifies the Category Rating assigned. If more space is required, use additional sheets of paper and include the name of the supervisor at the top of each sheet and identify the appropriate Rating Factor or Job Element. NOTE: This form may be used for comments by the supervisor followed by those of the reviewer or separate forms may be used for each. If separate forms are used for the supervisor and the reviewer, the supervisor's appraisal should be made available to the reviewer during the review processes.

CATEGORY RATINGS

5 Employee's performance exceeds expectations to such an extent that it warrants special mention for placement considerations.

4 Employee has demonstrated the Rating Factor (KSAO) or Job Element to a degree that is clearly above that expected of a fully competent employee and you would expect the employee to display the same degree of ability in the position applied for.

3 Employee has demonstrated the Rating Factor (KSAO) or Job Element to the full extent expected of a thoroughly competent employee and you would recommend the employee with confidence for another position in which the Rating Factor (KSAO) or Job Element is important.

2 Employee's performance relative to the Rating Factor (KSAO) or Job Element is acceptable but you would have some reservations about recommending the employee for another position in which the Rating Factor (KSAO) or Job Element is important.

1 Employee's performance relative to the Rating Factor (KSAO) or Job Element exhibits some definite weaknesses.

0 Unable to appraise. (When this category is used, cite reasons - *e.g., current job does not include the KSAO's in this Rating Factor or Job Element.*)

COLUMN I RATING FACTOR (KSAO) OR JOB ELEMENT	COLUMN II CATEGORY	COLUMN III NARRATIVE: Specific examples of what the employee has or has not done to cause me to ward this rating.
JOB RELATED RANKING ELEMENTS: 1) Ability to establish and maintain relationships with field managers, headquarter managers, consultants, contractors, business executives, and internal or external program officials to implement findings & recommendations on program effectiveness.	5	Ms. Ramirez is widely recognized at the VISN + VACO level as the point of contact for VACHS. She has earned the respect of staff due to her knowledge of our operations and her ability to develop relationships
2) Skills to communicate both orally and in writing with people from different background which includes, tact, good judgment, empathy, flexibility, and a good sense of humor to work with the diversity of patients, family, and staff.	5	This area is a definate strength for Ms. Ramirez. Her communication skill enable her to effectively serve as my representative.

2008 NOV 21 PM 3:41

SAN JUAN VAMC
HRMS STAFFING (05B)

Automated **VA Form 5-4667b**

COLUMN I RATING FACTOR (KSAO) OR JOB ELEMENT	COLUMN II CATEGORY RATING	COLUMN III NARRATIVE: Specific examples of what the employee has or has not done to cause me to ward this rating.
3) Knowledge and ability to develop strategies, alternatives or recommendations to meet short and long range projection relating to the assigned areas.	5	Ms. Ramirez designed a systematic mechanism to ensure that projects are completed in time, data based, and planned appropriately
4) Ability to supervise, plan, and direct the work of a subordinate staff.	5	She effectively guides and directs a host of projects, all Action items, and oversees patient safety staff.
5) Knowledge of various Public Laws, VHA regulations and standards as well as the Privacy Act Freedom of Information Act, Advance Directives Act, HIPAA Law, JCAHO, CARF, OSHA, and others pertains to planning and evaluation programs.	5	Outstanding knowledge exhibited in all areas listed. She consistently uses the knowledge to ensure that all items are addressed during planning and implementation.
6) Must have strong knowledge in administrative matters and background in planning and implementing projects related to workflow; space utilization, space assignment movements, purchase, and installation equipment and furniture for major and minor construction projects, strategic planning, capital assets for projects, major construction and business action items in order to improve organizational performance, accountability, and efficiency.	5	This area is one of Ms. Ramirez's strongest knowledge skills & abilities. She developed a service agreement to ensure that projects & leases include all elements and are planned with timelines and contingencies

SIGNATURE OF SUPERVISOR Melissa Ramirez	DATE 11/21/08	TOTAL TIME YOU SUPERVISED EMPLOYEE FROM March 1, 2008 TO Present
SIGNATURE OF REVIEWER	DATE	TOTAL TIME EMPLOYEE UNDER YOUR DIRECT OR INDIRECT SUPERVISION FROM TO
SIGNATURE OF EMPLOYEE *(If appropriate)* Cheryle Perry		DATE 11/19/08

Automated **VA Form 5-4667b**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO. 12-1430

LAURA RODRIGUEZ-MACHADO
Plaintiff - Appellant

v.

