No.

IN THE

Supreme Court of the United States

LILLIAN FISCHER,
Petitioner

v.

THE CITY OF NEW YORK, et al.
Respondents

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

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1. In light of this Court's decisions in *O'Connor v. Ortega*, 480 U.S. 709 (1987) and *Hoffa v. United States*, 385 U.S. 293 (1966), do government employers have unfettered authority to perform searches that are not justified at inception, go beyond their stated scope, and are for the purpose of locating and seizing the employees' personal property?

2. When a government employer has a publicly available written policy concerning the procedures of post-termination hearings for employees, are the Fifth and Fourteenth Amendment guarantees of due process satisfied when the employer instead follows a secret, different version of those policies which also violate the employing agency's by-laws and the collective bargaining agreement signed with the employees' union?

3. Against the backdrop of numerous rulings from this Court dating back over eighty years, does a person subjected to a hearing which would deprive them of both a property right and a liberty interest, have the right to counsel at that hearing?

4. Can employers financially punish employees for utilizing the First Amendment's Exercise Clause to freely practice their religion of choice rather than proscribing to the religion promoted by the employer?

5. When a government employee uses the only method available to speak out against the illegalities being committed by their employer, is the government entitled to retaliate and financially punish the employee for their protected speech?

6. When an employer provides direct evidence of their racial and religious discrimination via deposition testimony admissions, are courts allowed to ignore both the evidence and this Court's ruling in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) and instead apply the *McDonnell Douglas* test?

PARTIES TO THE PROCEEDINGS

Petitioner Lillian Fischer was the plaintiff in the District Court and the appellant in the Second Circuit.

All respondents were defendants in the District Court and appellees in the Second Circuit. They are:

- The City of New York
- The Panel For Educational Policy a/k/a the Panel For Educational Policy of the Department of Education a/k/a the Panel for Educational Policy of the New York City Department of Education a/k/a the Panel for Educational Policy of the Department of Education of the City of New York a/k/a the Panel for Educational Policy of the City School District of the City of New York a/k/a the Department of Education of the City of New York a/k/a the New York City Department of Education f/k/a the Board of Education of the City School District of the City of New York a/f/k/a the Board of Education of the City of New York
- Linda Alfred, individually and in her official capacity
- Roz German, individually and in her official capacity
- Lybi Gittens, in her official capacity
- Peggy Lawrence, individually and in her official capacity
- Joseph Belesi, individually and in his official capacity
- Bonnie Laboy, in her official capacity.

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Additional References

Lillian Fischer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The orders of the Court of Appeals (App. 1a-7a) and the District Court (App. 8a-24a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 17, 2013. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Fourth, Fifth, Sixth, and Fourteenth Amendments, 42 U.S.C. §§1981 and 1983 are reproduced in the appendix. (App. 25a-27a.)

STATEMENT OF THE CASE

Petitioner was jointly employed as a secretary by the City of New York ("NYC") and the Panel for Educational Policy ("PEP"). Under color of law, NYC, PEP, and their employees committed torts against petitioner and violated her Constitutional rights and guarantees. Per jurisdiction established by Article III of the Constitution and 28 U.S.C. §§1331, 1343, and 1367, petitioner brought this action in the District Court for the Eastern District of New York.[1]

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[1]Typographical errors listed jurisdiction in the amended complaint as being under 28 U.S.C. §§1347 and 1361.

Summary judgment can only issue when "there is no genuine issue as to any material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The threshold inquiry is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Ibid.* Despite material factual disputes existing, the respondents' contentions were accepted as truthful and everything was viewed in the light most favorable to the moving party respondents.[2]

The District Court ignored some causes of action, rewrote petitioner's claims, allowed unauthenticated documents into evidence, and granted summary judgment to the respondents. Only referencing petitioner's amended complaint indicates that her summary judgment pleadings and evidence were ignored. The court also ignored rulings of this Court as well as admissions and contradictions in the respondents' deposition testimony and pleadings. Further, the decision contains untruths about petitioner and her pleadings, "facts" created by the court, and contradictions including the court both ruling and not ruling on the case. (App. 24a.)

The Second Circuit partially addressed only two issues while ignoring all other issues petitioner raised. The Circuit Court also ignored the issues, causes of action, and arguments which the District Court had ignored. Instead of addressing the unauthenticated evidence issue, the Second Circuit

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[2] Citing only part of amended complaint paragraph 16 (App. 16a) distorts facts in the respondents' favor.

cited to that evidence as a basis for part of its decision. (App. 6a.) The appellate court did not address the lower court's "manufactured facts" or contradictions but instead called the decision "comprehensive and clear." (App. 7a.)

REASONS FOR GRANTING THE WRIT

The freedoms and rights granted by the initial ten amendments were those which the Founding Fathers deemed to be important checks on the power of the government. Freedoms and rights granted by subsequent amendments also imposed limitations on the ability of the government to take actions against the people. Once any person's freedoms or rights are denied and trodden upon by the government, we are all damaged. The decisions of both lower courts have turned the Constitution on its head by deeming that governments can act against their citizens unchecked because governments in this country are above the Constitution and rulings of this Court.[3]

I. THE CONDUCTED SEARCH VIOLATED THE FOURTH AMENDMENT

A. Expectations of privacy exist even for government employees

For security reasons, searches are routine for certain government employees *National Treasury Employees Union v. Von Rabb*, 489 U.S. 656 (1989). It is common for police officers to be subjected to searches of their lockers. Employees can also waive their privacy rights by signing an acknowledgment

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[3] By affirming for the same reasons stated by the District Court, (App. 7a) the Circuit Court adopted the lower court's reasoning, thus differentiating *Mandel v. Bradley*, 432 U.S. 173 (1977).

that their lockers can be searched even though they may contain personal items. *American Postal Workers Union, Columbus Area Local AFL-CIO v. United States Postal Serv.*, 871 F.2d 556 (6th Cir. 1989).

When an employer's policy prohibits employees from storing personal property in their work area or the employer's manual says searches can be done even if personal property is stored in the searched area, there is no expectation of privacy. *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177 (2d Cir. 2004); *United States v. Bunkers*, 521 F.2d 1217 (9th Cir. 1975).

However, when the opposite of the *Shaul* scenario exists, the opposite ruling must exist. Where the government employer's policy is to provide employees with a secure place to store personal belongings, there is an expectation of privacy in that location. Such expectation is one which society is prepared to recognize as being reasonable and performing a search of that space is prohibited.

B. The lower courts disregarded this Court's test for determining the validity of a search

To be valid, searches conducted by government employers must be justified at inception and must not go beyond their stated scope. *O'Connor v. Ortega*, 480 U.S. 709 (1987).

When for more than a year immediately prior to the search, the employer has actual knowledge that

the person whose desk was being searched did not have possession of, or responsibility for, what was allegedly being sought, the search is not justified. When the three individuals who performed the search[4] give contradicting deposition testimony regarding who performed the search, why the search was performed, what was being sought, and what areas were searched, the search cannot be justified. When, on these matters, respondents' pleadings contradict one another and contradict their testimony, the search cannot be justified.

The District Court ignored petitioner's contentions and all contradictions in the respondents' testimony and pleadings. It even ignored petitioner's evidence and declared none exists. (App. 19a.) Instead, the lower court selected one version of the respondents' "stories" regarding the search as support for declaring the search justified at inception. (App. 11a, 16a, 21a-22a.) Even worse, the court manufactured its own fact. Only one file was allegedly being sought and the respondents admitted that it was never found yet the Court claims petitioner acknowledged that multiple missing files were being sought and that they were found in her desk. (App. 16a). In affirming, the Second Circuit changed petitioner's pleading. Petitioner never conceded that a file was the focus of the search. (App. 4a.) Rather, she pointed to the respondents' multiple stories about what was allegedly being sought.

O'Connor's second prong requires determination of whether or not the search stayed within its stated

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[4] All were superior to petitioner in the employer's hierarchy.

scope. Although petitioner provided respondents' deposition testimony admissions as evidence in support of her arguments of the search having gone beyond the stated scope, the District Court ignored the second prong of the test. Instead it granted summary judgment to the respondents on the basis of the search having passed just the first *O'Connor* prong. This is not only error but demonstrates that the lower court does not believe it necessary to apply tests mandated by this Court.

By affirming this issue without discussion, the Second Circuit also ignored the test mandated by this Court and ignored petitioner's pleadings and arguments regarding that test. In doing so, the Second Circuit radically departs from the norm of the other Circuits by demonstrating that it will disregard rulings and directives of this Court.

C. Employers cannot search for, or seize, personal property of employees

Fourth Amendment restraints apply to "[s]earches and seizures by government employers or supervisors of the private property of their employees." *O'Connor* at 715.

1. Searches

For almost half a century, this Court has held to the tenet that a person who places personal property in a constitutionally protected area such as a desk drawer in his office "has the right to know it will be secure from an unreasonable search or an unreasonable seizure." *Hoffa v. United States*, 385 U.S. 293, 301 (1966). "A legitimate expectation of

privacy in one's desk and its contents is not unreasonable." *Reinhold v. County of York*, No. 1:11-CV-605 (M.D. Penn., August 31, 2012) (internal citation omitted).

