APPX–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 30th day of June, two thousand twenty-three.

PRESENT: Gerard E. Lynch,
Raymond J. Lohier, Jr.,
Maria Araujo Kahn,
Circuit Judges.

Yan Ping Xu,

Plaintiff-Appellant,

v. No. 21-1059-cv

The City Of New York, Other The New York City Department Of Health And Mental Hygiene, Brenda M. Mcintyre,

Defendants-Appellees. *

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* The Clerk of Court is directed to amend the caption as set forth above.

FOR PLAINTIFF-APPELLANT: Yan Ping Xu, *pro se,* Islip, NY

FOR DEFENDANTS-APPELLEES: Claude S. Platton, Janet L. Zaleon, *on behalf of* Sylvia O. Hinds-Radix, Corporation Counsel of the City of New York, New York, NY

Appeal from an order entered in the United States District Court for the Southern District of New York (Analisa Torres, *Judge).*

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court is AFFIRMED.

Plaintiff-Appellant Yan Ping Xu, proceeding pro se, appeals from a March 31, 2021 order of the United States District Court for the Southern District of New York (Torres, J.), adopting in full the Report and Recommendation of the Magistrate Judge (Lehrburger, M.J.), granting summary judgment in favor of Defendants-Appellees on Xu's procedural due process and employment discrimination claims, and denying Xu's cross motion for summary judgment on her due process claim. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

APPX–A

21-1059-cv
Xu v. City of New York

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 30th day of June, two thousand twenty-three.

PRESENT: GERARD E. LYNCH,
RAYMOND J. LOHIER, JR.,
MARIA ARAUJO KAHN,
Circuit Judges.

YAN PING XU,
Plaintiff-Appellan t,
v. No. 21-1059-cv

THE CITY OF NEW YORK, other THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, BRENDA M. MCINTYRE,
Defendants-Appellees. *

* The Clerk of Court is directed to amend the caption as set forth above.

Xu, a woman of Chinese national origin who was at all relevant times in her late fifties, worked as a research assistant in a noncompetitive, probationary position at the New York City Department of Health and Mental Hygiene ("DOHMH"). At the end of a six-month probationary period, Xu's position became permanent. In March 2008, however, after working for DOHMH for only nine months, Xu was fired.

Xu sued the City of New York, DOHMH, and various DOHMH employees, including Brenda M. McIntyre, under 42 U.S.C. § 1983, claiming, as relevant here, that they violated her Fourteenth Amendment right to procedural due process by firing her without a hearing and discriminated against her based on her race, color, national origin, gender, and age in violation of Title VII, the New York State Human Rights Law ("NYSHRL"), and the New York City Human Rights Law ("NYCHRL"). Appellees moved for summary judgment on Xu's due process and discrimination claims, and Xu moved for summary judgment on her due process claim. The District Court referred the parties' summary judgment motions to the Magistrate Judge, who recommended that the District Court grant Appellees' motion and deny Xu's cross motion. After considering Xu's objections, the District Court adopted the Magistrate Judge's Report and Recommendation in its entirety.

"We review de novo a district court's decision to grant summary judgment, construing the evidence in the light most favorable to the party against whom summary judgment was granted and drawing all reasonable inferences in that party's favor."[1] Covington Specialty Ins. Co. v. Indian Lookout Country Club, Inc., 62 F.4th 748, 752 (2d Cir. 2023) (quotation marks omitted). "[I]t is well established that a court is ordinarily obligated to afford special solicitude to pro se litigants ... particularly where motions for summary judgment are concerned." Harris v. Miller, 818 F.3d 49, 57 (2d Cir. 2016) (quotation marks omitted). But "our application of this different standard does not relieve [pro se] plaintiff[s] of [their] duty to meet the requirements necessary to defeat a motion for summary judgment." Jorgensen v. Epic/Sony Records, 351 F.3d 46, 50 (2d Cir. 2003) (quotation marks omitted).

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[1] Xu argues that the District Court wrongly reviewed the Report and Recommendation for clear error instead of de novo. Assuming that the District Court applied the wrong standard, "our own de novo review of the record ... obviates the need for remand." Finkel v. Romanowicz, 577 F.3d 79, 84 n.7 (2d Cir. 2009).

I. Due Process Claim

We begin with Xu's procedural due process claim. "In a § 1983 suit brought to enforce procedural due process rights, a court must determine (1) whether a property interest is implicated, and, if it is, (2) what process is due before the plaintiff may be deprived of that interest." Progressive Credit Union v. City of New York, 889 F.3d 40, 51 (2d Cir. 2018) (quotation marks omitted). "Property interests ... are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." O'Connor v. Pierson, 426 F.3d 187, 196 (2d Cir. 2005) (quoting Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)).

Pointing to New York Civil Service Law, Xu argues that she had a property interest in her continued employment because (1) she was a permanent employee and (2) she was denied due process when she was fired without a hearing. We disagree. New York Civil Service Law does not guarantee employees like Xu the right to a pretermination hearing. Section 75(l)(c) provides that "an employee holding a position in the non-competitive [class]" who has "completed at least five years of continuous service" "shall not be removed ... except for incompetency or misconduct shown after a hearing."

N.Y. Civ. Serv. Law § 75(l)(c) (emphasis added). Xu completed only nine months of continuous service. The "mere fact that her position is characterized as permanent means only that she has passed her probationary period; it does not establish that she is entitled to tenure protections afforded by section 75." Voorhis v. Warwick Valley Cent Sch. Dist., 92 A.D.2d 571, 571 (N.Y. App. Div. 2d Dep't 1983); see Wright v. Cayan, 817 F.2d 999, 1003 (2d Cir. 1987).

We are also unpersuaded by Xu's argument that her collective bargaining agreement supplants the five-year requirement under section 75. Although "[s]ection 75 ... may be modified or replaced by a collective bargaining agreement," Ciambriello v. Cnty. of Nassau, 292 F.3d 307, 314 (2d Cir. 2002), the grievance procedures in Xu's collective bargaining agreement apply only to permanent employees covered by section 75(1), provisional employees who have served for at least two years, and noncompetitive employees who have served for at least one year. Because Xu makes no showing that she qualifies under any of those prongs of the agreement, the District Court did not err in granting summary judgment dismissing her procedural due process claim.[2]

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[2] In her opposition to summary judgment, Xu also introduced a "stigma-plus" procedural due process claim. We need not

consider this untimely claim because it did not appear in her complaint and she did not move to amend the complaint to add the claim. See Creenidge v. Allstate Ins. Co., 446 F.3d 356, 361 (2d Cir. 2006). Even if the stigma-plus claim were timely, however, it fails on the merits because Xu could have pursued an Article 78 proceeding. With respect to stigma-plus claims, "[a]n Article 78 proceeding provides the requisite post-deprivation process—even if [a plaintiff] failed to pursue it." Anemone v. Metro Transp. Auth., 629 F.3d 97, 121 (2d Cir. 2011). And we have held that "the availability of adequate process defeats a stigma-plus claim." Segal v.City of New York, 459 F.3d 207, 213 (2d Cir. 2006).

