

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Case No. _____

Yong Li
Appellant

v.

John Didio
Appellee
and
Raytheon Company et. al.
Appellees

ON APPEAL FROM AN
APPELLATE SUA SPONTE DISMISSAL
UNDER RULE 12(B)(6)
AND OTHER RULINGS

APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

ORAL ARGUMENT REQUIRED

Yong Li (pro se)

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REQUEST FOR FUTHER APPELLATE REVIEW

Appellate sua sponte dismissal under Rule 12(b)(6) had never occurred in US history¹. Appellant, Yong Li, respectfully requests for leave of this Supreme Judicial Court to obtain further appellate review. A copy of the Appeals Court’s opinion is Attachment A.

PRIOR PROCEEDINGS

On May 11, 2006, Yong Li (“Li”), a senior software engineer worked for Raytheon, filed a complaint to the Middlesex Superior Court. Li alleged racial discrimination and retaliation claims under 151B, plus various tort-law claims, against Raytheon Company (“Raytheon”). In the complaint, Li also charged Tortious Interference of Advantageous Relationship against Raytheon’s department manager Ian C. Mitchell (“Mitchell”) and human resources manager Arthur Buliung (“Buliung”). Li also charged a claim of reckless/Intentional Infliction of Emotional Distress against John Didio (“Didio”), a licensed social worker in the Raytheon’s Employee Assistant Program (EAP). Raytheon, Mitchell and Buliung filed a motion to dismiss under Mass. R. Civ. P. 12 (b) (9) for Li’s

¹ According to Yong Li’s statistics from the database in www.versuslaw.com. The related precedents are listed in the **Attachment D**.

Court Name	Search Type	No. of Precedents
US Supreme Court, 1 st -11 th circuit courts, & 53 states’ Appeal Court	appellate sua sponte dismissal under rule 12(b)(6)	0
Mass. Court of Appeal	sua sponte dismissal under rule 12(b)(6)	0
Mass. Court of Appeal	sua sponte dismissal for other reasons	5
Federal 1st Circuit Court	sua sponte dismissal under rule 12(b)(6)	8
US Supreme Court	sua sponte dismissal for other reasons	5+

pending action in federal court². Didio filed a motion to dismiss under Rule 12(b)(6) for failure to state a claim. The motions were allowed. After the dismissal, the Superior Court denied Li's motion to amend the complaint, in which Li attempted to add new defendants and new tort claims³.

During the appeal, Li focused on Count I (racial discrimination), Count II (Retaliation), Count V (Intentional Infliction of Emotional Distress), Count VII (Tortious Interference of Advantageous Relationship) of the complaint, plus the denial of the Motion to Amend.

The Appeal Court ("panel") affirmed the dismissal of the Count V against Didio, and affirmed the denial of the motion to amend. With respect to the Counts I, II, and VII against Raytheon et al, the panel ruled "the motion judge erred in dismissing the claims pursuant to rule 12(b)(9)." (see the **Attachment A**, the panel's decision of March 25, 2008, "Decision", p.4, ¶1). However, the panel did not remand the case back to the Superior Court. Instead, the panel voluntarily dismissed these counts on Rule 12(b)(6) for failure to state a claim. The panel ruled "counts I, II, V, VII of Li's complaint could properly have been dismissed pursuant to Mass.R.Civ.P. 12(b)(6), 365 Mass. 754 (1974)," (Decision, p.4, ¶2), despite the issue of Rule 12(b)(6) had never been raised in the Superior Court.

² Before the state action, Li filed a federal action with Title VII claims plus tort claims against Raytheon. Later, Li filed a motion to amend her complaint in order to add 151B claims, but the motion was denied, so that this state action followed.

³ After the Superior Court dismissed Li's case, the federal judge granted a summary judgment, dismissed Li's Title VII claims, and declined the various state-law claims. Later, the majority of federal 1st circuit denied Li's petition for rehearing en banc (the order of the denial is the **Attachment B**).