In deposition testimony, respondent Alfred repeatedly declared that they were searching for petitioner's personal property. A search, even of a government employee's assigned desk, by the employee's superiors is illegal and unreasonable if the search was for the employee's personal property. *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951). Employees were allowed to bring personal property to the workplace and petitioner kept personal property in her desk. Her superiors "could not reasonably search the desk for" anything not belonging to the government. *Id.* at 1021. Further, as a government secretary, petitioner is the exact example of a person whose desk Justice Scalia said could not be searched by government employers. *O'Conner* at 730.

By granting and affirming summary judgment to the respondents, the lower courts have declared that once brought onto the employer's physical property, government employers can search for, and search through, their employees' personal property. As such, all governments in the Circuit can now search for, and search through the bags, purses, briefcases, clothing, etc. of their employees for the express purpose of locating and seizing the employees' personal property. Even more dangerous, the rulings imply that such searches can be done on the whim of the employer, including a person's direct supervisor.

2. Seizures

As contended in the complaint, petitioner's personal property, including communications with her union, was seized during the search.[5] The respondents denied having done so even though respondent Alfred repeatedly admitted that petitioner's personal property was the actual focus of the search. Thus there was a significant issue of material fact concerning whether or not an illegal seizure had been committed. Yet the District Court granted summary judgment to the respondents without discussion of the seizure issue.

"The Fourth Amendment 'is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England.'" *Cassady v. Tackett*, 938 F.2d 693, 698 (6th Cir. 1991) (internal citations omitted). Although usually discussed in criminal matters, the concept is equally applicable to civil matters where a government employer searches for and seizes their employees' property. The purpose of the Amendment was to protect the citizens from abuse by the government. Petitioner's grievance was a criticism of the government for breeching contracts in violation of public policy. Seizure of materials directly related to that grievance is a modern version of the British Crown seizing the property of those critical of the Crown. By approving of such behavior, the lower courts have returned to the days when

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[5] This included communication regarding a grievance petitioner filled against respondent Alfred. With a grievance hearing scheduled for only a few weeks subsequent to the search, documents concerning planned hearing strategy were of advantage to respondents.

criticism of the government was met with sharp reprisal. If a government employee legitimately criticizes his employer, the government can now search for, and seize, that employee's personal property so as to squelch further criticisms.

II. THE CONSTITUTION GUARANTEES DUE PROCESS

The lower court decisions declare that even for deprivation of liberty interests and property rights, due process never has to be provided. The decisions also indicate that equality and equal protection are not applicable in litigation against the government.

A. Determination of fact

Interpreting the meaning of contractual terms is a matter for the trier of fact. When a jury trial is demanded, the trier of fact is the jury, not the bench. When the contract is between a government entity and a union, the contract is of major significance.

1. The District Court

Whether petitioner was tenured or probationary is a significant dispute which affects the due process rights to which she and all similarly situated union members are entitled. "Where contractual language is susceptible of at least two fairly reasonable interpretations, this presents a triable issue of fact and summary judgment would be improper." *Aetna Casualty & Surety Co. v. Giesow*, 412 F.2d 468, 471 (2d Cir. 1969).

On motions for summary judgment, a court "cannot try issues of fact" or "determine questions of

fact without an adequate and proper hearing." *Hoffman v. Babbitt Bros. Trading Co.*, 203 F.2d 636, n.1 (9th Cir. 1953) (quoting 3 Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, §1231). Summary judgment "affects the substantial rights of the litigants" and as a drastic remedy, "it must be used with a due regard for its purposes, and a cautious observance of its requirements in order that no person will be deprived of a trial of disputed factual issues." *Ibid.*

The District Court bench interpreted the contract and issued a declaration of fact regarding petitioner's employment status. Without discussion, the bench rendered a decision of fact that petitioner was probationary not tenured and granted summary judgment to the respondents on the basis of probationers having no due process rights regarding termination. (App. 22a-23a.) Doing so exceeded the court's authority. *Anderson*, supra at 248.

"A bare conclusion, without discussion, is beyond meaningful judicial review." *Cunningham v. Colvin*, No. 11-CV-765 (N.D. Okla., April 5, 2013) (internal citation omitted). Although put forth in regards to a decision of an administrative law judge, the concept must apply to all judicial decisions of finality. When a lower court provides no discussion or explanation for rendering a decision, especially one of finality such as a grant of summary judgment, there is no meaningful judicial review possible by the appellate court. Concluding without discussion that petitioner was probationary was error and that conclusory decision could not be meaningfully reviewed by the Second Circuit.

In seeking summary judgment, the respondents never relied upon any law to justify their claim that petitioner was probationary. Rather, they relied on a declaration and exhibits annexed thereto.[6] The District Court accepted the view espoused therein while ignoring petitioner's cites to state laws and contract terms. The Third, Seventh, and Ninth Circuits subscribe to the viewpoint that affidavits filed in support of summary judgment motions "may be considered for the purpose of ascertaining whether an issue of fact is presented, but they cannot be used as a basis for deciding the fact issue." *Frederick Hart & Co. v. Recordgraph Corporation*, 169 F.2d 580, 581 (3d Cir. 1948).

By appointing itself the trier of fact, ignoring pleadings, laws, and evidence, and issuing a decision of fact which impacts all employees covered by a union contract, the District Court denied due process to all union members covered by that contract. In taking such action, the lower court disregarded *Anderson*, supra and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) thereby again radically departing from the judicial norm.[7]

2. The Second Circuit

Due process was one of only two issues on which the Second Circuit explained its affirmance. But the Circuit Court committed several errors.

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[6] As discussed *infra* at VII, the exhibits were not authenticated.

[7] Judge Johnson has cited these rulings when denying summary judgment. *Waldman v. Atlantic-Heydt Corp.*, No. 04 CV 2154 (E.D.N.Y. July 14, 2006). As such, it appears as though he complies with, or disregards these rulings at his whim.

Firstly, it affirmed interpretation of contractual clauses and a decision of fact by the lower court bench. The Circuit Court not only declared petitioner's probationary status to be a fact (App. 4a) but twisted her words. (App. 6a.) In her deposition, petitioner said that she was told that her probationary period was three years. Being told something does not make it true.

Secondly, the Circuit Court justified its decision by citing to unauthenticated, inadmissible evidence.[8] (App. 6a.)

Thirdly, the Circuit Court stated that petitioner only asserted, without evidence, that she was tenured rather than probationary. (App 6a-7a.) This indicates that petitioner's arguments and citations to specific sections of NYS Civil Service Law, NYS Education Law, NY Codes Rules and Regulations, and clauses of her union contract were ignored.[9] By ignoring these citations, the Second Circuit indicates that it will ignore laws and rewrite government contracts so as to justify ruling in favor of the government.

Fourthly, the Circuit Court cited to, and thereby relied on, sections of law which the respondents put forth in their brief as appellees. (App. 6a.) However, the respondents' citation of, and arguments concerning, NYS Educ. Law §2573 were only raised

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[8] Discussed *infra* at VII.

[9] The Court appears to contend that probationary or tenured status is created by what an employer created document says (App. 6a) even though the status is created by law.

on appeal.[10] "It is a bedrock rule that when a party has not presented an argument to the district court, she may not unveil it in the court of appeals." *United States v. Slade*, 980 F.2d 27, 30 (1st Cir. 1992); *Citizens Ins. Co. of America v. Barton*, 39 F.3d 826, 828 (7th Cir. 1994) ("Arguments not raised in the district court are waived on appeal."); *Frank v. Colt Industries, Inc.*, 910 F.2d 90 (3d Cir. 1990) (when no exposition of the theory being advanced on appeal was found in the party's memorandum of law on summary judgment with the lower court, the theory will not be considered on appeal); *Newark Morning Ledger Co. v. United States*, 539 F.2d 929 (3d Cir. 1976) (argument raised on appeal by the government will not be heard since it was not raised in the summary judgment motion or in opposition to the other party's summary judgment cross-motion). All of these decisions are in line with the rule put forth by this Court that "appellate courts will not consider arguments not raised before trial courts." *Sims v. Apfel*, 530 U.S. 103, 108 (2000). Justifying its affirmation by citing to arguments only raised on appeal once again reveals that the Second Circuit breaks from the norm of the other Circuits and again demonstrates its noncompliance with rulings of this Court.

More importantly, by considering arguments only raised by the government on appeal, the Second Circuit indicates that in disputes involving the government, it will not treat the parties equally but

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[10] NYC, as a government and PEP as the government entity responsible for NYC's public schools, cannot legitimately argue that at the time of their summary judgment pleadings, they and Corporation Counsel were unaware of law regarding education.

will be biased towards government parties. This violates the Fifth and Fourteenth Amendment guarantees of equal protection.

B. Due process requires consideration of all issues a party raises

Each of petitioner's due process causes of action concerned different ways in which due process had been denied. The District Court granted summary judgment to the respondents on all due process claims predicated on an analysis of only one of those causes of action. When legal issues are raised but not addressed, the lower court has erred. *Colón-Santiago v. Rosario*, 438 F.3d 101 (1st Cir. 2006). Likewise, when arguments put forth by a party are ignored, the court has committed procedural error. *United States v. Martin*, No. 12-3154, (7th Cir. May 28, 2013). All issues raised here were put before both lower courts but were ignored and left unaddressed.