IL Discrimination Claims

With respect to her claims of discrimination, Xu first argues that the District Court should not have considered or relied on information contained in the affidavits and notes of her former supervisors to grant summary judgment because that information constituted inadmissible hearsay. See Delaney v. Bank of Am. Corp., 766 F.3d 163, 169-70 (2d Cir. 2014). We review a district court's evidentiary rulings underlying a grant of summary judgment for abuse of discretion. See Porter v.Quarantillo 722 F.3d 94, 97 (2d Cir. 2013).

Here, the District Court determined that it could rely on information contained in the affidavits and notes because the same information could be admitted through the direct testimony of their authors. We decline to assign error to this determination. Material relied on at summary judgment need

not be admissible in the form presented to the district court. Rather, so long as the evidence in question "will be presented in an admissible form at trial," it may be considered on summary judgment. Santos v. Murdock, 243 F.3d 681, 683 (2d Cir. 2001). We therefore conclude that the District Court did not abuse its discretion in relying on the information in the affidavits and notes and we decline to disturb the District Court's evidentiary ruling.

Turning to the merits, we analyze discrimination claims under Title VII and the NYSHRL using the McDonnell Douglas burden-shifting framework. See Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 82-83 (2d Cir. 2015) (Title Vll); Vasquez v. Empress Ambulance Serv., Inc., 835 F.3d 267, 271 n.3 (2d Cir. 2016) (NYSHRL). First, the employee must establish a prima facie case of discrimination by showing that "(1) she is a member of a protected class; (2) she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination." See Vega, 801 F.3d at 83 (quotation marks omitted). Once an employee has demonstrated a prima facie case, "[t]he burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the disparate treatment." Id. (quotation marks omitted). "If the employer articulates such a reason for its actions, the burden shifts back to the plaintiff to prove that the employer's reason was in fact pretext for

discrimination." Id. (quotation marks omitted).

Although Xu may have established a prima facie case of discrimination, she failed to demonstrate that the asserted legitimate, non-discriminatory reasons for her termination were pretextual. In their affidavits and notes, Xu's superiors explained that Xu was terminated because she was unable to complete her assignments, struggled to communicate her findings in team meetings, and demonstrated an unwillingness to learn from and cooperate with her coworkers. Xu did not proffer any admissible evidence that these reasons were actually a pretext for discrimination against her based on her race, color, national origin, gender, or age. She has cited no reason for believing that she was discriminated against based on race, color, or age. Instead, Xu pointed the District Court to her "gut feeling"—in other words, her "conclusory allegation[] or unsubstantiated speculation"—that she was discriminated against because of her sex. Robinson v. Concentra Health Servs., Inc., 781 F.3d 42, 44 (2d Cir. 2015). But she cannot rely on allegations or speculation to defeat Appellees' motion for summary judgment. Neither can she rely solely on her status as the only person of Chinese national origin working in a managerial capacity at the Bureau of Immunization to raise an inference of discrimination. See e.g., Pattanayak v. Mastercard Inc., No. 22-1411, 2023 WL 2358826, at *2 (2d Cir. Mar. 6, 2023) (summary order). Under these

circumstances, the District Court did not err in granting summary judgment on Xu's Title VII and NYSHRL claims.

Finally, we turn to Xu's NYCHRL claim. Summary judgment is appropriate in NYCHRL cases "only if the record establishes as a matter of law that a reasonable jury could not find the employer liable under any theory." Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 113 (2d Cir. 2013). Because the record does not contain any evidence that discrimination played any role in Xu's termination, we conclude that the District Court did not err in granting summary judgment on Xu's NYCHRL claim.

We have considered Xu's remaining arguments and conclude that they are without merit. For the foregoing reasons, the order of the District Court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

APPX–B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 27th day of October, two thousand twenty-three.

Yan Ping Xu,
Plaintiff - Appellant,

v.

The City of New York, other The New York City Department of Health and Mental Hygiene, Brenda M. Mclntyre,
Defendants - Appellees.

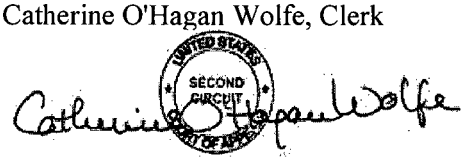
ORDER

Docket No: 21-1059

Appellant, Yan Ping Xu, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPX–C

Constitutions and Statutes Involved

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

Fourteenth Amendment....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 U.S.C. § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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,....

N.Y. Const. Art. I § 6..... protection of certain enumerated rights.....

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

N.Y. Civ Serv L § 42 Non-competitive class

1. The non-competitive class shall include all positions that are not in the exempt class or the labor class and for which it is found by the commission having jurisdiction to be not practicable to ascertain the merit and fitness of applicants by competitive examination. Appointments to positions in the non-competitive class shall be made after such non-competitive examination as is prescribed by the state civil service department or municipal commission having jurisdiction. No position shall be deemed to be in the non-competitive class unless it is specifically named in such class in the rules. Not more than one appointment shall be made to or under the title of any office or position placed in the non-competitive class pursuant to the provisions of this section, unless a different or an unlimited number is specifically prescribed in the rules.

2-a. The state or municipal civil service commission by appropriate amendments to its rules shall designate among positions in the non-competitive class in its jurisdiction those positions which are confidential or require the performance of functions influencing policy.

N.Y. Civil Service Law § 63. Probationary term

1. Every original appointment to a position in the competitive class ...shall be for a probationary term;....The state civil service commission and municipal civil service commissions may provide, by rule, for probationary service upon intradepartmental promotion to positions in the competitive class and upon appointment to positions in the exempt, non-competitive or labor classes.

2. The state civil service commission and municipal civil service commissions shall, subject to the provisions of this section, provide by rule for the conditions and extent of probationary service.

N.Y. Civil Service Law § 75 Removal and other disciplinary action

1. Removal and other disciplinary action. A person described in paragraph (a) or paragraph (b), or paragraph (c), ... of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(c) an employee holding a position in the non-competitive.... , who since his or her last entry into service has completed at least five years of continuous service in the non-competitive .....

55 RCNY Appendix A

Rule I -Definitions

Regulation

Regulation is a resolution of the commissioner of citywide administrative services setting forth policy or procedures for the effectuation of the provisions of the civil service law of the State of New York and the rules of the commissioner of citywide administrative services, which shall not be inconsistent with or supersede the civil service law or the rules.