The Appeal Court's decision can be subjected to “**appellate sua sponte dismissal under Rule 12(b)(6)**”, which probably had never occurred in US history. Accordingly, Li filed a Petition for Rehearing (a copy of the petition is **Appendix 1**) on May 13, 2008. The issue of “appellate sua sponte dismissal under Rule 12(b)(6)” is the focus of Li's request for further review.

STATEMENT OF FACT

The decision of the Appeal Court did not adequately address the facts of this case. Li hereby listed the facts according to her complaint (“Cmp”), which is the **Attachment C**:

Li was born in China, completed two degrees, and had worked in England for 7 years as a software engineer. She was hired by Raytheon in 1998 and moved to the Air Traffic Control Division located Marlborough Massachusetts. (Cmp, §1)

At the end of 2002, Li's ex-manager Jen Lewis, cornered Li into a meeting room and verbally attacked Li⁴. Li filed an internal racial-discrimination complaint. (Cmp, §14)

⁴ The fact of discrimination was not adequately stated in Li's complaint:

Li was working in a group with all woman leads. Technically, Li was much advanced than these leads, and Li had finished the complicated programming but never gained respect. One group leader, who was specialized French literature, had difficult to understand Li's short efficient software-code. Another group lead, a 25 years old young girl, requested Li to make formative expand. Li found the expanded code caused unnecessary repetition, so that Li sent an email to search opinions from group members. To resolve this dispute, the team manager, Jen Lewis, cornered Li into a small meeting room, and accused Li of using the technical discussion to attack the group leader. Li, the only Chinese in that group, tried to apology to Ms. Lewis for improving the relationship. Lamentably, the confrontation was reflected in Li's 2002 performance review. Li refused to sign the negative performance review, and also requested an apology from Ms. Lewis. However, Li was told that Ms. Lewis would become a very high level person in Raytheon, and Li would make an enemy if requesting apology... *(from Li's Title VII action, for the court's convenient.)*

Raytheon made an investigation but failed to interview Li's co-worker who supported Li. Raytheon declined to let Li read the report of the investigation (which was hidden from Li for 3 years), but asked Li to see a company counsel John Didio while Li had no idea about mental evaluation. (Cmp, §14)

After that, Li voluntarily went to Raytheon's facility in Langley Virginia. (Cmp, §16)

Upon Li returned to Marlborough in 2004, Jen Lewis' office mate Ian Mitchell became Li's department manager. The alleged retaliation immediately started (Cmp, §17):

Li was withheld permanent assignment, pushed to quit or to go another state;
Li was told that she should leave because she had problems with Jen Lewis;
Li was told that her name was on a layoff list; (Cmp, §18)

After Li found an assignment by her own, her manager denied his layoff statement and claimed there was no layoff plan. Li was shocked; (Cmp, §20)

Meanwhile, Li's ex-manager Jen Lewis repeatedly stared at Li whenever they met alone [which was a finding of fact in Li's worker comp case⁵]. Li felt physically intimidated; (Cmp, §17) After eight months of being stared, Li became worried about her personal safety. She approached Human Resources ("HR") for guidance; (Cmp, §21)

HR manager Buliung set a meeting, in which they embedded a mental evaluation without Li's express knowledge and consent (illegal as a matter of law⁶). Li was assumed the counselor was an investigator; (Cmp, §22)

During the meeting, the counselor did not ask why Li felt unsafe. Instead, he repeatedly pointed his finger at Li and asked "do you want to kill someone or do you want to kill yourself." Li was traumatized and felt raped. Li started experience flashback and could not function normally, though Li had no history of mental illness (Cmp, §22)

⁵ Board #0426804, Decision of Administrative Judge of the Department of Industrial Accidents, June 13, 2007.

⁶ 258 CMR 20.02(1), which states:

A social worker shall not perform or attempt to perform any social work service or function without the informed consent of the client or prospective client who is to receive that service or, in the case of a service recipient who lacks the legal capacity to give valid consent, the informed consent of an individual who is legally authorized to give consent on behalf of that client or prospective client.