1. Illusions of due process do not qualify as due process

Petitioner was treated as a probationer and given the same post-termination hearing as provided to all probationers terminated from NYC's school system. Numerous problems exist with the manner in which these hearings are conducted and these problems affect everyone subjected to such a hearing.

There are two different versions of the official written policies which detail the procedures for such hearings: the easily available public version and the "secret" version only obtained through discovery. The two versions contain different instructions and procedures for the hearing process – demonstrating

that the public version exists to create the illusion of providing due process.

a. The "advisory opinions"

The public version declares that with non-unanimous hearing panel "advisory opinions," both a minority and majority report are to be submitted to the ultimate decision-maker. But the secret version requires submission of only one report.

The secret policies also violate both the union contract and respondent PEP's by-laws. The contract requires sending the "opinions" to the community school board[11] or the Chancellor. The by-laws specifically defer to the contract terms. At the hearings, per policy, a formal statement is read into the record declaring that the "opinions" would be submitted to the Chancellor. Yet they are not sent to the Chancellor. In deposition testimony, respondent Belesi testified that official policy is to send the hearing "opinions" to the superintendent and that the statement read aloud is "just a form we read."

Not only is an illusion of due process created, but "insiders" are required to advance this illusion by reading that form into the record at every hearing. Every person subjected to these hearings has been victimized by these policies and this victimization continues unabated.

Perhaps worse is the official policy concerning the panel's consideration of evidence. While documentary

[11] The superintendent is not part of the community school board.

evidence from rating officers is submitted well in advance of the hearings, terminated probationers only present their evidence at their hearings. Respondent Belesi testified that per policy, one to two weeks before a scheduled hearing, review begins of the rating officer's evidence while in contrast, policy allocates no more than one hour for the panel to: (a) review the terminated probationer's evidence, (b) discuss the hearing and evidence, and (c) render a decision. He further testified that the panel did not read every page of, or even consider, petitioner's evidence.[12]

Courts across the country have acknowledged this Court's requirement that a decision maker "should state the reasons for his determination and indicate the evidence he relied on." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). By ignoring, not reading, and not considering the terminated probationers' evidence, probationers are denied a fair opportunity to be heard nor could their evidence be the basis of, or cited in, hearing "opinions." This due process violation is the municipal defendants' official policy.

b. The superintendents

For over forty years, courts have cited this Court's ruling that "an impartial decision maker is essential" to due process. *Ibid*. Due process requires "a fair tribunal" and "an absence of actual bias." *Ibid*. (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Further, "no man can be a judge in his own case."

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[12] In his opinion to the superintendent, Belesi even declared that petitioner never disputed the rating officer's accusations.

Murchison at 136. The municipal respondents' policy provides probationers with biased decision-makers.

Per policy, superintendents, in person or via representative, attend and testify at the hearings. Once a superintendent testifies in such a hearing they are not impartial. In deposition testimony, two respondents acknowledged that the superintendent who rendered the ultimate decision regarding petitioner had, via representative, testified against petitioner at the hearing.

Like all others subjected to such hearings, petitioner was denied a crucial element of due process by an official policy of the municipal respondents which continues to be in effect today.

2. An Article 78 hearing is not the appropriate forum

The District Court granted the respondents summary judgment on all due process causes of action by focusing solely on petitioner's employment status. After rendering the unexplained decision of fact that petitioner was probationary, the court discussed how Article 78 proceedings provide due process for probationers appealing their termination. The lower court ignored all due process causes of action for issues discussed above and simply declared that by not filing for an Article 78 proceeding, petitioner was not denied Constitutional due process. (App. 22a-23a.)

This case is not about a single arbitrary and capricious government action. At issue is denial of

Constitutional due process by the municipal respondents' official policies and victimization of all people subjected to those policies. Creation and enforcement of such policies is state action under 42 U.S.C. §1983 and constitutional claims under §1983 cannot be adjudicated in an Article 78 proceeding. *Kirschner v. Klemons*, 225 F.3d 227 (2d Cir. 2000).

Further, it is well settled that in an Article 78 proceeding, only declaratory or injunctive relief is available with damages only recoverable when they are "'incidental to the primary relief sought.'" *Mitchell v. Fishbein*, 377 F.3d 157 (2d Cir. 2004) (internal citation omitted). Damages for civil rights violations are not incidental damages and cannot be recovered in an Article 78 proceeding. *Id*; *Davidson v. Capuano*, 792 F.2d 275 (2d Cir. 1986).

C. Due process is required when depriving individuals of a liberty interest or a property right

Deprivation of a liberty interest or property right is an injury. "Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law." *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 155 (5th Cir. 1961), cert. denied, 368 U.S. 930.

1. Liberty interests

Individuals have liberty interests in their chosen profession. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). Treating petitioner as a probationer denied her the due process to which she was entitled as a tenured employee and thereby

deprived petitioner of her liberty interest. The District Court declaring without explanation that petitioner was probationary further denied due process to petitioner.

As explained in II(A)(2), *supra*, the Second Circuit ignoring petitioner's arguments, evidence, and citations to laws exacerbated the erroneous due process denial. By ignoring them and then declaring that petitioner only made assertions without providing evidence, (App. 6a-7a) the Second Circuit distorts the facts and tells untruths about petitioner's pleadings in order to justify its decision. The Circuit Court went even further by accepting the respondents' arguments regarding NYS Educ. Law §2573 despite, as indicated in II(A)(2), supra, the respondents only raising these arguments on appeal. (App. 6a.)

By these actions, the Second Circuit demonstrates that it will say anything in its decisions, whether or not truthful, and will stomp on Constitutional rights so as to justify ruling in favor of the government. This again demonstrates the Second Circuit's pro-government bias.

2. Property rights

In order to maintain her employment position, petitioner, like all others in the same job title, was required to have a license for that position. It is well established that a license to practice one's profession is a protected property right and once issued, its continued possession "may become essential in the pursuit of a livelihood." *Bell v. Burson*, 402 U.S. 535, 539 (1971).

Per policy of the municipal respondents, once an individual's employment is terminated, they are barred from employment in the district from which they had been terminated. When terminated from a high school, employment in any high school in the county is additionally prohibited.[13] This significantly destroys the value of the employee's property right. *Stidham v. Peace Officer Standards and Training*, 265 F.3d 1144 (10th Cir. 2001); *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983).

Further, although internally divided into "districts," NYC's school system is a single district. NYS Educ. Law §2590. All licenses are issued by that single district entity. As such, being barred from employment in the district from which a person is terminated can constitute revocation of the license via a prohibition of employment anywhere in the NYC School District.

Whether fully or partially revoked, the official policy deprives individuals of both present and future government employment. Being deprived "not only of present government employment but of future opportunity for it certainly is no small injury." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185 (1951) (Jackson, J., concurring). The Fourteenth Amendment prohibits state action depriving licensees of their property right without procedural due process. *Bell* at 539 (citing *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Goldberg*, supra).

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[13] Petitioner was barred from employment in 123 public schools in Queens and 92 public schools in Brooklyn.

III. THE CONSTITUTION GUARANTEES THE RIGHT TO COUNSEL

For decades, courts across the country have complied with this Court's declaration that a hearing "has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). This "guiding hand of counsel" is especially crucial to a layman. *Id*. at 69.

Everyone has the right to aid, assistance, and advice of, and representation by, retained counsel. Yet, like all others subjected to the same type of post-termination hearing, the municipal respondents' official policy deprived petitioner of her right to counsel – even barring her retained counsel from the hearing.[14]

Per policy, terminated probationers are the only hearing participants prohibited from having the aid, assistance, and advice of counsel. As the hearing panel members are under the auspices of respondent PEP's Office of General Counsel, they officially represent, and can consult with, the employer's counsel. The "rating officer" is entitled to consult with counsel during the hearing. The superintendent who makes the ultimate decision is also entitled to consult with counsel.[15] As such, per official policy, everyone involved in these hearings is entitled to the

[14] At deposition, Belesi declared that attorneys were prohibited in the 300-400 hearings he had conducted.

[15] Respondent Laboy testified at deposition that she always consults with counsel before rendering her decisions.

aid and assistance of counsel – except the individuals being deprived of their property right, liberty interest, and livelihood.

The right to counsel in civil matters has been in existence far longer than the same right in criminal matters. *Faretta v. California*, 422 U.S. 806 (1975) (citing 1 Pollock & Maitland, History of English Law (1909) n.16, at 211.) This Court has declared that the right to be heard by counsel is applicable in both the criminal and civil context and that counsel is required in pre-deprivation hearings. *Powell* at 69; *Goldberg* at 270. In certain situations, federal and state statutes require, and even mandate appointment of, counsel in civil matters. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 Clearinghouse Rev. 245 (July-Aug. 2006). These rulings and statutes clarify that the right to counsel in civil matters is inherent in the Sixth Amendment. Yet, the District Court declared that the right to counsel applies only to criminal and quasi-criminal cases. (App. 23a-24a.) This error affects procedural and substantive due process rights and was compounded by the Second Circuit's affirmation.

