No.

IN THE

SUPREME COURT OF THE UNITED STATES

YAN PING XU

Petitioner,

v.

NEW YORK CITY s/h/a
THE NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE
DR. JANE R. ZUCKER, DENNIS J. KING,
BRENDA M. MCINTYRE

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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Dated: 4 July 2018

Petitioner, Pro Se

QUESTIONS PRESENTED

1. Whether no remedy for the former municipal employee injured directly from her supervisors, federal defendants clothed with municipal authority power, is equal justice under law.
2. Whether the dismissal of the retaliation claim against all defendants was properly affirmed.

LIST OF PARTIES

The petitioner in this case is Yan Ping Xu, M.S. pro se. The respondents are the New York City, the New York City Department of Health and Mental Hygiene, Dr. Jane R. Zucker, Dennis J. King, Brenda M. McIntyre.

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OPINIONS AND ORDERS BELOW

The summary order of the Second Circuit for No. 16-4079 is published as 700 Fed. Appx. 62 and is also available as 2017 U.S. App. LEXIS 21875 (App. B). The final order of the Southern District of New York for No. 08 Civ. 11339 in September 2016 is available as 2016 WL 8254781. (App. C).

JURISDICTION

The summary order of the Second Circuit was entered on 2 November 2017 in case No. 16 - 4079. A timely petition for rehearing and rehearing en banc was denied by the Second Circuit on 2 February 2018. (App. A).

On 27 March 2018 for application No. 17A1039 Justice Ginsburg granted petitioner extension of time to file this petition to and including 9 July 2018.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

CONSTITUTIONS AND STATUTES INVOLVED

The First, Fifth Amendments, 42 U. S. C. § 2000e et seq., 42 U. S. C § 215 (b), New York State Constitution Art. I § 8. (App. D).

STATEMENT OF THE CASE

A. Backgrounds

Petitioner, Xu, M.S. a pro se plaintiff – appellant, in 2008 at age 57, a woman and U.S. citizen of Chinese national origin, former City Research Scientist (CRS), Level I, for the Vaccine for Children Program (VFC), a federally funded program that has been jointly administered by the New York City

Department of Health and Mental Hygiene (DOHMH) and the Centers for Disease Control & Prevention (CDC), brought this action on 30 December 2008, pursuant to the First and Fifth Amendments of the U. S. Constitution, Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e et. seq. ("Title VII"), and other related the U.S. and New York State Constitutions as well as NYSHRL, and NYCHRL, etc. against her former employer and its authorities including her former supervisors Zucker and King, federal employees on "detail" at the municipality pursuant to 42 U. S. C. § 215 (b) acting as the Assistant Commissioner of DOHMH and the Deputy Director of Bureau of Immunization (BOI), respectively, in addition to McIntyre, the Assistant Commissioner for DOHMH, seeking appropriate relief.

Xu was summarily terminated after her probationary period ended and before the solely negative performance evaluation was presented to her. She "produces copies of emails and notes taken over her months of work showing various positive statements made by her supervisor and others about her work, and nothing to show that she was failing to meet the standards and needs of her department." *Xu v. N.Y.C. DOH,* 906 N.Y.S. 2d 222, 225 (N.Y. App. Div. 2010) (citation omitted).

King and Zucker (federal defendants) had provided McIntyre (municipal defendant) with Xu's evaluation of alleged negative performance, dated 7 March 2008, starting their "confidential" termination process on 5 March 2008, for firing her in two days, i.e. on the day they submitted their knowingly incorrect old data to CDC, excluding her

supplemental report. Then, they provided her with said evaluation on 14 March 2008 after her firing on 13 March 2008.

Said termination and evaluation just happened after "...she reported to her supervisor that a report to be provided to CDC was based on outdated data, and insisted that a supplemental report be provided disclosing the inaccuracies to the CDC"; "she discussed the matter with [King] and urged that a report be submitted to the CDC explaining the problem with the data in the report that had been submitted." *Id. at* 226 - 227. Particularly, "....she was instructed to use data from 2006 for the survey, and she refused to do so on the ground that it was incorrect for that year." *Xu v. N.Y.C. DOH*, 2013 NY Misc. LEXIS 2513, *4 (Sup. Ct. N.Y. Cnty. 2013).