Li reported her suicidal thought to Raytheon's lab manager. However, Li was told that it was not intentional, and Li was asked to stop sending email and moving forward; (Cmp, §29)

Li reported the interrogation meeting to Raytheon CEO. Immediately, Li was put on administrative leave, and ordered to see a psychiatrist; (Cmp, §32)

Raytheon hid the psychiatrist's report and asked Li to go back to work, despite the report stated Li suffered acute mental illness and could not return to work. (Cmp, §36)

Meanwhile, Li's own doctor diagnosed that Li suffered PTSD, and Li applied medical leave. Raytheon, however, sent a letter to warn Li to go back to work, and threatened to terminate Li's employment; (Cmp, §§ 39)

Li never went back to work, and she had been hospitalized several times and eventually became long term mental disabled. Her job was terminated after FMLA expired. (Cmp, §41)

ISSUES FOR FURTHER REVIEW

Whether the **appellate sua sponte dismissal** of Counts I, II, and VII **under Mass.R.Civ.P. 12(b)(6)** is erroneous.

Whether the Appeal Court erred by affirming the dismissal of Count V against John Didio for failure to state a claim.

Whether the Appeal Court erred by affirming the denial of Motion to Amend the Complaint.

ARGUMENT

APPELLATE SUA SPONTE DISMISSAL [OF COUNTS I, II, AND VII] UNDER RULE 12(B)(6) IS ERRONEOUS.

1. Appellate Sua Sponte Dismissal Under Rule 12(b)(6) Is Inconsistent with Fundamental Principal of Due Process and Adversary Process

Appellate sua sponte dismissal under Rule 12(b)(6) does not like a low court sua sponte dismissal, because **the petitioner lost an opportunity to go to the appeal court.**

Appellate sua sponte dismissal under Rule 12(b)(6) violated the petitioner’s Fifth Amendment rights of due process, for the further appeal in the Supreme Court will not be a matter of right.

Even concerning appellate sua sponte dismissal for other reasons, the petitioner could not find any precedent in the Massachusetts Supreme Court and Appeal Court for passing judgment on appellate sua sponte dismissal [based on Li’s statistics from www.versuslaw.com]. Because the new rules are modeled after the Federal Rules of Civil Procedure, the petitioner turns to the federal decisions for guidance.

Court Name	Search Type	No. of Precedents
US Supreme Court, 1 st -11 th fed. circuit courts, 53 states’ Appeal Courts	appellate sua sponte dismissal under rule 12(b)(6)	0
US Supreme Court,	appellate sua sponte decisions for other issues,	5+

(The related precedents in the table are listed in **Attachment D**)

Generally, the US Supreme Court discussed appellate *sua sponte* action in Singleton v. Wulff, 428 U.S. 106 (1976) and stated, “a federal appellate court does not consider an issue not passed upon below.” Supreme Court Justice John Paul Stevens in Patterson v. McLean Credit Union, stated “the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review. New Jersey v. T. L. O., 468 U.S. 1214, 1216 (1984) (dissenting from order directing reargument). If the Court decides to cast itself adrift from the constraints imposed by the adversary process and to fashion its own agenda, the consequences for the Nation -- and for the future of this Court as an institution -- will be even more serious than any temporary encouragement of previously rejected forms of

racial discrimination. The Court has inflicted a serious -- and unwise -- wound upon itself today.”

Although “Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt.” See John R. Sand & Gravel Company v. United States 552 U.S, (2008), the US Supreme Court of claims “statute of limitations requires sua sponte consideration of a lawsuit's timeliness, despite the Government's waiver of the issue.” Turner v. City of Memphis, 369 U.S. 350 (1962), or where "injustice might otherwise result." Hormel v. Helvering, 312 U.S., at 557. “Ordinarily an appellate court does not give consideration to issues not raised below.” However, in the instant case, the dismissal under Rule 12(b)(6) does not like the issue of timeliness and can not beyond any doubt without a full hearing.

2. Sua Sponte Dismissal under Rule 12(b)(6) Is Erroneous Unless the Parties Have Been Afforded Notice to Amend the Complaint.