Although the right to counsel has been declared by *Powell* and *Goldberg*, not all Circuits follow the ruling. The Fifth, Sixth, and Eight Circuits acknowledge the *Goldberg* decision. *Ortwein v. Mackey*, 511 F.2d 696 (5th Cir. 1975)[16]; *Texas Catastrophe Property Ins. Ass'n v. Morales*, 975 F.2d

[16] Pretermitting discussion of the lower court's ruling of the right to be heard by counsel at administrative termination hearings of probationary employees allowed that right to stand.

1178 (6th Cir. 1992); *Ahern v. Board of Education of Sch. Dist. of Grand Island*, 456 F.2d 399 (8th Cir. 1972). The Third Circuit does not. *Kentucky W. Va. Gas Co. v. Pennsylvania Public Utility Comm'n*, 837 F.2d 600 (3d Cir. 1988), cert. denied, 488 U.S. 941. By affirming the lower court's decision, the Second Circuit indicates that it too does not comply with the *Goldberg* ruling.[17] This Court's intervention is necessary to ensure that all lower courts comply with its rulings.

A. Courts cannot manufacture "facts" to justify decisions

On the due process claims, the Court ruled that because petitioner had chosen not to file for an Article 78 hearing, her due process rights were not violated. (App. 23a.) But on the Sixth Amendment claim, the court ruled that petitioner had no right to counsel at the Article 78 proceeding she had. (App. 23a.) This immediately creates two issues.

Firstly, a court cannot rule against a party on different claims predicated on diametrically opposite facts which cannot both be true. Secondly, and more importantly, it is undisputed that petitioner never had an Article 78 hearing. As such, the District Court created its own "fact" of petitioner having had an Article 78 hearing and used that "fact" to justify its decision. A court creating its own "fact" is beyond mere error. For a court to then use its own

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[17] The lower court's reliance on *Madera v. Board of Education*, 386 F.2d 778 (2d Cir. 1967) is flawed. *Madera* involved an informal meeting between school officials and a child's parents, not a formal post-deprivation hearing requiring due process.

manufactured "fact" to justify ruling against a party is a denial of due process and demonstrative of bias.

The contradiction and "manufactured fact" issues were put before the Second Circuit. Yet the Circuit Court ignored them and affirmed what it called "a comprehensive and clear" District Court decision. (App. 7a.) Doing so sends a message that justice will not be served in the Second Circuit. This Court's assistance is sought to instill in all courts of the land that the judicial system must be just, treat all fairly, apply the law equally, and cannot manufacture facts or issue rulings containing contradictions.

IV. THE FIRST AMENDMENT PROTECTS FREEDOM OF RELIGION AND SPEECH

Freedom of religion and speech are core freedoms granted by the Founding Fathers. Yet the lower courts tossed them aside. There was no discussion of the freedom of religion issue and the District Court completely changed petitioner's free speech pleading contentions.

A. The lower courts ignored Exercise and Establishment Clause violations

A long history of decisions from this Court reaffirms the First Amendment freedom to practice one's religion. Yet the lower courts have approved of government promotion of a specific religion and financially punishing those practicing their religion of choice rather than the promoted religion.

The public school in which petitioner had been employed promoted Christianity. School functions

had Christian "themes," promoted Christianity, and school events were held in, or sponsored by, a church.[18] The school's official newsletter contained a professionally authored poem declaring that in order to be a family, you require the parents, the child, and at the center you must have Christ. This declaration, especially in conjunction with the Christian nature of official school functions and events, is a pronouncement that the only acceptable religion is Christianity. This promotion of Christianity violates the Establishment Clause.

Upon the death of certain relatives such as a parent, the municipal respondents' official policy entitles the employee to three paid mourning days without deduction from the employee's "sick bank." To receive these days, policy only requires that the employee complete a form. All individuals employed in the same school as petitioner who lost a qualifying relative were granted these three days except petitioner. Three days were instead deducted from petitioner's "sick bank" thereby preventing her from using those days in the future. As such, she was financially damaged.

During her deposition, respondent German twice testified that it was "not unusual" for respondent Alfred to only deny these days to a Jew. This acknowledges, admits, and underscores that petitioner's financial injury was punishment for

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[18] The respondents don't deny this. Instead, their summary judgment pleadings called petitioner's complaints about this "a handful of minor and petty subjectively perceived slights" and "gripes."

utilizing her Exercise Clause freedom to practice Judaism rather than Christianity.

"It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 405-406 (1963). Promotion of a specific religion and denying a benefit to those not proscribing to that religion is a dual violation of the First Amendment.

B. Government employees maintain freedom of speech to speak out against actions of their employer

Petitioner contended that she was retaliated against for filing a grievance against her supervisor. Yet, the District Court ignored that contention. In a confusing analysis, the lower court reinvented petitioner's First Amendment claims – contending petitioner argued that she had a free speech cause of action for her supervisor's "freedom of speech" to defame petitioner. (App. 19a-20a.)

When speaking on matters of public concern, public employees maintain freedom of speech under the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410 (2006). If the speech is only about an employment matter, the speech may not be protected, especially if it is specifically personal to the individual employee. *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995); *Connick v. Myers*, 461 U.S. 138 (1983). But, when the matter affects all employees and all government contracts, it is of public concern.

This Court has declared that internal grievance procedures "in many cases will not seek to communicate to the public or to advance a . . . point of view beyond the employment context." *Borough of Duryea, Pa. v. Guarnieri*, 131 S.Ct. 2488, 2501 (2011). The term "in many cases" acknowledges that this is not a rule. Internal grievances filed by employees of respondent PEP are heard and ruled upon by the NYC Schools Chancellor via individuals bearing the title "Chancellor's Representative." Thus, grievances are taken to an official representative of the person in charge of the entity. As public hearings only address issues directly concerned with education of students, grievances are the only method of bringing these issues before him.

The grievance in this matter concerned violation of contracts. Petitioner was being required to perform tasks expressly prohibited by her union contract and which also violated another contract whose terms allowed only members of that union to perform those tasks. All government contracts are matters of public concern. Bringing to light violations of contracts by a principal abusing her authority was a matter of public concern.[19] Unless the practice was stopped, other principals would do the same. As NYC was the employer, once it approves violations of union contracts, it unilaterally modifies those contracts. All union contracts to which it is a party then become fair game for violation/unilateral modification. The slippery slope of such a policy could then extend to contracts for goods or services.

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[19] Although petitioner argued this, the District Court claimed that petitioner never alleged that she engaged in protected free speech. (App. 19a-20a).

Contracts would become worthless as they could be unilaterally altered at the whim of the government or employees in supervisory positions.

Petitioner's speech on an issue of public concern was protected. Yet the respondents retaliated in several ways including financial. The earlier discussed mourning days were denied to petitioner only two months after she filed her grievance. At her deposition, respondent German declared that it was "not a coincidence" that respondent Alfred only denied those mourning days to the only person to have filed a grievance against her. This is an explicit admission of retaliation for the filing of a public concern grievance.

"Government employees are often in the best position to know what ails the agencies for which they work." *Garcetti* at 429 (Souter, J., dissenting). In that vein, this Court has declared it "essential" that public employees be able to speak out on matters of public concern "without fear of reprisal." *Pickering* at 572. By allowing retaliation for protected speech, the lower courts chill the ability of employees to speak out on government improprieties or illegalities.

V. THE MCDONNELL DOUGLAS TEST SHOULD NOT HAVE BEEN APPLIED TO THE DISCRIMINATION CLAIMS

Besides due process, the only issue on which the Second Circuit gave a small explanation was the discrimination claim. Yet the analysis failed to comply with this Court's rulings regarding evidence

and only addressed the racial, but not the religious, discrimination.

A. McDonnell Douglas is inapplicable when direct evidence exists

The test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is designed to aid in determining whether or not discrimination exists when there is no direct evidence. When direct evidence exists, the *McDonnell Douglas* test is not applicable. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (internal citations omitted); *Swierkiewicz v. Sorema NA*, 534 U.S. 506 (2002).

"Direct evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990). With direct evidence, "witnesses testify directly of their own knowledge of the main fact or facts to be proved." *Wilkins v. Hogan*, 425 F.2d 1022, 1025 n.1 (10th Cir. 1970). "Direct evidence typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer." *Coghlan v. Am. Seafoods Co. LLC.*, 413 F.3d 1090, 1095 (9th Cir. 2005).

To defeat summary judgment requires direct evidence "of a stated purpose to discriminate." *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 607 (4th Cir. 1999) (internal citations omitted). "What is required is evidence of conduct or statements that both reflect directly the alleged

discriminatory attitude and that bear directly on the contested employment decision." *Ibid*.

There can be no better direct evidence than the employer's admissions of discriminatory behavior. "A single discriminatory comment by a plaintiff's supervisor or decisionmaker is sufficient to preclude summary judgment for the employer" and when "the person who exhibited discriminatory animus influenced or participated in the decisionmaking process, a reasonable factfinder could conclude that the animus affected the employment decision." *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1039-1040 (9th Cir. 2005).

In deposition testimony, respondent Alfred stated that she reprimands Asians and Caucasians. Her claim of race having no bearing on her reprimands is contradicted by her testimony of only "talking to" African-Americans. In deposition testimony, her direct supervisor, respondent German declared that it was "not unusual" for respondent Alfred to treat petitioner differently and negatively because petitioner is Caucasian and Jewish.