2.2. These rules shall have the force and effect of law.

3.4.4. Jurisdictional Reclassification

Whenever a position in the exempt, non-competitive or labor class is reclassified into the competitive class, the permanent incumbent of such position, if there be any at the time of such reclassification, shall continue to hold the position with all the rights and status of a competitive employee.

5.2.1. Probationary Term

(b) Every original appointment to a position in the non-competitive or exempt class shall be for a probationary period of six months unless otherwise set forth in the terms and conditions for appointment as determined by the commissioner of citywide administrative services..... Nothing herein shall be deemed to grant permanent tenure to any non-competitive or exempt class employee.

5.2.7. Termination

(a) At the end of the probationary term, the agency head may terminate the employment of any unsatisfactory probationer by notice to such probationer and to the commissioner of citywide administrative services.

5.3.14. Eligibility for Certification from a Promotion List

Eligibility for certification by the commissioner of citywide administrative services or head of a certifying agency from a promotion list shall be limited to permanent employees whose names appear on such list who have successfully completed their probationary periods in the eligible title from which promotion is being made.

6.4.1. Removal Notification to Department of Citywide Administrative Services

Where a person has been removed from a position for cause, a copy of the reasons therefor together with a copy of the proceedings thereon shall be transmitted to the department of citywide administrative services.

7.5.5. Appeals

(a) Each agency shall establish and maintain an appeals board which shall determine appeals by permanent sub-managerial employees of their performance evaluations.

(b) The determination of the appeals board may be appealed by such permanent employee to the head of the agency.

7.5.6. Sub-Managerial Performance Evaluations for Probationary Employees

(b) Such probationary employee shall not have the right to appeal a performance evaluation but any unsatisfactory interim reports and all final probationary reports shall be reviewed by the agency's employee service board.

The City Chapter 35 Section 821 Officers or employees designated to serve in exempt civil service positions

(e) Upon the termination of the officer or employee's services in such exempt position, except by dismissal for cause in the manner provided in section seventy-five of the civil service law, such officer or employee shall immediately and without further application return to the position in the

competitive class with the status, rights, privileges and salary enjoyed immediately prior to the designation to the position in the exempt class.

N.Y. Comp. Codes R. & Regs. tit. 4 § 4.5- Probation

(b) Probationary term. (1) Except as herein otherwise provided, every permanent appointment from an open competitive list and every original permanent appointment to the noncompetitive, exempt or labor class shall be subject to a probationary term of not less than 26 nor more than 52 weeks.

22 NYCRR § 500.27 Discretionary proceedings to review certified questions from Federal courts and other courts of last resort

(a) Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals.

The Second Circuit Local Rule 27.2 Certification of Questions of State Law

(a) General Rule. If state law permits, the court may certify a question of state law to that State's highest court. When the court certifies a question, the court retains jurisdiction pending the state court's response to the certified question.

APPX-D

Xu v. City of New York

United States District Court for the Southern District of NY

March 31, 2021, Decided; March 31, 2021, Filed

Reporter

08 Civ. 11339 (AT) (RWL)
2021 U.S. Dist. LEXIS 62984 *; 2021 WL 1222119

YAN PING XU, Plaintiff, -against- THE CITY OF NEW YORK s/h/a THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, and BRENDA M. MCINTYRE, Defendants.

Judges: ANALISA TORRES, United States District Judge.

Opinion by: ANALISA TORRES

Opinion

ORDER

ANALISA TORRES, District Judge:

Plaintiff, Yan Ping Xu, brings this employment discrimination action pursuant to *42 U.S.C. § 1983* against Defendants, the City of New York, and Brenda McIntyre, the Director of the Bureau of Human Resources, alleging violations of Plaintiff's rights under the *Fourteenth Amendment to the United States Constitution*, Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.* ("Title VII"), the New York State Human Rights Law, *N.Y. Exec. Law § 296* (the "NYSHRL"), and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 (the "NYCHRL"). ECF No. 277 at 1-2. On May 5, 2020, Defendants moved for summary judgment pursuant to *Federal Rule of Civil Procedure 56*, ECF No. 259, and

Plaintiff cross-moved for partial summary judgment on her *Fourteenth Amendment* due process claim, ECF No. 262. On June 10, 2020, the Court referred the matter to the Honorable Robert W. Lehrburger for a report and recommendation. ECF No. 272. Before the Court is his Report and Recommendation (the "R&R"), which recommends that the Court grant Defendants' motion for summary judgment, **[*3]** and deny Plaintiff's motion for partial summary judgment. ECF No. 277. Plaintiff filed objections to the R&R. Pl. Obj., ECF No. 289. For the reasons stated below, the Court ADOPTS the R&R in its entirety.

DISCUSSION[1]

I. Standard of Review

A district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *28 U.S.C. § 636(b)(1)(C)*. When a party makes specific objections, the court reviews *de novo* those portions of the report and recommendation that have been properly objected to. *Id.*; *Fed. R. Civ. P. 72(b)(3)*. However, "when a party makes only conclusory or general objections, or simply reiterates his original arguments," the court reviews the report and recommendation strictly for clear error. *Wallace, 2014 U.S. Dist. LEXIS 85254, 2014 WL 2854631, at *1*; *see also Bailey v. U.S. Citizenship & Immigration Serv., No. 13 Civ. 1064, 2014 U.S. Dist. LEXIS 86034, 2014 WL 2855041, at *1 (S.D.N.Y. June 20, 2014)* ("[O]bjections that are not clearly aimed at particular findings in the [report and recommendation] do not trigger *de novo* review."). An order is clearly erroneous if the

[1] The Court presumes familiarity with the facts, procedural history, and legal standards set forth in the R&R, and, therefore, does not summarize them here. *See* R&R. Plaintiff appears to generally object to the R&R's background section as "incomplete, inaccurate, and erroneous." Pl. Obj. at 1. Judge Lehrburger set out in great detail the facts and procedural history of this case. R&R at 2-33. The Court reviews this general objection for clear error, and finds none. *Wallace v. Superintendent of Clinton Corr. Facility, No. 13 Civ. 3989, 2014 U.S. Dist. LEXIS 85254, 2014 WL 2854631, at *1 (S.D.N.Y. June 20, 2014)*.

reviewing court is "left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie, 532 U.S. 234, 242, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001)* (internal quotation marks and citation omitted).

In addition, "new arguments and factual assertions cannot properly be raised for the first time in objections to the report and recommendation, and indeed **[*4]** may not be deemed objections at all." *Razzoli v. Fed. Bureau of Prisons*, No. 12 Civ. 3774, 2014 WL 2440771, at *5 (S.D.N.Y. May 30, 2014). The court may adopt those portions of the report and recommendation to which no objection is made "as long as no clear error is apparent from the face of the record." *Oquendo v. Colvin, No. 12 Civ. 4527, 2014 U.S. Dist. LEXIS 116124, 2014 WL 4160222, at *2 (S.D.N.Y. Aug. 19, 2014)* (internal quotation marks and citation omitted).