At that time, it was King's own job for providing supplemental report, because King was supervising said survey, which was involved beyond Xu's unit reflected by the published survey. Said report was outside and above the scope of Xu's ordinarily official duties. Said survey, additionally, was submitted by King via his internal connection with CDC that could not be accessed by Xu. Said fact further reflects that King was entirely responsible for the survey. Xu, therefore, performed out - of - title work as a citizen.

The termination and said evaluation also happened after the 7th February 2008 meeting. At the said meeting, she spoke out improper governmental actions involving Michael Hansen being indefinitely assigned to daily supervise her. Hansen was a CRS, Level I, for the Citywide

Immunization Registry Unit (CIR), a Caucasian younger male of America national origin.

B. Court Procedures

In 2018, the Second Circuit improperly denied Xu's petition for panel rehearing and rehearing en banc. In her petition, she respectfully requested to rehear her claims as upheld in part of the judgment of the district court, including due process, discrimination and equal protection, and *Bivens* claims against federal defendants, in addition to her retaliation claim against all defendants.

In 2017, the summary order of the Second Circuit correctly vacated the judgment of the district court in part: the dismissal of not only Xu's procedural due process but also her discrimination claims under Title VII, NYSHRL, NYCHRL, against the municipal defendants. It, however, erroneously affirmed the dismissal of her due process claim and the discrimination and equal production claims against federal defendants and the retaliation claim against all defendants.

In 2016, the district court (A. Torres, J), again, granted all defendants' Rule 12 (c) motions and dismissed the complaint in its entirety, and then it denied Xu's motion for reconsideration, after the summary order of the Second Circuit in 2015. *Xu v. The City of New York,* 612 Fed. App'x 22 (2 Cir. 2015), *cert. denied*, 136 S. Ct. 1823 (2016).

In the 2015 summary order, the Second Circuit correctly vacated and remanded in part of the district court's 2014 order (A. Torres, J), which granted all defendants' 12 (c) motions and dismissed the complaint in its entirety. *Xu v. the City of New*

York, 2014 U.S. Dist. LEXIS 186904 (SDNY 2014). Said summary order, however, it erroneously affirmed the dismissal of discrimination and equal protection claims against federal defendants, retaliation claim against all defendants, etc.

In August 2010, the district court (D. Cote, J.) had granted federal defendants' Rule 12 (c) motion, *Xu v. the City of New York,* 2010 U.S. Dist. LEXIS 78404 (SDNY 2010); in December 2010, it had granted Xu's motion for reconsideration in part, *Xu,* 2010 U.S. Dist. LEXIS 127216 (SDNY 2010).

Initially, in 2009, SDNY had granted Xu's leaving to file a third amended complaint and set up discovery schedules after the municipality filed its Rule 12 (b) (6) motion to dismiss.

Her state plenary action had been dismissed in 2011 because of the pending state Article 78 proceeding. *Xu v. The City of New York*, 82 A.D.3d 559 (NY App. Div. 2011).

Her Article 78 proceeding had been dismissed in 2009. *Xu v. N.Y.C. DOH*, 2009 N. Y. Misc. LEXIS 179 (Sup. Ct. N.Y. Cnty. 2009). In 2010, the Article 78 petition had been reinstated. *Xu,* 77 A.D.3d 40 (N.Y. App. Div. 2010). After that, said proceeding was dismissed again in 2013. *Xu*, 2013 N.Y. Misc. LEXIS 2513 (Sup. Ct. N.Y. Cnty. 2013). In 2014, the Appellate Division remanded the matter to respondent agency for further proceedings. *Xu,* 121 A.D.3d 559 (N.Y. App. Div. 2014). Up to date, petitioner has not heard from respondent agency.