The District Court erred in failing to even consider this direct evidence and in applying *McDonnell Douglas* instead of *Trans World*. Ignoring petitioner's summary judgment pleadings and citing only to the amended complaint, the District Court declared that petitioner had offered "no particular support" and no "concrete examples" of having been discriminated against because she is Caucasian and

Jewish.[20] (App. 16a.) Petitioner had provided the lower court with excerpts of deposition testimony of respondents Alfred and German, and official documents of the municipal respondents evidencing promotion of Christianity by, and existence of discrimination in, the school. This was direct evidence of discrimination and *McDonnell Douglas* was not applicable.[21]

Preventing employment discrimination is of national interest. Once one local government and entity are granted permission to openly discriminate in an employer capacity, all local governments and entities are granted authority to do the same. Of equal importance is that once government and government entities are allowed to discriminate against their employees, how soon before the authority to discriminate extends to their governmental capacity?

B. The Second Circuit's approach to discrimination cases radically departs from all other Circuits and this Court

In its affirmance, the Second Circuit relied upon *Maraschiello v. City of Buffalo Police Department* 709 F.3d 87 (2d Cir. 2013) and *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992). But, neither is applicable. In *Maraschiello*, the therein plaintiff's counsel only argued circumstantial, not direct,

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[20] The lower court contradicts its own claim by acknowledging that petitioner did recount that while sitting shiva, the respondents disturbed her concerning work related matters and accused her of highly illegal behavior. (App. 16a.)

[21] Even if *McDonnell Douglas* was applicable, the District Court erred in declaring that petitioner did not meet the test's prongs.

evidence. *Tyler* involved a mixed-motive situation whereas this case does not.[22] More importantly, *Tyler* diverges from other Circuits as it announces that the Second Circuit will not comply with this Court's rulings.

Trans World continues to be relied upon by Circuits across the country regarding the inapplicability of *McDonnell Douglas* when direct evidence of discrimination exists. The Circuits all agree that summary judgment is precluded for the employer when direct evidence of discrimination exists – except the Second Circuit. The Second Circuit has declared that it will ignore *Trans World* in all discrimination cases and will always apply *McDonnell Douglas*.

In *Tyler*, the Second Circuit listed discrimination cases from across the country and indicated whether or not direct evidence was found in each case. But, in the preceding paragraph, the Second Circuit declared that it will never find direct evidence in a discrimination case because "direct evidence of intent cannot exist, at least in the sense of evidence which, if believed, would establish the ultimate issue of intent to discriminate." *Tyler* at 1183 (internal quotations and citation omitted).

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[22] Petitioner was terminated on the basis of allegations contained in three letters of reprimand. Each contained untruths and was the subject of separate libel causes of action. Petitioner's evidence proved the untruthfulness of the reprimand accusations thereby demonstrating that the untruths were intentional so as to disguise the actual discriminatory reason for termination.

By declaring that it will never recognize existence of direct evidence, the Second Circuit has indicated that it approaches discrimination cases with a preconceived bias. By such declaration, the Second Circuit has indicated that it will not be an impartial adjudicator of discrimination claims; will not recognize an employer's admissions of discrimination as direct evidence; and that it does not need to comply with Supreme Court rulings.

VI. A COURT CANNOT BOTH RULE AND NOT RULE ON THE CAUSES OF ACTION

"Any lawyer knows that §1983 claims do not occur in splendid isolation; they are usually joined with claims under state tort or contract law arising out of the same facts." *Wilson v. Garcia*, 471 U.S. 261, 285 (1985).

In *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), this Court declared that a federal court with jurisdiction should hear all claims, both federal and state, which arise out of the same nucleus of operative fact such that all claims would be expected to be tried in a single case. This was reconfirmed in *Finley v. United States*, 490 U.S. 545 (1989). As explained by Justice Kennedy, "Congress intended to authorize courts to exercise their full Article III power to dispose of an 'entire action before the court [which] comprises but one constitutional "case."'" *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 553 (2005) (internal citation omitted).

Petitioner's state tort claims were directly related to the federal claims.[23] Yet, the District Court both ruled, and did not rule, on these claims. The District Court explained why it was dismissing the defamation claims[24] (App. 20a-21a) then contradicted itself by declaring that it was not exercising pendent jurisdiction over the state tort claims. (App. 24a.)

Further confusing matters is that the respondents sought summary judgment over all causes of action except one. The District Court granted the motion in the first sentence of its Conclusion, then reversed itself by stating that it was not exercising its pendent jurisdiction.[25] (App. 24a.)

Even more confusing is the lower court statement that it "declines to exercise jurisdiction over Plaintiff's civil and state tort claims." (App. 24a.) By this statement, the District Court implies that it granted summary judgment to the respondents because the Court lacks interest in non-criminal cases. This is, at the very least, judicial error. The Second Circuit ignored petitioner's pleadings regarding these statements by the District Court. Instead, without discussion, the Circuit Court affirmed what it called a "comprehensive and clear" District Court decision. (App. 7a.)

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[23] Several also constitute 42 U.S.C. §1981(a) and (b) claims.

[24] All four defamation claims were dismissed on the basis of partially addressing one libel claim in a manner inapplicable to the other claims.

[25] This denied petitioner's unopposed summary judgment cross-motion on that one cause of action.

VII. RULES MUST APPLY EQUALLY TO ALL

When only one party is required to comply with rules, the court openly demonstrates bias.

A. The Federal Rules of Evidence

The Federal Rules of Evidence apply to civil proceedings before district courts and circuit courts of appeal. Fed.R.Evid. 101, 1101. All parties must comply with these rules to get evidence admitted. Evidence not meeting the requirements will not be admitted or considered.

In support of their summary judgment motion, the respondents submitted a declaration which attempted to authenticate the annexed exhibits. The declaration did not certify that the documents were "made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters" as required by then existing Rule 902(11)(a).[26] Without that required certification, the exhibits were unauthenticated and inadmissible.

Never-the-less, the District Court allowed the documents into evidence and the Second Circuit cited to this evidence as justification for its decision. (App. 6a.) By doing so, the lower courts demonstrated that all who come before them are equal – except some are more equal than others. By allowing some parties to ignore the Federal Rules, the lower courts did not treat the parties equally and violated the equal

[26] Current Rule 902 requires that certification as set forth in Rule 803(6)(a).

protection guarantees of the Fifth and Fourteenth Amendments.

B. The Second Circuit's Individual Rules

Initial counsel for the appellees was NYC Corporation Counsel Michael Cardozo. He was replaced as counsel of record when Scott Shorr filed a notice of substitution of counsel. By such filing, the Office of Corporation Counsel continued to be the firm representing the appellees but counsel of record was Shorr. No other notices of appearance were filed by the appellees.

Per the Second Circuit's Local Rule 12.3, other than counsel of record, any attorney appearing in any capacity on behalf of a party "must file the Notice of Appearance Form for Substitute, Additional, or Amicus Counsel at the time the attorney enters the case."

When filing their brief, the appellees violated Local Rule 12.3. Firstly, Cardozo was listed as attorney of record. Having been substituted for, pleadings could not be filed by him or under his name. Francis Caputo was also listed on the brief as appearing for the appellees. Yet Caputo never filed a notice of appearance.

This Court has declared that the terms "shall," "will," and "must" are "of an unmistakably mandatory character." *Hewitt v. Helms*, 459 U.S. 460, 471-472 (1983). Thus the only way to read Local Rule 12.3(b) is that filing the Notice of Appearance of Additional Counsel form upon entry into the case is

mandatory. None-the-less, the Second Circuit allowed Caputo to appear without having filed the mandatory notice of appearance.[27]

Although Local Rule 12.3(c) provides the court with discretion to not hear a party who fails to comply with parts (a) or (b), existence of a mandatory requirement is worthless without consequences for non-compliance. Non-compliance with a mandatory requirement should automatically bar non-complying parties from being heard.

Just like in the District Court, the Circuit Court allowed the government to violate the rules without consequences and then ruled in favor of the rule-breaker. To allow the government to break the rules while requiring its opponents to comply with the rules is more evidence of an existing bias infecting the Second Circuit and its lower courts. Ignoring the flagrant violations of rules by the respondents was neither error nor an abuse of discretion. Rather, they were outright violations of the maxim that "No man in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. 196, 220 (1882).

CONCLUSION

Allowing the government and its officials to trample on rules and laws without fear of consequences is a return to the days when the king was above the law and could do no wrong. This concept was rejected during the revolution and even

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[27] The mandatory notice filing differentiates cases such as *In re Jacobson*, 402 B.R. 359 (Bankr. W.D. Wash. 2009) and *In re Stauffer*, 378 B.R. 333 (Bankr. D. Utah 2006).

the President is not above the law. *Nevada v. Hall*, 440 U.S. 410 (1979); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). To now place a city government, a government entity, and their employees above the law is to reverse everything upon which this country was founded.

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of May, two thousand thirteen.

PRESENT:

JOSÉ A. CABRANES,

BARRINGTON D. PARKER,

RAYMOND J. LOHIER, JR.,

Circuit Judges.