ERIC K. SHINSEKI, Secretary, United States Department of Veterans Affairs
Defendant - Appellee

UNITED STATES OF AMERICA'S MOTION FOR LEAVE TO FILE A SUR-REPLY TO APPELLANT'S REPLY BRIEF

TO THE HONORABLE COURT:

COMES NOW, the United States Department of Veterans Affairs, through the undersigned attorneys, and to this Honorable Court very respectfully states and prays as follows:

1. On October 18, 2012, plaintiff-appellant Laura Rodríguez-Machado ("Plaintiff"), filed a reply brief to appellee's brief in this appeal.

2. As will be expanded upon in the government's sur-reply brief, Plaintiff's reply brief misconstrues the record in various instances and alludes to claims that were never presented before the district court.

3. A short sur-reply by the government would help to clarify these matters and place this Court in a proper position to decide this case.

WHEREFORE, it is respectfully requested that this Honorable Court grant the government leave to file a sur-reply to Plaintiff's reply brief. For this Court's convenience and to avoid delay of the proceedings, the government's sur-reply brief has been filed jointly with this motion.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 23th day of October, 2012.

ROSA EMILIA RODRÍGUEZ-VÉLEZ
United States Attorney

/s/ Nelson Pérez-Sosa
Assistant United States Attorney
Chief, Appellate Division

/s/ Juan Carlos Reyes-Ramos
Assistant United States Attorney
Appellate Division

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification to attorneys of record.

/s/ Juan Carlos Reyes-Ramos
Assistant United States Attorney
Appellate Division

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO. 12-1430

LAURA RODRIGUEZ-MACHADO
Plaintiff - Appellant

v.

ERIC K. SHINSEKI, Secretary,
United States Department of Veterans Affairs
Defendant - Appellee

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

SUR-REPLY BRIEF FOR APPELLEE

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SUR-REPLY BRIEF FOR APPELLEE

TO THE HONORABLE COURT:

COMES NOW, the United States of America herein represented through the undersigned attorneys, and very respectfully submits the following sur-reply brief for appellee:

I. INTRODUCTION

In this case, plaintiff-appellant Laura Rodríguez-Machado ("Plaintiff") challenges the district court's grant of summary judgment in favor of the United States Department of Veterans Affairs ("the "VA") dismissing Plaintiff's age-discrimination, hostile work environment, and retaliation claims in their entirety. On October 18, 2012, Plaintiff filed a reply to appellee's brief. Similar to her opening brief, Plaintiff's reply is full of unsubstantiated assertions that are both immaterial to the outcome of this case and distort the record. Plaintiff also apparently wishes to explore a new claim at this late hour, as she alludes to a possible sex-discrimination claim. Because this Court may be aided by a clarification of Plaintiff's assertions, the government respectfully submits the following sur-reply to Plaintiff's reply.[1]

1. References to the record will be as follows: D.E. (Docket Entry or Entries); p. (page or pages); No. (Number).

II. ARGUMENT

Plaintiff's reply begins by misguidedly complaining that appellee's brief exceeded 35 pages, which Plaintiff believes is the length allowed by Fed. R. App. P. 28. (Appellant's Reply Brief p. 2). Her challenge misses the mark, as Rule 28 establishes no such requirement. Rather, the relevant rule is Fed. R. App. P. 32(a)(7), which states that the length of a principal brief is appropriate if it complies with **either** the page limitations of Rule 32(a)(7)(A) (i.e., 30 pages or under) or the type-volume limitations of Rule 32(a)(7)(B) and (C). As certified in its "Certificate of Compliance" section, appellee's brief fully complied with said type-volume limitations. As discussed below, Plaintiff's other contentions are similarly baseless.