With respect to low-court sua sponte dismissal under Rule 12(b)(6), the petitioner could not find a precedent in the Massachusetts Appeal Court [based on Li’s statistics from www.versuslaw.com]. The petitioner turns to the federal decisions for guidance.

Court Name	Search Type	No. of Precedents
Mass. Court of Appeal	sua sponte dismissal under rule 12(b)(6)	0
Mass. Court of Appeal	sua sponte dismissal for other reasons	5
Federal 1st Circuit Court	sua sponte dismissal under rule 12(b)(6)	8
US Supreme Court	sua sponte dismissal for other reasons	6

(The related 8 precedents of Federal First Circuit Court are listed in **Attachment D**)

The US Supreme Court have no occasion to rule on sua sponte dismissal under Rule 12(b)(6), see Neitzke v. Williams, 490 U.S. 319, 329, 104 L. Ed. 2d 338 109 S. Ct. 1827 (1989). (footnote 8, we have no occasion to pass judgment, however, on the permissible

scope, if any, of sua sponte dismissals under Rule 12(b)(6)). But the US Supreme Court emphasized the standard of Rule 12(b)(6): "under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon." (*Id.*).

The federal First Circuit ruled "Sua sponte dismissals are strong medicine, and should be dispensed sparingly." Chute v. Walker, 281 F.3d 314, 319 (1st Cir. 2002) (quoting Gonz lez-Gonz lez, 257 F.3d 31 at 33). "the general rule is that 'in limited circumstances, sua sponte dismissals of complaints under Rule 12(b)(6) of the Federal Rules of Civil Procedure are appropriate. See Wyatt v. City of Boston, 35 F.3d 13, 14 (1st Cir. 1994). However, such dismissals are erroneous unless the parties have been afforded notice and an opportunity to amend the complaint or otherwise respond.'" Chute, 281 F.3d at 319 (quoting Futura Dev. of P.R., Inc. v. Estado Libre Asociado de P.R., 144 F.3d 7, 13-14 (1st Cir. 1998)); Street v. Fair, 918 F.2d 269 (1st Cir. 11/02/1990) "Yet in dismissing the claim on this basis sua sponte, with prejudice, and without affording plaintiff notice and an opportunity to be heard, the court acted at best prematurely"; Literature Inc. v. Quinn, 482 F.2d 372 (1st Cir. 07/26/1973) "Yet a court may not do so without at least giving plaintiffs notice of the proposed action and affording them an opportunity to address the issue. Dodd, supra, 393 F.2d at 334. This alone might well justify reversal here, since there is no indication that notice of a possible dismissal was given."

3. Appellate Sua Sponte Decision Under Rule 12(b)(6) Is Out of the Panel's Jurisdiction

The three-judges panel do not have jurisdiction to voluntarily (sua sponte) dismiss a claim based on a low-court rule, pursuant Mass. R. Civ. P. Rule 1 “Scope of Rules”:

These rules govern the procedure before **a single justice of the Supreme Judicial Court or of the Appeals Court**, and in the following departments of the Trial Court: the Superior Court, the Housing Court the Probate and Family Court in proceedings seeking equitable relief, the Juvenile Court in proceedings seeking equitable relief, in the Land Court, in the District Court and in the Boston Municipal Court, in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in [Rule 81](#). They shall be construed to secure the just, speedy and inexpensive determination of every action. ... (emphasis added)

The penal is not a single justice, and should not act on the low court rule, Mass.R.Civ.P Rule 12(b)(6). The penal can affirm, modify, or vacate the original judgment, and should not sit as self-directed boards of legal inquiry and research.