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LILLIAN FISCHER,

Plaintiff-Appellant,

-v.- No. 12-3570-cv

CITY OF NEW YORK, PANEL FOR EDUCATIONAL POLICY, AKA Department of Education of the City of New York, AKA Panel for Educational Policy of the Department of Education, AKA Panel for Educational Policy of the New York City Department of Education, AKA Panel for Educational Policy of the Department of Education of the City of New York, FKA Board of Education of the City School District of The City of New York, FKA Board of Education of the City of New York, AKA New York City Department of Education, AKA Panel for Educational Policy of the City School District of the City of New York, LINDA ALFRED, individually and in her official capacity, ROZ GERMAN, individually and in her official capacity, LYBI GITTENS, individually and in her official capacity, PEGGY LAWRENCE, individually and in her official capacity, JOSEPH BELESI, individually and in his official capacity, BONNIE LABOY, in her official capacity,

Defendants-Appellees.[*]

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[*] The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

FOR PLAINTIFF-APPELLANT

Benjamin J. Fischer (Luis A. Pagan, *of counsel*), Law Office of Benjamin J. Fischer, PLLC, Bayside, NY.

FOR DEFENDANTS-APPELLEES:

Francis F. Caputo (Scott Shorr, *of counsel*), *for* Michael A. Cardozo, Corporation Counsel of the City of New York, New York, NY.

Appeal from the judgment of the United States District Court for the Eastern District of New York, entered August 6, 2012 (Sterling Johnson, Jr., *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the August 6, 2012 judgment of the District Court be **AFFIRMED**.

Plaintiff Lillian Fischer appeals from an order of the District Court granting summary judgment to defendants the City of New York, the Panel for Educational Policy, Linda Alfred, Roz German, Lybi Gittens, Peggy Lawrence, Joseph Belesi, and Bonnie Laboy (jointly, "New York"). We review an order granting summary judgment *de novo* and "resolv[e] all ambiguities and draw[ ] all permissible factual inferences in favor of the party against whom summary judgment is sought." *Burg v. Gosselin*, 591 F.3d 95, 97 (2d Cir. 2010) (quoting *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009)). "A defendant is

entitled to summary judgment where the plaintiff has failed to come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on an essential element of a claim on which the plaintiffs bear the burden of proof." *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 256 (2d Cir. 2013) (quotation marks and alterations omitted).We assume familiarity with the underlying facts and procedural history of this case.

BACKGROUND

Fundamentally, this is an employment discrimination suit. Until she was fired in June of 2007, Fischer, who is white and Jewish, worked as a probationary secretary at the Frederick Douglass Academy VI High School ("FDA VI") in Far Rockaway, Queens. She claims, in substance, that (1) she was subjected to a hostile work environment and fired on account of her race and religion; (2) she suffered discrimination on the basis of her race and religion when her supervisor called her while she was "sitting shiva"[1] for her recently deceased mother; (3) her desk was illegally searched for a missing file; (4) she was libeled in her performance reviews; and (5) she was denied various protections required under state law and the Constitution during her post-termination process. On the basis of these allegations, Fischer brought suit pursuant to 42 U.S.C. §§1981 and 1983 "for violations of [her] First, Fourth, Fifth, Sixth, and Fourteenth Amendment

[1] In Jewish custom, "sitting shiva" refers to observance of the week-long mourning period following the death of a first-degree relative. *See* Sara E. Karesh & Mitchell M. Hurvitz, Encyclopedia of Judaism 473-74 (2006).

rights and protections and for tortuous actions taken against [her] including violation of city, state and federal laws." Am. Compl. ¶1. On July 31, 2012, the District Court filed a memorandum and order awarding summary judgment to New York on all claims, and dismissing Fischer's suit. Judgment was entered on August 6, 2012.

DISCUSSION

Fischer's chief arguments on appeal are that (1) the District Court should not have applied the burden-shifting framework set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to her discrimination claims because she provided direct evidence of discrimination, *see Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 93-94 (2d Cir. 2013); and (2) the District Court should not have granted summary judgment because whether Fischer was a tenured secretary rather than a probationary one, and therefore entitled to greater pre-termination process, was a material fact in genuine dispute.

Fischer's first claim, that she has identified direct evidence of invidious discrimination, finds no support in the record. For example, Fischer refers us to the deposition of Linda Alfred, the principal of FDA VI, who hired Fischer. In that deposition, Alfred stated that race "had nothing to do with" her decisions to reprimand or not reprimand employees and that, by way of example, she has "reprimanded Caucasian teachers and Asian teachers. It doesn't have anything to do with it." Joint App'x 523-24. Fischer attempts to twist this denial that race enters into Alfred's

decision-making into an admission that Alfred only reprimands white and Asian teachers. We are not convinced. Neither this statement, nor any other we have found in the record, plausibly provides direct evidence from which a reasonable juror could find that New York discriminated against Fischer on the basis of her race or religion. The District Court therefore correctly evaluated Fischer's claims under the *McDonnell Douglas* framework. *See Maraschiello*, 709 F.3d at 93-94; *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2d Cir. 1992).

Fischer's second claim, that she has raised a genuinely disputed issue of material fact as to her status as probationary or tenured, similarly lacks evidentiary support. Fischer herself stated in her deposition that she understood when she was hired that she was subject to a three-year probationary period. Joint App'x 229. Indeed, her annual performance reviews for 2005, 2006, and 2007 each were labeled, in bold font with all capital letters, "annual professional performance review and report on *probationary* service of school secretary." *Id.* at 305-08 (emphases altered). Fischer's understanding was in perfect compliance with New York law, which provides for three-year probationary periods for school secretaries in cities, like New York, which have over 1,000,000 inhabitants. *See* N.Y. Educ. Law §2573(1)(a), (10)(a) (McKinney 2009). It was also in compliance with her collective bargaining agreement. *See* Joint App'x 316. In short, Fischer's assertion in her brief that she was not a probationary secretary does not itself create a genuine dispute as to this fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (explaining that, for a plaintiff to survive a summary judgment motion, "there must be evidence

on which the jury could reasonably find for the plaintiff"). No reasonable juror could find that she was not a probationary secretary.

Fischer raises a litany of other arguments, each of which was addressed ably in the District Court's comprehensive and clear opinion. Therefore, substantially for the reasons stated in the District Court's July 31, 2012 memorandum and order, we reject Fischer's remaining arguments as meritless.

CONCLUSION

We have reviewed the record and the parties' arguments on appeal. For the reasons set out above, we **AFFIRM** the August 6, 2012 judgment of the District Court.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk of Court
[Seal of the Second Circuit]

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
LILLIAN FISCHER,
Plaintiff,

-against-

MEMORANDUM AND ORDER
08-CV-1009 (SJ) (SMG)

THE CITY OF NEW YORK, et al.,
Defendants.
----------x
APPEARANCES

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JOHNSON, Senior District Judge:

Defendants The City of New York, The Panel for Educational Policy and related city entities (collectively, "Defendants") have moved this Court for summary judgment pursuant to Rule 56.1 of the Federal Rules of Civil Procedure. Plaintiff Lillian Fischer ("Plaintiff") has cross-moved for summary judgment. Based upon the submissions of the parties, Defendants' motion is GRANTED and Plaintiff's cross-motion is DENIED.

I. BACKGROUND

Plaintiff brought this action in 2008, pursuant to 42 U.S.C. §§ 1981 and 1983, alleging that Defendants violated her constitutional rights under the First, Fourth, Fifth, Sixth and Fourteenths [sic] Amendments to the United States Constitution and "various other city, state and federal laws."

Plaintiff filed her complaint ("Complaint") on March 11, 2008. The Complaint is two hundred and sixty-seven (267) pages in length and includes eighteen causes of action against eight defendants. The Court found that the Complaint was too long, and undecipherable, in violation of Fed. R. Civ. Pro. 8(a)(2) ("Rule 8"). While the Second Circuit held in Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988) that *pro se* litigants' complaints are to be treated liberally, Plaintiff is represented by counsel. The Court found, accordingly, that the prolixity of the Complaint was an inexcusable, undue burden upon the Court and Defendants. The Court dismissed the Complaint without prejudice, with leave to re-file an amended Complaint consisting of a "short and plain statement" of the claim, as required by Rule 8.

On January 7, 2009, Plaintiff filed an amended complaint ("Amended Complaint"), which is still incredibly long at seventy-five (75) pages. However, from the Amended Complaint, the Court has been able to glean that Plaintiff alleges that because she is Caucasian and Jewish, she was targeted for termination by the principal of Frederick Douglass Academy ("FDA VI"), who is African-American and Christian. (See Am. Comp., ¶¶ 54, 58, 60, 63-64.) Plaintiff also claims that she was subjected to a hostile work environment, subjected to an unreasonable search and seizure, deprived of due process, and denied the right to counsel, in violation of her constitutional rights. (See Am. Comp., ¶¶ 1, 83, 176, 178, 180.)