For example, Plaintiff asserts that Evelyn Ramos ("Ramos"), i.e., Plaintiff's former supervisor, "was not forthright, and was hiding information." (Appellant's Reply Brief p. 2). In support, she cites page 18 of an old version of appellee's brief that, with leave of this Court, was corrected and superseded so that it read: "As a result of its investigation, the Investigative Board found that **Plaintiff** was not forthright and was hiding information." (Corrected Appellee's Brief p. 18 (emphasis added)). To be clear, nothing in the record fairly supports Plaintiff's assertion that Ramos was not forthright. The record, however, does show that the independent Administrative Investigative Board (the "AIB") found that Plaintiff

was hiding information. To that effect, Plaintiff herself recounted that during her interview with the AIB, board members "were very strong asking [her] why [she] didn't report or prepare an issue brief." (Appendix p. 381). (*See also* Appellee's Brief p. 18).

Next, Plaintiff suggests that her actions -- alerting wards and clinics prior to **unannounced** reusable-medical-equipment visits so that they would follow procedures -- were in accordance with management's orders. (Appellant's Reply Brief p. 2-3). Her suggestion is belied, among other things, by the transcript of the interview performed by the AIB on Ramos, where the following exchange took place between board member Janice Cobb and Ramos:

> MS. COBB: And one other comment, when you all did an unannounced visit to the clinics, were you aware that Laura Rodríguez [Plaintiff] called the clinics beforehand and told them you were coming to those clinics?
>
> THE WITNESS [Ramos]: That I was coming?
>
> MS. COBB: That the group was coming.
>
> MS. COBB: It was an unannounced, with Ms. Mims [the VA Director] and others, and she [Plaintiff] organized the schedule, and she [Plaintiff] called the units to make sure they were doing procedures.
>
> THE WITNESS [Ramos]: No, ma'am, I wasn't aware of that. I know that she [Plaintiff] has been tapped in by Ms. Mims to do things, because Ms. Mims doesn't have right now a staff assistant. She has Mayra Ramírez, who is her staff assistant, now has a service. She was promoted to another position. So Laura has been tapped to do -- you

> know, she coordinated the deep dive and the visits and -- but there was other people involved also.
>
> MS COBB: So if you have to conduct an unannounced visit, would you consider than [sic] unannounced?
>
> THE WITNESS [Ramos]: No. If it's unannounced, it's by surprise; nobody should be alerted to it, so that you can find what you're looking for, which is whether people are performing processes adequately.

(Appendix p. 442-44). Notably, when Cobb asked Ramos whether Ramos was aware that Plaintiff had called the units in advance of unannounced inspection visits, so that they would perform procedures correctly, Ramos stated that she was not aware of that. Moreover, it is preposterous for Plaintiff to argue that the unannounced visits had to be notified. They would not be "unannounced" if they were previously notified.

In any event, the foregoing issue, which involves an allegation of pretext by Plaintiff, is immaterial to the outcome of her retaliation claim, because, as an initial matter, Plaintiff failed to demonstrate a prima facie case of retaliation. Specifically, Plaintiff has not presented any evidence from which a reasonable trier of fact could find that Nevin Weaver (i.e., the VISN official who Plaintiff alleged was responsible for her detail to VISN) had any knowledge of her prior EEO activities; therefore, there is no causal connection between Plaintiff's EEO

activities and her detail to VISN.[2] As the EEO investigator noted, based on Plaintiff's own allegations, Plaintiff "identifie[d] Nevin Weaver, Responding Management Official, as the individual responsible for her assignment on the [VISN] detail and four subsequent extensions of the detail." (Appendix p. 52). Moreover, Plaintiff admitted to the EEO investigator that she was unaware as to whether Weaver knew of her prior EEO activities. (*Id*.). Thus, Plaintiff's attempt to draw a causal connection between her VISN detail -- which responded to the recommendations of the Office of Inspector General (OIG) and an independent Administrative Investigative Board (AIB) -- and her prior EEO activities is based on rank speculation. Rather, as the district court properly found, "the OIG and AIB matter is not related at all with Plaintiff's EEOC complaints." *Rodríguez-Machado* v. *Department of Veterans Affairs*, 845 F. Supp. 2d 429, 443 (D.P.R. 2012).