REASONS FOR GRANTING THE PETITION

The instant case, indeed, is exceptional importance. For example, VFC, pursuant to 42 U. S.

C. § 1396s, has been a nationally vital public health program. The CDC, pursuant to 42 U. S. C. § 215(b), has authorized to continuously send (detail) federal employees to a local government in implementing its federal functions.

No remedy for Xu's injured directly from her supervisors, federal defendants clothed with municipal authority power, is unjust on its face. It contradicts that "where there is a legal right, there is also a legal remedy..." *Ziglar v. Abbasi,* 137 S. Ct. 1843, 1874 (2017) (citation omitted) (Breyer, J., dissenting). It was also contrary to: "'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *Davis v. Passman,* 442 U.S. 228, 246 (1976) (citations omitted). It seems that the Supreme Court has not settled an employment case related to 42 U. S. C. § 215 (b).

Relying on a "discriminatory state of mind" requirement in *Ashcroft v. Iqbal,* 556 U.S. 662, 683 (2009), a 5-4 vote decision, the Second Circuit had dismissed her discrimination claim against federal defendants in a pleading stage, which the district court had followed in 2016. *Xu,* 612 Fed. App'x 25.

It is illogical, irrational and inconsistent to have dismissed the discrimination and equal protection claims against federal defendants, while the specific analysis of the disparate treatment was regarding federal defendants' actions by the circuit and district courts. (7a; 17a, 18a). It contradicts a common-sense standard for judgment. It is obviously contrary to "EQUAL JUSTICE UNDER LAW" a

phrase engraved on the front of this building, while federal defendants took the same actions at the same office under the same roof standing the same floor with their municipal colleagues. "[T]he denial of equal justice is still within the prohibition of the constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

This case brought the question whether *Iqbal* "discriminatory state of mind" applies to an employment case in an initial pleading stage, for example, *Xu* presented herein, while *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973) and *Swierkiewicz v. Sorema N. A.*, 534 U. S. 506 (2002) have not been retired. Said question should be settled by the Supreme Court.

The dismissal of the due process claim against federal defendants, again, contradicts with the common-sense judgment and equal justice. Before her termination, federal defendants nullified and deprived Xu of the due process rights for her reviewing the alleged negative performance and her challenging said evaluation in the first place. Said evaluation given by them was purposed, conducted, and served merely for their firing her. King further destroyed her reputation, such as, his notes for the record -- outside the administrative record-- given to McIntyre and EEOC.

Federal defendants violated, at least, the "notice" requirement -- a crucial threshold requirement of the due process. See, e.g., *Zinermon v. Burch*, 494 U. S. 113 (1990) (citation omitted) ("at minimum, due process requires '*some* kind of notice and ... *some* kind of hearing' (emphasis in original)."). They also violated both the municipal policy and union

contracts that have carried on the due process of the Constitution.

A cause of action and damages remedy can be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated. *Davis*, 442 U. S. 228. Procedural due process rights, indeed, are as fundamental as employment equal treatment protected by the Fifth Amendment. "A deprivation of procedural due process rights can give rise to a *Bivens* claim." *Arar v. Ashcroft,* 585 F. 3d 559, 597 (2 Cir. 2009). (15a). The core purpose of the *Bivens* remedy is to deter federal officers from engaging in unconstitutional wrongdoing in their individual capacities. *Bivens v. Six Unknown Names Agents,* 403 U.S. 388 (1971).

Relying on merely Xu "ma[king] the report pursuant to her official duties", further, a blanket conclusion, her retaliation claim against all defendants under the First Amendment had been dismissed. *Xu,* 612 Fed. App'x 25. It was affirmed by the instant summary order. (8a).