In June 2007, Plaintiff was terminated from her employment as a probationary secretary at FDA VI, before completing her 3-year probationary period. Specifically, Plaintiff alleges that she was forced to perform duties that were not hers to perform, and that she was constantly harassed, intimidated and berated by her supervisor. (See Am. Comp., ¶¶ 50-51.) According to Plaintiff, this harassment occurred because she is Caucasian and Jewish, and that she was targeted for termination because the supervisor believed that the African continent was the school's "motherland". (See Am. Comp., ¶ [63.) Plaintiff further alleges that her supervisor called her and harassed her at home when she was *sitting shiva,* or mourning the death of her mother pursuant to Jewish ritual in December 2006. (See Am. Comp., ¶¶ 55-60.) While she was *sitting shiva,* her supervisors conducted a search of the school's administrative office in search of the missing file of a former teacher. This search was initiated at the request of two Local Instructional Superintendents, who traveled to FDA VI from headquarters to find the missing file. During the course of that broad search, they searched Plaintiff's work desk. While searching Plaintiff's desk. Plaintiff's supervisors found multiple students' files and records, and other official legal documents which should have been stored or sent elsewhere. Plaintiff contends that this search was unlawful. (See Am. Comp., ¶¶ 73-79.) Plaintiff further claims that she was defamed and subjected to libelous work performance reviews. (See Am. Comp., ¶ 61.) Lastly, Plaintiff submits that she was denied due process and the right to counsel apropos her post-termination hearings, as she was allegedly directed to attend the wrong type of hearing and was not allowed to be

accompanied by her attorney during the hearing. (See Am. Comp., ¶ 162.)

Following discovery, Defendants moved the Court for summary judgment against Plaintiffs, [sic] on October 17, 2011. Plaintiff cross-moved for summary judgment against Defendants, on the same date.

II. DISCUSSION

A. Summary Judgment Standard

The Court may grant summary judgment to a moving party when the pleadings and supporting evidence show "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c). A party moving for summary judgment has the burden of establishing that there exists no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Ford v. Reynolds, 316 F.3d 351, 354 (2d Cir. 2003). Material facts are those that may affect the outcome of the case. See Anderson, 477 U.S. at 248. An issue of fact is considered "genuine" when a reasonable finder of fact could render a verdict in favor of the non-moving party. Id. In considering a summary judgment motion, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences

against the moving party." Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986) (citing Anderson, 477 U.S. at 248). If the Court recognizes any material issues of fact, summary judgment is improper, and the motion must be denied. See Eastway Constr. Corp. v. City of New York, 762 F.2d 243,249 (2d Cir. 1985).

If the moving party discharges its burden of proof under Rule 56(c), the nonmoving party must then "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party opposing a properly supported motion for summary judgment "may not rest upon mere allegations or denials of his pleading." Anderson, 477 U.S. at 256. Indeed, "the mere existence of some alleged factual dispute between the parties" alone will not defeat a properly supported motion for summary judgment. Id. at 247-48. Rather, enough evidence must favor the nonmoving party's case such that a jury could return a verdict in its favor. Id. at 248; see also Gallo v. Prudential Residential Servs., Ltd., 22 F.3d 1219, 1224 (2d Cir. 1999) ("When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper.").

Here, Defendants must show that no genuine issue as to any material fact exists in order to be awarded summary judgment. This Court must "resolve[ ] all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of

the party opposing summary judgment." Brown v. Henderson, 257 F.3d 246, 251 (2d Cir. 2001). Summary judgment is not favored in discrimination cases, and is only awarded "sparingly". Id. The belief by the Court that Plaintiff would be unable to meet her burden at trial alone does not justify an award of summary judgment to the Defendants. See Stem v. Trustees of Columbia Univ., 131 F.3d 114 (2d Cir. 1998).

B. Plaintiffs 42 U.S.C. §§ 1981 and 1983 Discrimination Claims Fail

Plaintiff alleges that she was discriminated against because she is Caucasian and Jewish, in violation of 42 U.S.C. §§ 1981 and 1983. See Cunningham v. New York State Dep't of Labor, 326 F. App'x 617, 620 (2d Cir. 2009).

> To survive a summary judgment motion on discrimination claims pursuant to...section 1981, the plaintiff must establish a prima facie case of discrimination under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973). To do so, [s]he must show: (1) that [s]he belongs to a protected class, (2) that [her] job performance was satisfactory, (3) that [s]he suffered adverse employment action, and (4) that the action occurred under conditions giving

> rise to an inference of discrimination.

Paulino v. N.Y. Printing Pressman's Union, Local Two, 301 Fed. Appx. 34, 37 (2d Cir. N.Y. 2008) (internal citations omitted). The same four-prong analysis is used in adjudicating § 1983 employment discrimination claims. See McKenna v. Pacific Rail Service, 32 F.3d 820, 826 n.3 (3d Cir. 1994).

It is undisputed that Plaintiff is a member of a protected class. It is also undisputed that Plaintiff suffered adverse employment action; these two prongs are satisfied. Thus, at issue is whether or not Plaintiff has demonstrated that: her work performance was satisfactory; and that her termination occurred under conditions giving rise to an inference of discrimination. Assuming that Plaintiff demonstrates a *prima facie* case, based on these four McDonnell Douglas factors, the burden of production would shift to Defendants to "articulate a legitimate, clear, specific and non-discriminatory reason" for Plaintiff's termination. Holt v. KMI-Continental, Inc., 95 F.3d 123, 129 (2d Cir. 1996). "If the defendant satisfies this burden of production, the plaintiff has the ultimate burden to prove that the employer's reason was merely a pretext for discrimination." See id. Lastly, in order to survive a motion for summary judgment, Plaintiff must offer "concrete particulars" in order to substantiate her claims. Meiri v. Dacon, 759 F.2d 989 (2d Cir. 1985), cert denied, 474 U.S. 829 (1985).

Defendant Linda Alfred ("Alfred") interviewed and hired Plaintiffs [sic] in September 2004, and

found Plaintiffs performance satisfactory during the 2004-05 and 2005-06 academic terms. However, Plaintiff's performance deteriorated, beginning in the fall of 2006. For example, while Plaintiff was out of the office in December 2006, her supervisors found various missing files and uncompleted tasks in Plaintiff s work desk during a search for a teacher's file. Among the files discovered were, inter alia, immunization records and transcripts of students. Plaintiff also failed to perform duties related to the "Automate the Schools" database and left various other tasks uncompleted. Subsequent to finding the files in Plaintiff's desk, Alfred advised Plaintiff that her performance at work was wanting, via letter, on two occasions in February 2007. In the letters, Alfred warned Plaintiff that continued poor performance on the job would result in termination. Alfred terminated Plaintiffs employment in June 2007. Plaintiff herself concedes that she did not satisfactorily perform her duties. (See Am. Compl.,¶ 16.) Therefore, Plaintiff cannot satisfy the third prong.

As to the fourth prong, Plaintiff asserts that she was discriminated against and eventually fired because she is Caucasian and Jewish, but she offers no particular support for that assertion. While she alleges that she was harassed and belittled at work, she offers no concrete examples of a pattern of harassment nor specifies an instance when such alleged harassment was ever based upon her ethnicity or religious beliefs. (See e.g., Am. Comp., ¶¶ 51-52.) Plaintiff recounts one occasion when Defendant Alfred accused her of "highly illegal behavior" pertaining to her work performance and the

missing files found in Plaintiff's desk while Plaintiff was *sitting shiva.* (Am. Comp., ¶ 145.) However, disputes over the quality of Plaintiffs work performance are not to be construed as discrimination. See generally Taylor v. Polygram Records, 94-7689, 1999 U.S. Dist. LEXIS 2583, at *27-29 (S.D.N.Y. Mar. 8, 1999) (finding that an employee's dissatisfaction with her work performance evaluations combined with conclusory allegations of discrimination does not establish a *prima facie* case of discrimination).

That Plaintiff and Alfred are of different races and religions does not itself mean that the Defendant discriminated against Plaintiff *because of her* race and religion. See Richardson v. Newburg, 984 F. Supp. 735, 744 (S.D.N.Y. 1997). Furthermore, the Defendant who ordered the aforementioned search of Plaintiff s desk is also a Jewish, Caucasian woman, thereby undermining Plaintiff s already unsupported speculation. See Connell v. Consolidated Edison Co., 109 F. Supp. 2d 202, 210 (S.D.N.Y. 2000) (holding that the plaintiff failed to demonstrate discrimination where the plaintiff and the alleged discriminator were of the same protected class). Plaintiff fails to satisfy the fourth prong.

Moreover, other factors exist which undermine Plaintiffs claim of discrimination. See Vaughn v. City of New York, No. 06-6547, 2010 U.S. Dist. LEXIS 50791, at *27 (E.D.N.Y. May 24, 2010) (citations omitted). "[W)hen the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious

motivation that would be inconsistent with the decision to hire. This is especially so when the firing has occurred only a short time after the hiring." Grady v. Affiliated Cent., Inc., 130 F.3d 553, 560 (2d Cir. 1997). Furthermore, "[i]t is difficult to impute bias against a plaintiff in a protected class where the person making the adverse employment decision also made a recent favorable employment decision regarding the plaintiff." Chuang v. T.W. Wang Inc., 647 F. Supp. 2d 221, 233 (E.D.N.Y. Jan. 15, 2009). Alfred fired Plaintiff less than three years after making a favorable employment decision by hiring her, during which period Alfred both commended Plaintiff s satisfactory work performance and, later, advised Plaintiff of her subsequent unsatisfactory performance. See Marullo v. Ellerbe Becket, Inc., No.95-4561, 2001U.S. Dist. LEXIS 3826, at*17 (E.D.N.Y., Mar. 16, 2001) ("something akin to same actor inference" applies when where termination occurred more than two years after hiring).