II. Additional Evidence

In addition to Plaintiff's objections, she has submitted a supplementary 56.1 statement, and a second supplementary declaration with 20 additional exhibits. See ECF Nos. 289, 289-1-289-21. However, "absent a most compelling reason, the submission of new evidence in conjunction with objections to the [r]eport and [r]ecommendation should not be permitted." *Housing Works, Inc. v. Turner, 362 F. Supp. 2d 434, 438 (S.D.N.Y. 2005)*. Plaintiff has provided no compelling reasons. *See generally* Pl. Obj; ECF Nos. 294-95. Accordingly, the Court will not consider new evidence.

III. Plaintiff's Objections

Judge Lehrburger recommends that the Court grant Defendants' motion for summary judgment, and that the Court deny Plaintiff's partial motion for summary judgment on her *Fourteenth Amendment* claim. R&R at 2. Plaintiff objects to the dismissal of each of her claims. Pl. Obj.

A. Due Process Claim

Plaintiff argues that her *Fourteenth Amendment* due process

claim should not be dismissed because she had a property and liberty interest in her continued **[*5]** employment. Pl. Obj. at 8-16. To establish a procedural due process violation, a plaintiff must demonstrate that (1) she had a constitutionally protected liberty or property interest and (2) she was deprived of that interest without the requisite process. *See Ciambriello v. Cty. of Nassau, 292 F.3d 307, 313 (2d Cir. 2002)*. "Property interests are not created by the Constitution; rather, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* Thus, in order to have a property interest in continued employment, a plaintiff "must have had a legitimate claim of entitlement to it." *Id.* (internal quotation marks and citation omitted). Independent sources can include statutes, regulations, collective bargaining agreements, employment contracts, rules, and policies. *See Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577-78, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)* (statutes, rules, policies); *Ciambriello, 292 F.3d at 314* (statutes, regulations, collective bargaining agreements); *Atterbury v. U.S. Marshals Serv., 805 F.3d 398, 407 (2d Cir. 2015)* (employment contracts). A public employee has a legitimate claim of entitlement to continued employment "if the employee is guaranteed continued employment absent 'just cause' for discharge." *Ciambriello, 292 F.3d at 313* (quoting *Moffitt v. Town of Brookfield, 950 F.2d 880, 885 (2d Cir.1991))*.

The parties agree that there is no dispute of material fact as to Plaintiff's due process claim: (1) Brenda **[*6]** McIntyre approved Plaintiff's firing, and (2) Plaintiff did not receive a pre-termination hearing. ECF No. 260-25 ¶¶ 99-100; ECF No. 263-2 at 1; R&R at 33. Therefore, Plaintiff's due process claim turns on whether she had a protected property interest in her continued employment that was violated when Plaintiff was denied a pre-termination hearing. Judge Lehrburger correctly found that she did not.

Judge Lehrburger determined that Plaintiff was a

"permanent," non-competitive class employee, but was nevertheless not entitled to continued employment absent just cause for termination. R&R at 35-46. Plaintiff argues that her status as a "permanent" employee entitled her to continued employment, reiterating her arguments before Judge Lehrburger. *Compare* Pl. Obj. at 7-12, *with* ECF No. 264 at 2-4. Additionally, Plaintiff seemingly objects to Judge Lehrburger's reliance on *Voorhis v. Warwich Valley Central School District, 459 N.Y.S.2d 325 (N.Y. App. Div. 1983)*, on the ground that it is inapplicable to her case because that plaintiff was fired after five years. Pl. Obj. at 11. However, Judge Lehrburger correctly noted that the five-year bar was not the reason for that plaintiff's inability to satisfy *N.Y. Civil Service Law § 75*. R&R at 41 n.23. Thus, the Court reviews this objection for clear error, and finds none. *Wallace, 2014 U.S. Dist. LEXIS 85254, 2014 WL 2854631, at *1*.

Next, Plaintiff objects [*7] that Judge Lehrburger failed to reference *N.Y. Civil Service Law § 63*. Pl. Obj. at 11-12. Plaintiff could have raised the applicability of this provision before Judge Lehrburger, but she did not. *See* ECF No. 264. Thus, this is a new argument that "cannot properly be raised for the first time in objections to the report and recommendation." *Razzoli, 2014 U.S. Dist. LEXIS 74148, 2014 WL 2440771, at *5*.

Plaintiff's remaining arguments also fail. Plaintiff contends that the collective bargaining agreement provided her with permanent employee status. Pl. Obj. at 13. Judge Lehrburger thoroughly considered the applicability of the collective bargaining agreement and found that it did not apply to Plaintiff because she had not served for a year, as required by the agreement. R&R at 50-51. Specifically, she argues that "defendants' . . . statements should supplement and supersede" the one-year service requirement. However, "extrinsic evidence . . . may not be used to alter the meaning of unambiguous terms" of a collective bargaining agreement. *See Am. Federation of Grain Millers, AFL-CIO v. Int'l Multifoods Corp., 116 F.3d 976, 981 (2d Cir. 1997)*.

Additionally, Plaintiff objects to Judge Lehrburger's finding that she was not improperly fired without a pre-termination hearing. Pl. Obj. at 13-14. She contends that Judge Lehrburger "cited incompletely" *Tyson v. Hess, 109 A.D.2d 1068, 1069, 487 N.Y.S.2d 206 (2d Dep't 1985)*. This vague objection is reviewed for **[*8]** clear error, and the Court finds none. *Wallace, 2014 U.S. Dist. LEXIS 85254, 2014 WL 2854631, at *1*. Finally, Plaintiff seemingly objects to Judge Lehrburger's determination that without a property interest in her continued employment, Plaintiff had no property interest in an appeal of her negative evaluation. Pl. Obj. 14-15; R&R at 58-59. However, Judge Lehrburger appropriately laid out the arguments from each party, *see* R&R at 58-59, and determined that under Second Circuit law, the question was irrelevant, *see Jannsen v. Condo, 101 F.3d 14, 16 (2d Cir. 1996)* ("Where there is no property interest in the employment, there can be no property interest in the procedures that follow from the employment.").

B. Liberty Interest

Judge Lehrburger recommends that the Court reject Plaintiff's attempt to bring a due process claim based on deprivation of a liberty interest because the claim is procedurally barred due to its untimeliness. R&R at 60. First, Plaintiff objects to this recommendation on the ground that she raised this issue before the summary judgment stage. Pl. Obj. at 15-16. However, Plaintiff already made these arguments in her original brief before Judge Lehrburger. *Compare* Pl. Obj. at 15-16, *with* ECF No. 276 at 10-11 ("Xu's Third Amended Complaint pointed out the *14th Amendment* principle, which included the liberty interest."). Thus, **[*9]** the Court reviews this objection for clear error, and finds none. *Wallace, 2014 U.S. Dist. LEXIS 85254, 2014 WL 2854631, at *1*.