4. **The Panel Erred by Relying on a Case Law When Setting Rule 12(b)(6) To Be a Valid Ground on Which the Motion to Dismiss Had Been Allowed.**

Raytheon’s Motion to Dismiss was solely based on Rule 12(b)(9). The panel “allowed” this motion on a different ground, Rule 12(b)(6). The panel relied on [Conant v. Sherwin L. Kantrovitz, P.C.](#), 29 Mass. App. Ct. 998, 998 (1990) and cited “any valid ground on which the motion should have been allowed.” However, the panel’s citation of [Conant](#) was cut mid-sentence. The whole citation should be:

All of the grounds specified in the motion are open on appeal, see [Pupecki v. James Madison Corp.](#), 376 Mass. 212, 215 (1978), and we will uphold the Judge's action if there is any valid ground on which the motion should have been allowed. See [Alholm v. Wareham](#), 371 Mass. 621, 625-626 (1976), and cases cited. (emphasis added)

[Conant](#), 29 Mass. App. Ct. 998, 998 (1990); accordingly, the genesis of the “any valid ground” should be “All of the grounds specified in the motion [to dismiss].”

5. **Li’s 151B Claims Should Not Fail to State a Claim Because Her Title VII Claims Were Granted Summary Judgment Based on Identical Facts**

The federal district court granted a summary judgment, and the majority federal circuit judges denied Li's petition for rehearing en banc (**Attachment B**: 1st Cir. Order of Denial Li's Pet. for Rehearing Eng Banc). How could the Counts I, II failed to state a claim, while 151B needs lesser burden to prove than Title VII does? See, Lattimore v. Polaroid Corp., 99 F.3d 456 (1st Cir. 1996) (applying Massachusetts law; unlike Title VII, finding of pretext sufficient to discharge employee burden).

6. The Panel Erred by Referring Jury-Trialed Precedent to Conclude Li's 151B Claim Failed to State A Claim

The panel referred MacCormack v. Boston Edison Co., 423 Mass. 652, 662 (1996) and Tate v. Department of Mental Health, 419 Mass. 356, 364 (1995) to support their conclusion that "Li failed to allege the required element that she suffered an adverse employment action." (Decision, p.5, ¶3) However, the panel "forgot" that MacCormack went for a jury trial, and Tate was granted summary judgment, but Li had no opportunity to amend her complaint.

7. Count VII (Tortious Interference of Advantage Relationship) Should Depend On the Ruling of 151B claims because Having Proved Unlawful Retaliation, also Proved the Existence of an Improper Motive.

The allegations against Mitchell and Buliung are part of the claims of discrimination and retaliation. If Li could prove that Mitchell or Buliung acted with discrimination or retaliatory animus, then the "improper motive" required in Count VII would be proved. "..., having proved unlawful retaliation, also proved the existence of an improper motive (and, thus, proved actual malice)," Celia Zimmerman v. Direct Federal Credit Union, 262 F.3d 70 (1st Cir. 2001). Accordingly, whether Count VII adequately stated the claim should depend on the ruling on Counts I, II.

THE APPEAL COURT ERRED BY AFFIRMING THE DISMISSAL OF COUNT V
AGAINST JOHN DIDIO SHOULD NOT FAILED TO STATE A CLAIM

In the Superior Court, defendant John Didio filed motion to dismiss the Reckless/Intentional Infliction of Emotional Distress (IIED) claim under Rule 12(b)(6). The motion was allowed, and Li appealed.

The panel affirmed the decision and simply concluded “We agree with the motion judge that Li could prove no set of facts in support of emotional distress claims that would entitle her to relief.” (Decision, p.5, ¶1) The panel did not touch on the severity of the fact: a licensed social worker indifferently **violated Li’s right of consent**, and recklessly performed **extreme psychopath tactics**, turning Li, a victim of retaliation, back to a potential murderer and caused her traumatized and mental disability.

Li made detail analysis in her reply brief on the element of extreme and outrageous (Li’s Reply Brief, pp.6-9). Li indicated:

- **Accusing Li of wanting to kill** someone with physical intimidation can be viewed as “attempt to intentionally shock and harm a person’s ‘peace of mind’ by **invading the person’s mental or emotional tranquility.**” Boyle v. Wenk, supra 378 Mass. At 595, 392 N.E.2d 1053 (1979);
- “Didio knew the precise nature of **Li’s emotional susceptibility**”, “a slim Asian woman with an English language barrier, worried personal safety, was cornered into a small room by three Caucasians ...” See Boyle v. Wenk. 392 N.E.2d 1053, 1055-56 (Mass. 1979) (victim just returned from hospital); Dawson v. Associates Fin.Servs. Co. of Kansas, Inc., 215 Kan. 814, 825