Plaintiff alleges that she was treated differently from another secretary of another race and religion. In order to demonstrate disparate treatment between herself and the other secretary resulting because of her race and religion, Plaintiff must demonstrate that she and the other secretary were similarly situated "in all material respects." Shumway v. UPS, 118 F.3d 60, 64 (2d Cir. N.Y. 1997) (citing Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992)). Plaintiff failed to so demonstrate, as the other secretary's work performance was not unsatisfactory.

Plaintiff s "attempt to rebut Defendants' proffered explanation by parsing the details of selected incidents, generally disputing her supervisors' assessments, and providing her own contrary appraisal of her work, is unavailing." Taylor, 1999 U.S. Dist. LEXIS at *26 (S.D.N.Y. Mar. 8,1999). Plaintiff has failed to offer any evidence that would permit a rational fact-finder to determine that she was being discriminated against by Defendants, or that her termination was based on anything other than her unsatisfactory work performance. Plaintiff has not established a *prima facie* case of discrimination; her claim must be dismissed. Moreover, she has not rebutted Defendants' legitimate, non-discriminatory reason for her termination. Similarly, Plaintiff's hostile work environment claim fails and must also be dismissed, as Plaintiff has not demonstrated a nexus between Defendant's alleged conduct and Plaintiff s race and religion.

C. Plaintiffs First Amendment and Defamation Claims Fail

1. First Amendment Claim

Plaintiff alleges that she was defamed by Alfred, and unsuccessfully attempts to attach the alleged defamation to a violation of her own First Amendment rights. Specifically, Plaintiff alleges that Alfred slandered her in a work meeting, and also placed a libelous letter in plaintiffs personnel file. In order to establish a First Amendment claim under federal law, Plaintiff must first allege that *she*

engaged in protected speech or activity. Plaintiff does not allege that she was engaged in any protected form of activity or speech; rather, she argues that she was injured by *Defendant Alfred's* speech. Defendant's speech does not affect Plaintiff's right to engaged in protected speech, and Plaintiff does not demonstrate that Defendant's expressions of dissatisfaction with Plaintiff's work performance in any way violated or suppressed Plaintiff s right to speech or protected activity. The First Amendment does not cover Plaintiff's defamation claim, and Plaintiff's First Amendment claim fails.

2. Defamation Claim Under New York Law

Under New York State Law, a cause of action accrues when the defamatory statement is published or uttered. See Ferber v. Citicorp Mortgage, Inc., No. 94-3038, 1996 U.S. Dist. LEXIS 1210, at *7 (S.D.N.Y. Feb. 6, 1996). A claim for defamation must be brought within one year of the publication or uttering. See N.Y. C.P.L.R. §215(3). As Plaintiff filed her complaint on March 11, 2008, her claims that she was defamed in January and February of 2007 are therefore time-barred. (See Dkt. No. 1).

Even if the statute of limitations had not already run on the state law defamation claims, Plaintiff has failed to sufficiently establish a claim of defamation. Plaintiff must establish: "(1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) published to a third party by the defendant; and (4) resulting in injury to the plaintiff." Nicholls v. Brookdale Univ. Hosp. Med. Ct.,

No. 03-6233, 2044 U.S. Dist. LEXIS 12816, at *28 (E.D.N.Y. Jul. 9, 2004) (quoting Kforce, Inc. v. Alden Pers., 288 F. Supp. 2d 513, 516 (S.D.N.Y. 2003)). The Second Circuit has held that allegations of professional incompetence do not create injury. See O'Neill v. Auburn, 23 F.3d 685, 690-95 (2d Cir. 1995); Aronson v. Wiersma, 65 N.Y.2d 592, 594, 483 N.E.2d 1138, 1139 (N.Y. 1992). Further, Plaintiff has not established that any allegedly defamatory statements were published to a third party. The fact that her disciplinary letters were placed in a Department of Education file does not constitute publication to a third party. Moreover, Plaintiff fails to specify the alleged defamatory statements. The statute of limitations notwithstanding, Plaintiff has not established a prima facie case of defamation.

D. Plaintiffs Fourth Amendment Claim Fails

Plaintiff claims that her rights under the Fourth Amendment were violated when her supervisors searched her work desk for missing files. The Supreme Court has held that the search of an employee's office by a supervisor is generally "'justified at its inception' when...the search is necessary for a non-investigatory work-related purpose such as to retrieve a needed file." O'Connor v. Ortega, 480 U.S. 709, 725-26 (1987). The Second Circuit has held that "government offices are [] provided to employees ... for the sole purpose of facilitating the work of an agency. Thus, the government interest in the efficient and proper operation of the workplace will often require intrusions on employee privacy." Shaul v. Cherry

Valley-Springfield Cent. Sch. Dist., 363 F.3d 177, 183 (2d Cir. 2004) (internal quotations omitted).

Therefore, Plaintiff did not have a reasonable expectation of privacy in her work desk, and the search for the missing personnel file was justified. That Plaintiff's supervisors uncovered other unfinished tasks and assignments in Plaintiff s desk does not move the search beyond the bounds allowed by the Fourth Amendment. Plaintiff alleges that the search was motivated by racial and religious animus on the part of Alfred, also by an attempt to retaliate against Plaintiff for having filed a grievance against Alfred, but Plaintiff offers no evidence to support those claims. Accordingly, Plaintiffs Fourth Amendment claim fails.

E. Plaintiffs Due Process Claims Fails

Plaintiff also claims that her due process rights under the Fifth and Fourteenth Amendments were violated when her employment was terminated. At issue is whether the Plaintiff had a property interest with which Defendants interfered and whether or not there were constitutionally sufficient procedures "attendant upon that deprivation." Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989).

Under New York state law, probationary employees have no property rights in their employment and they may be discharged "without a hearing and without any stated specific reason." Meyers v. City of New York, 208 A.D.2d 258,

262, 622 N.Y.S.2d 529 (N.Y. App. Div. 1995). Plaintiff had no property rights in her probationary employment, and therefore had no right to a pre-termination hearing. This fact notwithstanding, she was granted a Chancellor's Committee post-termination review. See Finley v. Giacobbe, 79 F.3d 1285, 1297 (2d Cir. 1997).

Additionally, Plaintiff had the opportunity to avail herself of a post-termination state court proceeding, pursuant to Article 78 of the Civil Law and Practice Rules. See Giglio v. Dunn, 732 F.2d 1133 (2d Cir. 1984). Through such a proceeding, Plaintiff would have had the opportunity to challenger [sic] her termination as a probationary employee, but she did not avail herself of this opportunity. The availability of Article 78 proceedings satisfies the Fifth and Fourteenth Amendments, whether or not a Plaintiff avails herself of such a proceeding. See Zinermon v. Burch, 494 U.S. 113, 132, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990); Davis v. City of New York, No. 06-3323, 2007 U.S. Dist. LEXIS 78031, at *5 (E.D.N.Y. Sep. 28, 2007). Given that Plaintiff was not entitled to a pre-deprivation proceeding, was afforded a post-termination review, and chose not to pursue an Article 78 proceeding, she cannot claim that she was deprived of due process under the Fifth or Fourteenth Amendments. Her Due Process claims fail.

F. Plaintiffs Sixth Amendment Claim Fails

Plaintiff alleges that her right to counsel under the Sixth Amendment was violated because her attorney was not allowed to accompany her to her

Article 78 proceeding. There is no right to counsel at a post-termination review hearing, as the Sixth Amendment only guarantees counsel for criminal and quasi-criminal proceedings, not civil actions. See U.S. Const. Amend VI; see also Madera v. Board of Education, 386 F.2d 778, 780 ("the [proceeding] is not a criminal proceeding; thus, the counsel provision of the Sixth Amendment and the cases thereunder are inapplicable."). Plaintiffs claim must be dismissed.

III. CONCLUSION

As there exists no genuine issue as to material fact, and as Plaintiff has failed to establish any of her claims, Defendants are entitled to a judgment from the Court. Defendants' motion for summary judgment is GRANTED. Conversely, Plaintiffs cross-motion for judgment is DENIED. Additionally, the Court declines to exercise jurisdiction over Plaintiffs civil and state tort claims, while also noting that Plaintiff has failed to allege any federal torts committed against her. The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Brooklyn, New York
July 30, 2012

/s/ (ARR)
Sterling Johnson, Jr.,
U.S.D.J.

APPENDIX C

Statutory and Constitutional Provisions Involved

The First Amendment, in pertinent part, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.

* * * * *

The Fourth Amendment, in pertinent part, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

* * * * *

The Fifth Amendment, in pertinent part, provides:

No person shall be . . . deprived of life, liberty, or property, without due process of law.

* * * * *

The Sixth Amendment, in pertinent part, provides:

In all criminal prosecutions, the accused shall have the Assistance of Counsel for his defence.

* * * * *

The Fourteenth Amendment, in pertinent part, provides:

Section 1.

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

* * * * *

42 USC §1981, in pertinent part, provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against . . . impairment under color of State law.

* * * * *

42 USC §1983, in pertinent part, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.