Next, Plaintiff contends that, contrary to Judge Lehrburger's determination, proceeding on this claim would not require lengthy discovery, and would not result in prejudice to Defendants. Pl. Obj. at 15; R&R at 62-63. However, Judge

Lehrburger correctly noted that in order to make out a "stigma" under a "stigma-plus" claim, a plaintiff must show: (1) that the government made stigmatizing statements about her"; (2) that "these stigmatizing statements were made public," which can be demonstrated by showing that the stigmatizing charges are placed in the discharged employee's personnel file and are likely to be disclosed to a prospective employer; and (3) that the stigmatizing statements were made "concurrently with, or in close temporal relationship to, the plaintiff's dismissal." R&R at 60 (quoting *Segal v. City of New York, 459 F.3d 207, 212 (2d Cir. 2006)*; *Brandt v. Bd. of Coop. Educ. Servs., 820 F.2d 41, 45 (2d Cir. 1987)*). The Court agrees that Defendants would be prejudiced because discovery would be necessary in order to determine whether and to what extent the performance evaluations have come up in Plaintiff's attempts to seek employment. R&R at 62-63.

Accordingly, Plaintiff's objections to Judge Lehrburger's recommendation concerning her *Fourteenth Amendment* due process claim are OVERRULED. **[*10]**

C. Discrimination Claims Under Title VII and the NYSHRL

Judge Lehrburger recommends that the Court grant summary judgment in Defendants' favor on Plaintiff's discrimination claim based on race or national origin under Title VII and the NYSHRL. R&R at 73. As an initial matter, Plaintiff contends that Judge Lehrburger used the incorrect standard when making this recommendation. Pl. Obj. at 16. The Court disagrees with Plaintiff's conclusory objection. Judge Lehrburger addressed the appropriate standard at length, *see* R&R 31-33, and the Court finds no error in his application of the standard. *Wallace, 2014 U.S. Dist. LEXIS 85254, 2014 WL 2854631, at *1*.

1. Prima Facie Case of Discrimination

Judge Lehrburger found that Plaintiff failed to adduce sufficient evidence to establish a prima facie case of discrimination. Plaintiff claims that the Second Circuit

already held that she established a prima facie case. Pl. Obj. at 16; *see Xu v. City of New York, 700 F. App'x 62 (2d Cir. 2017)*. Plaintiff is incorrect. The Second Circuit determined that Plaintiff could potentially establish a disparate treatment prima facie case by supporting with evidence her allegations that: "(1) she and Hansen were both classified as City Research Scientist I and were therefore employed at the same occupational level"; (2) "she trained Hansen on some aspects of **[*11]** programming, took over some of his responsibilities, and performed work that was both higher-level and higher quality than the work performed by Hansen"; (3) "she received negative feedback from Zucker and King while Hansen received positive feedback"; and (4) "Hansen was improperly tasked with supervising her." *Xu, 700 F. App'x at 64* (internal quotation marks omitted). Plaintiff concedes that there is no evidence supporting the notion that Hansen was her supervisor. Pl. Obj. at 17. Thus, there was no clear error in Judge Lehrburger's analysis of Plaintiff's prima facie case.

Additionally, Plaintiff puts forth a new argument—that King's supervision of Plaintiff, and Hansen potentially supervising Plaintiff, violated N.Y.C. Rules of General Administration 7.5.4(c). Pl. Obj. at 17-18. However, this is a new argument that "cannot properly be raised for the first time in objections to the report and recommendation." *Razzoli, 2014 U.S. Dist. LEXIS 74148, 2014 WL 2440771, at *5*.

2. Legitimate, Nondiscriminatory Reason

Judge Lehrburger found that even if Plaintiff had made out a prima facie case, Defendants established a legitimate, nondiscriminatory reason for her termination. R&R at 76. Plaintiff objects to Judge Lehrburger's use of "inadmissible" evidence in making this finding. **[*12]** Pl. Obj. at 19-20. Judge Lehrburger extensively addressed the admissibility of the challenged evidence. R&R at 65-72. At the summary judgment stage, a court cannot rely on inadmissible hearsay. *Mattera v. JP Morgan Chase Corp., 740 F. Supp. 2d 561,*

566 n.2 (S.D.N.Y. 2010). A court can, however, rely on evidence that "will be presented in admissible form at trial." *Smith v. City of New York, 697 F. App'x 88, 89 (2d Cir. 2017)*. Plaintiff states that Judge Lehrburger failed to address her point that no trial could be conducted without Hansen. Pl. Obj. at 19. However, Plaintiff is incorrect. Judge Lehrburger squarely addressed this issue, *see* R&R at 71-72, and noted that the Court has already denied her request for sanctions against Defendants because they "lost" Hansen, *id.* at 72. Moreover, he notes that Plaintiff has failed to show that Defendants had "control" over Hansen. *Id.* (citing *Odyssey Marine Exp., Inc. v. Shipwrecked & Abandoned SS Mantola, 425 F. Supp. 3d 287, 292-93 (S.D.N.Y. 2019))*.

Next, Plaintiff objects to Judge Lehrburger's reliance on King's notes, and the affidavits of McIntyre, Zucker, and Lapaz. Pl. Obj. at 19-23. Plaintiff rehashes her objection that Lapaz's testimony would be inadmissible at trial. *Compare* Pl. Obj. at 19, *with* ECF No. 264 at 18. She also reiterates her objection that King's notes are not business records. *Compare* Pl. Obj. at 20-21, *with* ECF No. 264 at 18. Judge Lehrburger did not make a determination as to whether King's **[*13]** notes constitute business records under *Federal Rule of Evidence 803(6)*, *see* R&R at 66-67, but determined that, in any event, the facts contained in King's notes could be presented in an admissible form at trial through King's testimony, *see id.* Additionally, Plaintiff reiterates her argument that Zucker and McIntyre do not have personal knowledge. *Compare* Pl. Obj. at 20, *with* ECF No. 264 at 19-20. These objections are reviewed for clear error, and the Court finds none. *Wallace, 2014 U.S. Dist. LEXIS 85254, 2014 WL 2854631, at *1*.

Finally, Plaintiff posits for the first time that the affidavits "show a lack of trustworthiness." Pl. Obj. at 21. The Court will not consider this new argument. *See Razzoli, 2014 U.S. Dist. LEXIS 74148, 2014 WL 2440771, at *5*. Regardless, as Judge Lehrburger correctly noted, these affidavits could readily be reduced to admissible form at trial through the

testimony of Defendants, and thus, he did not err in considering them when making his recommendation. *See Smith, 697 F. App'x at 89*; R&R at 69-70.