- (1974) (victim with multiple sclerosis); Delta Fin. Co. v. Ganakas, 93 Ga. App. 297, 298-299, 300 (1956) (victim was a child aged eleven years);
- Didio engaged in **persistent harassment** in violation of Li's right of consent. Li rejected his interview when he asked "do you want to kill someone" and used his finger pointed at Li repeatedly and stared at Li. He left the meeting room. However, he came back after a few minutes and continued asking questions. See Boyle, 378 Mass. At 596 (persistent misconduct by private investigator); Simon v. Solomon, 385 Mass. 91, 95, 97 (1982) (persistent failure by landlord to relieve flooding problem which resulted in water and sewage entering tenant's apartment was extreme and outrageous).
 - Didio, a licensed mental health professional, **own Li a duty of care**. His disobey his ethic code by physically intimidation, asking abusive question, using Li's language barrier against her for his benefit. "The extreme and outrageous character of the conduct arose from an abuse by the defendant of a position or relationship to the plaintiff." Restatement (Second) of Torts §46, Comment e (1965).

The allegation should have to approach the abuse of ordinary decencies to be found in George v. Jordean March Co., 359 Mass. 244 (1971) (extreme dunning tactics), Agis (public humiliation), Wenk (persistent misbehavior by investigator), or yes, Yong Li v. John Didio (extreme psychopath tactics, turning a victim back to a murderer).

THE APPEAL COURT ERRED BY AFFIRMING THE DENIAL OF A MOTION TO AMEND THE COMPLAINT, BECAUSE THE ORIGINAL DENIAL WAS WITHOUT FULL HEARING AND WAS MERELY FOLLOWED THE DISMISSAL OF THE COMPLAINT

The Superior Court Judge provided no opinions and no hearings when denying Li's motion to amend After he dismissed Li's complaint under Rule 12(b)(9). It seemed like the denial of the motion to amend was just following the ruling on motion to dismiss, and "brush off" Li's case. The motion to amend attempted to add Count IX Violation of Privacy against Raytheon and Irvin Kooris, a new defendant; Count X Violation of Right of Consent against John Didio; as well as other various tort claims. The potentially significant facts may not have been fully developed or given adequate consideration in the trial court. The motion judge erred by not following Rule 15(b) to discuss Li's new claims in the amendment.

If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

Li assumed the Superior Court dismissed the motion to amend for failure to state a claim, so that she readdressed the Count Ten for Violation of Li's Right of Consent against licensed social worker John Didio in her brief, she readdressed Count Nine Violated Right of Privacy against Raytheon and a new defendant Irvin Kooris in her reply brief. However, the panel did not touch on Li's arguments. Accordingly, the motion to amend should be reconsidered.

CONCLUSION

Appellate *sua sponte* dismissal under Rule 12(b)(6) had never occurred in US history. For the reasons stated, the application to obtain further appellate review should be granted.

Oral argument required in support of this request for leave to obtain further appellate review.

Respectfully submitted
Yong Li (pro se)

/s/ _____
Yong Li



Date: May 20, 2008

Certificate Service

Service was made upon counsel for each other party by first mail class in the counsel office, addressed as follow:

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On _____, /s/ _____ (Yong Li)

ATTACHMENT D

Yong Li's statistics about Sua Sponte Dismissal precedents based on the information from www.versuslaw.com.