However, there is a split among the Circuits of the United States Court of Appeals as to a public employee's speech whether it "was uttered as a private citizen or as a public employee is a question of law (as determined by the United States Court of Appeals for the Fifth, Tenth, and District of Columbia Circuits) or one of mixed law and fact (as determined by the United States Court of Appeals for the Third, Seventh, Eighth, and Ninth Circuits)." *Brady v. County of Suffolk,* 657 F. Supp. 2d 331, n7 (EDNY 2009). *Posey v. Lake Pend Oreille Sch. Dist. No. 84,* 546 F.3d 1121, 1127-1129 (9 Cir. 2008) detailed said split.

In *Connick v. Myers*, 461 U.S. 138, 148 n.7, (1983), "the inquiry into the protected status of speech is one of law, not fact". In *Garcetti v. Ceballos*, 547 U. S. 410, 424 (2006), it considered factual circumstances surrounding the speech at issue: "We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." See, also, *Ricciuti v. Gyzenis,* 832 F. Supp. 2d 147, 156 (D. Conn. 2011), *recons. den.* 2012 US Dist. LEXIS 8133 (D.Conn. 2012), *affd.* 834 F.3d 162 (2 Cir. 2016) ("by its own admission, however, *Garcetti* is not the final word on the speech of public employee.")

This threshold issue should be resolved by the Supreme Court, because there is the consequence of Xu's ordinarily official duties remained by one purely of law, such as the Second Circuit's rulings to her case, or a mixed question of law and fact in part for a factfinder, such as *Posey*.

Since the 5-4 vote *Garcetti* was decided more than a decade, some lower courts have still struggled to elucidate the factors with respect to speaking as a citizen or a government employee including involvement of a whistleblower issue. This Court also has not decided "what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover." *Garcetti*, at 426 (Stevens, J., dissenting). *Garcetti* appears in conflict with whistleblower statutes, in which there is no categorical difference between speaking as a citizen and speaking as an employee that protects "exposing governmental inefficiency and misconduct...." *Garcetti,* at 425.

Relying on a "without merit" conclusion, the dismissal of the retaliation claim under New York State Constitution conflicts with: "The New York Court of Appeals has construed the provision of the New York State Constitution that pertains to freedom of speech, N.Y. Const. art. I, § 8, as containing language that may be read more expansively than the First Amendment." *Clear Channel Outdoor, Inc. v. City of N.Y.*, 594 F.3d 94, 112 (2 Cir. 2010); "the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression." *People ex rel. Arcara v Cloud Books, Inc,* 510 N.Y.S.2d 844, 847 (N.Y. 1986); "a court must be mindful of the special protections afforded to speech under the New York State Constitution." *People v. Griswold*, 821 N.Y.S.2d 394 (NYC Ct. 2006); "The breadth of the [New York] Constitution's language suggests that a citizen's speech is protected, even when the speech is about her employment." *Ozols v. Town of Madison*, 2012 U.S. Dist. Lexis 116992, at *13 (D. Conn. 2012). Dismissing her retaliation claim under the State Constitution obviously contradicts the aforesaid decisions.

The Supreme Court, furthermore, repeatedly reminded that government employees' speech is often most valuable when it concerns a subject they know best: their jobs. See, *Waters* v. *Churchill*, 511 U. S. 661, 674 (1994) (plurality opinion) ("Government employees are often in the best position to know what ails the agencies for which they work;..."). "The discharge of one tells the others that they engage in protected activity at their peril."

Heffernan v. City of Paterson, 136 S. Ct. 1412, 1419 (2016) (citation omitted).

The Second Circle's summary orders can significantly affect the conduct of Xu, who will be prospectively reinstated to DOHMH, and her colleagues not only in the municipality but also nationwide in the future.

If permitted the outcome to stand uncorrected, it would likely introduce confusion into the body of the law in nationwide. The principles involved, also, are important to others and likely to arise frequently. In fact, a summary order after 1 January 2007 is permitted to be cited by another case under FRAP 32.1.

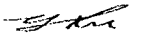
CONCLUSION

The Petition for a Writ of Certiorari Should Be Granted

Dated: Bay Shore, New York

4 July 2018

Respectfully submitted



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