3. Pretext

Judge Lehrburger found that Plaintiff was unable to meet the minimal burden of showing pretext. R&R at 77; *Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 203 (2d Cir. 1995)*. Plaintiff's objections to this determination rehash her previous arguments before Judge Lehrburger. *Compare* Pl. Obj. 23-25 (discussing Plaintiff's strong technological skills, positive performance evaluations, and Hansen's performance), *with* ECF No. **[*14]** 264 at 20-22 (discussing skills and positive performance evaluations), *and* ECF No. 276 at 3-4 (discussing Hansen's performance). As Judge Lehrburger noted, there is no evidence in the record, other than Plaintiff's "gut feeling," that she was discriminated against based on her national origin and gender. R&R at 78. Plaintiff testified that she could not remember anyone making comments about her race, national origin, or gender. *Id.* (citing Plaintiff's deposition transcript). Moreover, Plaintiff's evidence concerning her positive performance are not inconsistent with Defendants' legitimate, nondiscriminatory reason for her termination. *See Rubinow v. Boehringer Ingelheim Pharm., Inc., 496 F. App'x 117, 119 (2d Cir. 2012)*; *Browne v. CNN Am., Inc., 229 F.3d 1135, at *2 (2d Cir. 2000)*. Thus, the Court finds no clear error.

Plaintiff objects to Judge Lehrburger's recommendation that the Court dismiss her claims under the NYSHRL, on the ground that Judge Lehrburger failed to independently consider her claims under this law. Pl. Obj. at 25. However, as Judge Lehrburger correctly noted, claims under Title VII and the NYSHRL are analyzed under the same burden-shifting framework. *Vivenzio v. City of Syracuse, 611 F.3d 98, 106 (2d Cir. 2010)*; R&R at 74. Accordingly, the Court finds no clear error.

D. Discrimination Claim Under the NYCHRL

Similarly, Plaintiff objects that Judge Lehrburger failed to analyze her claims **[*15]** under the NYCHRL. Pl. Obj. at 25. Plaintiff is incorrect. *See* R&R at 80.

Accordingly, Plaintiff's objections to Judge Lehrburger's recommendation that the Court grant Defendants' motion for summary judgment on her discrimination claims are OVERRULED.

CONCLUSION

The Court has reviewed the remainder of the R&R for clear error.[2] For the reasons stated above, the Court ADOPTS the R&R in its entirety. The Clerk of Court is directed to terminate the motions at ECF Nos. 259 and 262 and to close the case. The Clerk of Court is further directed to mail a copy of this order to Plaintiff *pro se*.

SO ORDERED.

Dated: March 31, 2021

New York, New York

/s/ Analisa Torres

ANALISA TORRES

United States District Judge

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[2] To the extent not discussed above, the Court finds no clear error in the unchallenged portions of the R&R.

APPX-E

Xu v. City of New York

United States District Court for the Southern Dist. of N.Y.
December 22, 2020, Decided; December 22, 2020, Filed

08-CV-11339 (AT) (RWL)

Reporter

2020 U.S. Dist. LEXIS 250821 *; 2020 WL 8671952

YAN PING XU, Plaintiff, - against - THE CITY OF NEW YORK, s/h/a THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, and BRENDA M. MCINTYRE, Defendants.

Judges: ROBERT W. LEHRBURGER, UNITED STATES MAGISTRATE JUDGE.

Opinion by: ROBERT W. LEHRBURGER

Opinion

REPORT AND RECOMMENDATION TO HON. ANALISA TORRES: SUMMARY JUDGMENT MOTIONS

ROBERT W. LEHRBURGER, U. S. Magistrate Judge.

Pro se Plaintiff Yan Ping Xu is an Asian woman of Chinese national origin who, at all relevant times, was fifty-seven years old. This case **[*3]** stems from her employment with, and termination from, the New York City Department of Health and Mental Hygiene's Bureau of Immunizations ("BOI"), where she worked from June 2007 to March 2008.

Xu alleges that, in terminating her, the City of New York (the "City" or "NYC"), sued here as the New York City Department of Health and Mental Hygiene ("DOHMH"), and an Assistant Commissioner of DOHMH and the Director of the Bureau of Human Resources ("HR"), Brenda M. McIntyre, violated her *Fourteenth Amendment* right to procedural due process pursuant to *42 U.S.C. § 1983*, and discriminated against her based on race, color, national origin, gender, and age, in violation of Title VII of the Civil Rights Act, *42 U.S.C. §§ 2000e et seq.* ("Title VII"), the New

York State Human Rights Law, *N.Y. Exec. L. §§ 290 et seq.* ("NYSHRL"), and the New York City Human Rights Law, N.Y.C. Admin. Code §§ 8-101 *et seq.* ("NYCHRL").[1]

Defendants have moved for summary judgment. Plaintiff opposes and cross-moves for summary judgment on her due process claim. For the reasons explained below, I recommend that Plaintiff's motion be DENIED and Defendants' motion be GRANTED.

Background

A. Overview of Xu's Employment and Relevant Personnel

Xu was hired by DOHMH as a "City Research Scientist I" on June 4, 2007, and terminated on **[*4]** March 13, 2008. (Xu 56.1 ¶¶ 4-5; Defs. 56.1 ¶¶ 24, 99.[2]) She was thus employed by DOHMH for a total of nine months and ten days. (Xu 56.1 ¶ 5.) A City Research Scientist I is a "non-competitive" civil service title (Xu 56.1 ¶ 4; Defs. 56.1 ¶ 24), which is a category of public employment that is not subject to competitive examination and is governed by statutes and regulations on issues such as probationary periods and termination, *see, e.g.*, N.Y. Civ. Serv. *§ 75(1)(c)*; 55 RCNY Appendix A §§ 3.2.1, 5.2.1(b). As a City Research Scientist I, Xu was also a member of a union — the Civil Service Technical Guild, Local 375, AFSCME, AFL-CIO and District Council 37, AFSCME, AFL-CIO. (Defs. 56.1 ¶ 25.) As such, some aspects of her employment were also governed by a collective bargaining agreement between the

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[1] Xu originally brought numerous other claims against these and other Defendants, all of which have been dismissed. *See Xu v. City of New York, 700 F. App'x 62 (2d Cir. 2017)*. Some of the other claims and defendants are discussed below, as they relate to the remaining claims, but this opinion focuses primarily on the remaining claims.