Plaintiff, however, attempts in her reply brief to explore a different theory for her retaliation claim by arguing that Weaver only signed the detail letters, and that the individual behind the detail was actually Malcolm Potter, VISN Human Resource Manager, who drafted the detail letters. (Appellant's Reply Brief p. 5). In support, Plaintiff misconstrues the record by stating that Weaver admitted to only signing the detail letters. (*Id*.). Plaintiff provided no record reference for that

[2] Similarly, Plaintiff failed to establish that the challenged employment actions were materially adverse. (*See* Appellee's Brief p. 50-53).

unsubstantiated assertion; therefore, any ambiguity should be interpreted against her (*Id*.). *See Fryar* v. *Curtis*, 485 F.3d 179, 182 n.1 (1st Cir. 2007). In reality, as the EEO investigator noted, Weaver stated that "he signed the [VISN] detail letter based on recommendations from both an Office of Inspector General (OIG) investigation in August 2009 at VACHS and an Administrative Investigative Board (AIB) in September 2009." (Appendix p. 55). Weaver never suggested that his signature was a "rubber stamp," as Plaintiff apparently now proposes.

In addition, Plaintiff further distorts the record by arguing that Potter was aware of all of Plaintiff's prior EEO activities, citing pages 459-60 of the Appendix. (Appellant's Reply Brief p. 5). A review of that record reference, however, shows that her contention is unfounded, since Potter responded "unknown" when asked to identify Plaintiff's prior EEO activities. (Appendix p. 460). That understanding is further corroborated by the EEO investigator's report, which noted that both Weaver and Potter were unaware of Plaintiff's prior EEO activities. (Appendix p. 52). Therefore, even if Plaintiff's new and unsubstantiated theory for her retaliation claim (i.e., that Potter was the individual behind her detail) is accepted *arguendo*, her claim nevertheless fails, because nothing in the record fairly suggests that Potter knew of her prior EEO activities.

Finally, Plaintiff unavailing attempts to cast confusion with respect to the relevant dates for purposes of analyzing whether her EEO activities were causally

connected to her purportedly adverse employment actions. (Appellant's Reply Brief p. 5-6). Specifically, Plaintiff challenges the relevant dates (of her EEO activities) that were presented in the timeline included in page 47 of appellee's brief. (*Id*.). That timeline illustrated the temporal gaps between the Plaintiff's EEO activities and her alleged adverse employment actions. Notably, the EEO-activity dates presented in that timeline were the dates in which Plaintiff **formally** filed each of her three EEO complaints. (*See* Appendix p. 28, 47, 497, 503, 509). These were the relevant dates used by the district court to analyze her retaliation claim, *see Rodríguez-Machado*, 845 F. Supp. 2d at 434-436, 442-443, and Plaintiff never challenged that legal analysis in her opening brief. Yet, Plaintiff now seems to argue that the relevant dates are those in which she initially requested **informal** counseling from an EEO counselor, and not when she presented her formal complaint. (Appellant's Reply Brief p. 5-6). Her argument, however, is not properly substantiated and, in any event, actually hurts her dubious retaliation claim.

First, Plaintiff failed to demonstrate that the relevant decisionmakers were notified when Plaintiff sought informal counseling from an EEO counselor. Plaintiff is ambiguously misleading in this regard by arguing that "Plaintiff mediated this case before it went formal." (Appellant's Reply Brief p. 6 (citing Appendix p. 489)). Specifically, while the record shows that the claims made in

her third EEOC Complaint (the "3rd EEOC Complaint" filed on February 6, 2011) were mediated before they were formalized in that administrative charge (Appendix p. 515), nothing suggests that the claims made in the first and second EEOC complaints were mediated before they were formalized.