Court name	Search type	No of case	Case Title and Reason of Dismissal
US Supreme Court, 1 st -11 th circuit courts, 53 states' Appeal Court	Appellate sua sponte dismissal under rule 12(b)(6)	0	
Mass. Court of Appeal	Sua sponte dismissal under rule 12(b)(6)	0	
Mass. Court of Appeal	sua sponte dismissal	5	<p>QUEST SYSTEMS v. CHARLES M. ZEPP 04/13/1990, sua sponte dismissal for failure to prosecute;</p> <p>ALBERT C. BASSETT v. LETITIA FRANCES 11/14/1989, sua sponte dismissal to enforce a Connecticut Judgment</p> <p>Statewide Towing Association, Inc. v. City of Lowell, 865 N.E.2d 804, 68 Mass.App.Ct. 791 (Mass.App. 04/27/2007) Statewide asserts (1) that the judge erred in sua sponte dismissing count I. As we conclude that Statewide <u>lacks standing to pursue relief</u> for counts I and II, we affirm the judgment.</p> <p>09/28/93 HIBERNIA SAVINGS BANK v. JAMES J. BOMBA the Judge, sua sponte, dismissed Hibernia's action. "could be considered as an attempt to intentionally misrepresent facts to the motion Judge." If Hibernia does not file such materials within such period (the District Court Judge may in his or her discretion extend the period), the judgment of dismissal in the District Court shall stand on the basis that Hibernia's action against the Bombas is premature.</p> <p>05/14/91 LEONARD SHUMAN v. STANLEY WORKS sua sponte, dismissed Shuman's complaint without prejudice for failure to effect service...</p>

Federal 1st Circuit Court	Sua sponte dismissal under rule 12(b)(6)	8	<p>Gagliardi v. Sullivan, No. 06-2680 (1st Cir. 01/18/2008)01/18/2008 Motion to dismiss for 3 of 5 defendants, but the dismissal was on all defendants. The plaintiff failed to raise the issue in appeal.</p> <p>Chute v. Walker, 281 F.3d 314 (1st Cir. 02/27/2002) Chute says the district court erred by, sua sponte, dismissing those counts without providing him notice or an opportunity to be heard. we reverse the district court's dismissal of counts one, two, and five through nine of Chute's complaint, against Walker individually, and reinstate the case for further proceedings.</p> <p>Futura Development of Puerto Rico Inc. v. Rico, 144 F.3d 7 (1st Cir. 05/06/1998) This court has held that, in limited circumstances, sua sponte dismissals of complaints under Rule 12(b)(6) of the Federal Rules of Civil Procedure are appropriate. See Wyatt v. City of Boston, 35 F.3d 13, 14 (1st Cir. 1994). However, such dismissals are erroneous unless the parties have been afforded notice and an opportunity to amend the complaint or otherwise respond. See id.; Street v. Fair, 918 F.2d 269, 272 (1st Cir. 1990) (per curiam); Literature, Inc. v. Quinn, 482 F.2d 372, 374 (1st Cir. 1973). (vacate, reverse)</p> <p>Literature Inc. v. Quinn, 482 F.2d 372 (1st Cir. 07/26/1973) While no motion to dismiss had been filed, a district court may, in appropriate circumstances, note the inadequacy of the complaint and, on its own initiative, dismiss the complaint. Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968); 5 Wright & Miller, Federal Practice and Procedure: Civil, § 1357. Yet a court may not do so without at least giving plaintiffs notice of the proposed action and affording them an opportunity to address the issue. Dodd, supra, 393 F.2d at 334. (vacated)</p> <p>Wyatt v. City of Boston, 35 F.3d 13 (1st Cir. 09/15/1994)09/15/1994 Because appellant states a claim just by making a prima facie case, we cannot say that "it appears beyond doubt that [appellant] can prove no set of facts in support of" his case. Finally, <u>even assuming that appellant's complaint demonstrates that there was cause for his alleged demotions and dismissal, appellant must be given a "fair opportunity" to show that appellees' reasons for their actions were pretexts.</u> See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). In so finding, we express absolutely no opinion as to the substantive merits of the complaints. (vacated)</p> <p>Tempelman v. United States Postal Service, No. 92-1111 (1st Cir. 12/16/1992)12/16/1992 See, e.g., Street v. Fair, 918 F.2d 269, 272 (1st Cir. 1990) (per curiam); Pavilonis v. King, 626 F.2d 1075, 1078 n.6 (1st Cir. 1980) (sua sponte dismissal under Rule 12(b)(6) appropriate,</p>