[2] "Xu 56.1" and "Defs. 56.1" refer to the parties' respective Local Rule 56.1 Statements of Undisputed Material Facts (Dkts. 263-2, 260-25).

union and the City (the "CBA").[3] (McIntyre Aff. ¶ 4.[4])

There are two relevant units within BOI — the Vaccines for Children unit ("VFC") and the Citywide Immunization Registry unit ("CIR"). The VFC unit works in conjunction with the federal VFC Program. (Defs. 56.1 ¶ 26.) The VFC Program is a federally funded program jointly administered by DOHMH and the Centers for Disease Control and Prevention ("CDC"), which provides **[*5]** free vaccines to eligible children by purchasing vaccines at a discount from manufacturers and distributing them to state and local health agencies, which in turn distribute them to health clinics and physicians' offices that have registered as VFC providers. (King Aff. ¶ 6.[5]) BOI's VFC unit enrolls vaccine providers into the VFC Program and ensures that those providers adhere to standards of care. (King Aff. ¶¶ 6-7.) CIR is a separate unit from VFC that tracks the administration of vaccines. (Zucker Aff. ¶ 23.[6])

Xu's discrimination claims center on alleged disparate treatment between herself and another DOHMH employee, Michael Hansen, a younger white American male. Like Xu, Hansen was a City Research Scientist I. (Xu 56.1 ¶ 16.) Starting in August 2004, Hansen had been assigned to VFC, where his direct supervisor was Dileep Sarecha. (Xu 56.1 ¶

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[3] Sections of the CBA can be found at Dkt. 260, Ex. S. By its terms, it covers the thirty-two month and two-day period from July 1, 2005 to March 2, 2008. As noted, Xu was hired on June 4, 2007, and terminated on March 13, 2008. No party has argued that the CBA in the record is not the one that applied to her employment and termination.

[4] "McIntyre Aff." refers to the "Affidavit of Brenda McIntyre in Support of Respondent's Verified Answer" (Dkt. 260, Ex. G).

[5] "King Aff." refers to the "Affidavit of Dennis King in Support of Respondent's Verified Answer" (Dkt. 260, Ex. I).

[6] "Zucker Aff." refers to the "Affidavit of Jane R. Zucker in Support of Respondent's Verified Answer" (Dkt. 260, Ex. H).

19; Defs. 56.1 ¶ 28; Hansen Evals. at 1-4.[7]) Sometime before Xu was hired, Hansen was transferred to CIR, where his direct supervisor was Dr. Vissiliki Papadouka. (Xu 56.1 ¶ 24; Defs. 56.1 ¶ 37.) He remained in CIR until after Xu's termination.

For the first three months of Xu's employment (June, July, and August 2007), she was assigned to the VFC unit, and her direct **[*6]** supervisor was Dileep Sarecha. (Xu 56.1 ¶ 20; Defs. 56.1 ¶ 28.) For the rest of Xu's time with BOI (September 1, 2007, through March 13, 2008), her direct supervisor was Dennis King, Deputy Director of BOI. (Xu 56.1¶ 21; Defs. 56.1 ¶ 31.) At all relevant times, King's direct supervisor was Jane R. Zucker, head of BOI and Assistant Commissioner of DOHMH. (Xu 56.1¶ 21; Defs. 56.1 ¶ 32.) Both King and Zucker were CDC employees assigned to DOHMH. (Defs. 56.1 ¶ 33.)

For two months of that time (September to October 2007), starting on September 10, 2007, Xu was temporarily assigned to CIR, where Papadouka directed her daily tasks but King remained her direct supervisor. (Xu 56.1 ¶¶ 22-23; Defs. 56.1 ¶ 36.) For the remainder of Xu's employment with BOI (November 2007 through March 2008), she worked in the VFC unit, still supervised by King. She thus spent the majority of her time at BOI in the VFC unit supervised by King. Xu's duties at the VFC unit included "assembling the data that was reported by ... VFC providers, monitoring their performance to determine whether their reporting was timely and comprehensive, and analyzing the reported data." (King Aff. ¶ 9.)

From September 6, 2007 onward, **[*7]** Angel Lapaz was the acting coordinator of all VFC staff and activities (Defs. 56.1 ¶ 34), and at all relevant times, Brenda M. McIntyre was an Assistant Commissioner of DOHMH and the Director of HR (McIntyre Aff. ¶ 1).

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[7] "Hansen Evals." refers to the DOHMH performance evaluations of Michael Hansen, dated October 4, 2005, and May 8, 2009 (Dkt. 260, Ex. L).

While Xu's discrimination claims are based on disparate treatment between herself and Hansen, Xu does not allege discrimination by Sarecha, who directly supervised both of them, or Papadouka, who directly supervised Hansen and directed Xu's daily tasks in September and October 2007. To the contrary, in notes that Xu drafted to rebut notes that King drafted shortly after Xu's termination, Xu wrote that Papadouka sympathized with her disagreement about her dismissal. (Xu Notes at 15.[8]). Instead, both Xu's due process and discrimination claims center on the conduct of King, Zucker, and McIntyre.

B. Hansen and Xu's Performance

Hansen worked for BOI since at least 2004. (Hansen Evals. at 1.) For the period of August 2004 to August 2005, he received an overall evaluation rating of "very good" by his direct supervisor Sarecha.[9] (Hansen Evals. at 1-4.) For the calendar year of 2008, he received an overall evaluation rating of "outstanding" by his direct supervisor, Papadouka. (Hansen Evals. at 5-9.)

In 2006, while in the VFC unit, Hansen developed the Provider Profile database, **[*8]** which combined two databases, one that tracked the number of vaccines distributed, and one that tracked the number of vaccines administered. (Zucker Aff. ¶¶ 24, 48.) The Provider Profile database "greatly improved the quality and accuracy of information about providers enrolled in the VFC program." (Zucker Aff. ¶ 28.) Prior to the Provider Profile database, providers self-reported their VFC eligibility and the number of children they served, but BOI questioned the accuracy of

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[8] "Xu Notes" refers to Xu's "Rebuttals to King's Notes for the Record" (Dkt. 260, Ex. P). The notes contain their own pagination, which differs from the number of pages in the document uploaded to ECF. The numbers used in the Court's citations refer to the page numbers of the ECF filing itself, not the independent pagination.

[9] Evaluation ratings included: "Unratable," "Unsatisfactory," "Conditional (Needs Improvement)", "Good," "Very Good," and "Outstanding." (Hansen Evals. at 2.)

the information provided. (Zucker Aff. ¶¶ 29-31.) After creation of the Provider Profile database, BOI used it to generate the Provider Profile forms itself. (Zucker Aff. ¶ 32.) That information was significantly more accurate, and the Provider Profile database "has been repeatedly lauded by members of the public health community," including in a peer-reviewed article describing its efficacy and contributions to the VFC program. (Zucker Aff. ¶¶ 49-50.) In addition, DOHMH awarded Hansen the 2011 Distinguished Service Award for Innovation in recognition of "the work he did to build the Provider Profile thereby improving vaccine accountability, CIR reporting, and quality of CIR data." (Zucker Aff. ¶¶ 51-52.)