At any rate, it is interesting that **Plaintiff's argument** regarding the relevant dates of her EEO activities -- **if accepted** -- **makes it even more difficult for her to prove any causal connection** between her EEO activities and the purportedly adverse employment actions. This is because she proposes earlier dates for her EEO activities, which causes the temporal gap between the EEO activities and the allegedly adverse actions to be even longer. We illustrate below by providing a timeline that includes the relevant dates proposed by Plaintiff:

- 1st EEOC Complaint (informal counseling sought **February 6, 2009**, Appendix p. 101; formal complaint filed March 27, 2009, Appendix p. 28)
    - VISN Florida detail and Puerto Rico extensions thereof (beginning from mid-September 2009)
- 2nd EEOC Complaint (informal counseling allegedly sought **October 8, 2009**, Appellant's Reply Brief p. 6; formal complaint filed January 29, 2010, Appendix p. 47)
    - Reassignment to primary care and assignment of "unclassified duties" (Sept. 27, 2010 - October 4, 2010) (Appendix, pp. 483, 503)
    - Loss of parking privileges (allegedly on October 26, 2010, Appendix p. 504)

- Judicial Complaint (on March 2, 2011, summons was served on defendant, *see* D.E. No. 11, p. 2) (complaint filed on October 8, 2010)

- 3rd EEOC Complaint (informal counseling sought on **October 26, 2010**, Appendix p. 489; formal complaint filed on February 6, 2011, Appendix p. 497, 503, 509)

Notably, if this Court credits Plaintiff's suggestion that her retaliation claim should be analyzed with reference to the dates in which she sought informal counseling, then the gap between the VISN detail in September 2009 as compared to the date she sought informal counseling before an EEO counselor (i.e., February 2009) was **seven months**. Similarly, the gaps between her reassignment to primary care in September 2010 and her related loss of parking privileges in October 2010, as compared to the closest EEO activity (i.e., seeking informal counseling in October 2009 for the claims later made in the 2nd EEOC Complaint), were approximately **eleven months** and **twelve months**, respectively. Thus, the conclusion of Plaintiff's argument is that the temporal gap between her prior EEO activities and her allegedly adverse employment actions is even longer than what was initially stated in our brief. (Appellee's Brief p. 47-49). As discussed therein, these gaps are insufficient to fairly suggest a causal connection between the relevant events. *See Ramírez-Rodríguez* v. *Boehringer Ingelheim Pharm., Inc.*, 425 F.3d 67, 84 (1st Cir. 2005) (finding that a two-month temporal gap, standing alone, was insufficient to establish a causal connection).

Furthermore, on the issue of exhaustion of administrative remedies, Plaintiff misrepresents the record by suggesting that she amended her judicial civil complaint **after** the agency dismissed her 3rd EEOC Complaint. (Appellant's Reply Brief p. 6). The record, however, clearly demonstrates that it was the other way around, since the reason expressed by the agency for procedurally dismissing the 2nd EEOC Complaint and the 3rd EEOC Complaint was that Plaintiff filed an amended judicial civil complaint that included charges made in said administrative complaints. (Appendix p. 509. *See also* Appendix p. 64-66). More specifically, it was in response to Plaintiff's filing of an amended civil complaint in February 16, 2011 (D.E. No. 7), that the agency procedurally dismissed Plaintiff's second and third EEOC Complaints in April 2011. (Appendix p. 509. *See also* Appendix p. 64-66).

As a side note, because Plaintiff's reply brief (at page 4) seemingly alludes to an unarticulated sex-discrimination claim, the VA clarifies that no such claim was made in the district court or on appeal. Rather, as the district court found, the present case only involves allegations of discrimination and discriminatorily hostile work environment based on age, and purported retaliation for prior EEO activities. *Rodriguez-Machado*, 845 F. Supp. 2d at 436 n.8 ("Plaintiff did not include any charges or allegations on the basis of race, sex, or national origin in her

original complaint, as she did in the Second EEOC Complaint."). Therefore, this appeal involves no claims of discrimination based on race, sex or national origin.

III. CONCLUSION

For the foregoing reasons and authorities and as more fully explained in appellee's brief, the district court's grant of summary judgment, dismissing Plaintiff's complaint in its entirety, should be affirmed.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 23rd day of October, 2012.

ROSA EMILIA RODRÍGUEZ-VÉLEZ
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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND LENGTH LIMITATIONS

APPEAL NO. 12-1430 **LAURA RODRIGUEZ-MACHADO**
Plaintiff - Appellant

v.

ERIC K. SHINSEKI, SECRETARY,
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS
Defendant - Appellee

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