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			<p>despite lack of notice to plaintiff, where magistrate's report had highlighted deficiencies in complaint), cert. denied,449 U.S. 829 (1980). (affirmed, because the notice of appeal was filed more than 60 days after the October 30 order of dismissal.)</p> <p>Street v. Fair, 918 F.2d 269 (1st Cir. 11/02/1990)11/02/1990 The district court was therefore justified in concluding that plaintiff's eighth amendment allegations failed to state a claim.^{*fn1} Yet in dismissing the claim on this basis sua sponte, with prejudice, and without affording plaintiff notice and an opportunity to be heard, the court acted at best prematurely. As we stated in Literature, Inc. v. Quinn,482 F.2d 372 (1st Cir. 1973). (vacated)</p> <p>Pavilonis v. King, 626 F.2d 1075, 1078 n.6 (1st Cir. 1980) Although Pavilonis seems to argue in her brief that dismissal was improper because the defendants had not yet filed motions to dismiss, we think the court was entitled to act sua sponte and was not obliged to have its docket clogged indefinitely. Pavilonis had adequate warning that her complaints were vulnerable to dismissal and time to defend them or amend them. Compare Literature, Inc. v. Quinn,482 F.2d 372, 374 (1st Cir. 1974) (court may dismiss complaint at its own initiative, but not without affording notice and opportunity to be heard). (affirmed, because she had notice, not adequately listed the facts in her complaint.)</p>
US Supreme Court	Sua sponte dismissal	6	<p>Jones v. Bock, 127 S.Ct. 910 (U.S. 01/22/2007)01/22/2007 in forma pauperis, permitted sua sponte dismissal for frivolous. 28 U. S. C. §1915;</p> <p>COSTELLO v. UNITED STATES, 81 S. Ct. 534, 365 U.S. 265 (U.S. 02/20/1961)02/20/1961 sua sponte dismissal for failure to comply with court order.</p> <p>Day v. McDonough, 126 S.Ct. 1675, 547 U.S. 198, 164 L.Ed.2d 376 (U.S. 04/25/2006)04/25/2006 permitted the dismissal of habeas petitions on the sole ground of untimeliness.</p> <p>NEITZKE ET AL. v. WILLIAMS, 109 S. Ct. 1827, 490 U.S. 319 (U.S. 05/01/1989)05/01/1989 The frivolousness standard, authorizing sua sponte dismissal of an in forma pauperis</p> <p>THOMAS v. ARN, 106 S. Ct. 466, 474 U.S. 140 (U.S. 12/04/1985)12/04/1985 Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1465 (1984) (federal courts have inherent authority to regulate "technical details and policies intrinsic to the litigation process"). The Courts of Appeals have often exercised that authority. See, e. g., Tingle v. Marshall,716 F.2d 1109, 1112 (CA6 1983) (establishing procedure for sua sponte dismissal of complaints);</p>

			<p>SCTLINK v. WABASH RAILROAD CO., 82 S. Ct. 1386, 370 U.S. 626 (U.S. 06/25/1962)06/25/1962 dismissal for failure to appear at the pretrial, for failure to prosecute.</p>
US Supreme Court,	appellate sua sponte decisions for other issues	5+	<p>John R. Sand & Gravel Company v. United States 552 U.S. (2008) The court of claims statute of limitations requires sua sponte consideration of a lawsuit's timeliness, despite the Government's waiver of the issue. (affirmed)</p> <p>Singleton v. Wulff, 428 U.S. 106 (1976) stating, "a federal appellate court does not consider an issue not passed upon below." In Hormel v. Helvering, 312 U.S. 552, 556 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues... [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." (reversed)</p> <p>Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, see Turner v. City of Memphis, 369 U.S. 350 (1962), or where "injustice might otherwise result." Hormel v. Helvering, 312 U.S., at 557. "Ordinarily an appellate court does not give consideration to issues not raised below." (affirmed)</p> <p>Supreme Court Justice John Paul Stevens in Patterson v. McLean Credit Union, 485 U.S. 617, 623 (1988) stated, "the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review." (restored for re-argument)</p>