Xu, however, **[*9]** alleges that when she took over Hansen's old position at VFC, she found many problems with his previous work, including with the Provider Profile database. (Xu 56.1 ¶ 76-77; Compl. ¶ 41.[10]) For example, Xu claims that Hansen did not comply with required "design theory" when he created the Provider Profile database. (Xu 56.1 ¶ 76.)

In sworn affidavits drafted in support of DOHMH's answer to Xu's petition in a state court proceeding, King, Zucker, and Lapaz state that Xu's complaints about the various BOI databases were the result of Xu having "difficulties mastering the databases and data methodologies for which she was responsible" (Lapaz Aff. ¶ 8[11]), and demonstrated "a misunderstanding of activities conducted by the VFC program" and "an inability to fully comprehend the various data sources and methodologies" required for her work (Zucker Aff. ¶¶ 14, 22). For example, Zucker explains that Xu had a fundamental misunderstanding of the purpose of the Provider Profile forms (Zucker Aff. ¶¶ 22-39), and Lapaz states that Xu was unable to obtain accurate figures from one of the primary databases necessary for her tasks and "unable

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[10] "Compl." refers to Xu's Third Amended Complaint in this matter (Dkt. 260, Ex. D).

[11] "Lapaz Aff." refers to the "Affidavit of Angel Lapaz in Support of Respondent's Verified Answer" (Dkt. 260, Ex. K).

to understand that the prices for the vaccine[s] changed when **[*10]** there was a new CDC contract for vaccine purchase[s,] preventing her from properly preparing her reports" (Lapaz ¶ 9). Zucker and Lapaz cite several other specific instances where they believe Xu failed to comprehend basic concepts and tasks related to her work. (*E.g.*, Zucker Aff. ¶¶ 40-42; Lapaz Aff. ¶¶ 10-12.)

King and Zucker state that they repeatedly encouraged Xu to seek assistance from her supervisors and peers who could help her understand these issues, but that she was "unable or unwilling to learn from colleagues who possessed knowledge of specific areas of which Ms. Xu could have benefitted" (King Aff. ¶ 17; *see also* McIntyre Aff. ¶ 10) and "not responsive to suggestions and guidance from BOI colleagues and supervisors who had [relevant] experience," which prevented her from completing her work (Zucker Aff. ¶ 18).

Another recurring complaint about Xu's employment by her former colleagues is her inability to clearly communicate her ideas about how to improve BOI systems, instead launching into complex details without first providing an overview of her thoughts. (*E.g.*, McIntyre Aff. ¶ 10; King Aff. ¶¶ 15-16.) In Xu's rebuttal to King's notes, she makes blanket statements claiming **[*11]** that that was not true and that she was a better communicator than Hansen, and cites at least one example where King allegedly told her, "Your presentation was clear and brief." (Xu Notes at 9.) Xu's own descriptions of her actions, however, seem to confirm her colleagues' complaints. For example, she wrote that in response to King asking her to use plain language to explain problems, she said that she should be reporting to someone who "understand[s] basic technical issues" and that reporting to King was "like a scientist reporting to a non-technical personnel about how to fix a problem." (Xu Notes at 9.) King encouraged Xu to take courses to improve her communication, which she in fact completed, but King reports that her communication skills did not improve. (Defs. 56.1 ¶ 83; King Aff. ¶¶ 18-19.)

In her deposition, Xu stated that she was transferred to CIR

in September 2007 effectively to train Hansen on SQL programming (a type of programming language) and move CIR's data to an SQL server because Hansen did not know how to do that. (Tr. 54:4-9, 69:14-23.[12]) She testified that Hansen was a "good friend," "smart," a "nice guy," "very good," and "more creative" than her, but that she had better technology skills **[*12]** than him. (Tr. 54:9-13, 24-25.)

Although the context is not clear, also in September 2007, King sent an email to Xu saying, "Thank you, Xu, for your flexibility and positive attitude in adjusting to various lines of work on short notice. Very much appreciated." (Eval. Appeal at 20.[13])

King's notes documenting Xu's negative performance, however, recount an episode with Xu that occurred in October 2007. (King Notes at 1.[14]) King wrote that during a weekly supervisory meeting with Xu, he encouraged her to use the same methodology for preparing annual federal tax reports for the immunization providers that were used by the former VFC chief, but Xu replied that she would not "cook the books," implying that the prior VFC chief had done so. (King Notes at 1.) King directed Xu to research and apply the methods used in the previous tax year. (King Notes at 1.)

In Xu's rebuttal to King's notes, she disputed some details of that meeting. (Xu Notes at 10-11.) For example, she wrote

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[12] "Tr." refers to the transcript of Xu's deposition in the present matter, dated October 31, 2019 (Dkt. 260, Ex. E).

[13] "Eval. Appeal" refers to Xu's administrative appeal of her performance evaluation (Dkt. 260, Ex. N). The evaluation appeal contains its own pagination, which differs from the number of pages of the document uploaded to ECF, and is followed by numerous exhibits that are unpaginated and all uploaded together with the appeal as a single document. The numbers used in the Court's citations refer to the to the page numbers of the ECF filing itself.

[14] "King Notes" refers to King's "Notes for the Record" (Dkt. 260, Ex. O), kept "in accordance with DOHMH's termination policy" (King Aff. ¶ 44.)

that the former unit chief was not discussed until a subsequent email. (Xu Notes at 10.) In Xu's telling, King proposed a deadline for the project, she pointed out problems with the current method used for generating the reports, and King gave her an extension of time to complete the project but **[*13]** later asked her to consult with Hansen. (Xu Notes at 10.) Xu contends that Hansen had never generated those reports before, that he agreed with her ideas about the reports, and that her work improved the quality of the reports. (Xu Notes at 10-11.) In his sworn statement, however, Lapaz states that Xu was unable to obtain accurate figures for these reports. (Lapaz Aff. ¶ 9.)

After her approximately two months in CIR, Xu was transferred back to VFC in October 2007. From October to December 2007, Xu received positive comments from King in two emails. One said, "This was very helpful." (Eval. Appeal at 20.) The other said, "This report came out beautifully; very clear and easy to read. I hope the auditors like it. Thanks for putting so much effort into this." (Eval. Appeal at 20.)

On December 11, 2007, King's notes reflect that Xu disparaged her colleagues in another weekly supervisory meeting with King, stating that she "knows more than M. Hansen," and that Lapaz "does not know how to generate correct information." (King Notes at 3.) Xu's notes have a slightly different characterization of that meeting. The notes state that there was "no reason for me to comment on Mr. Lapaz'[s] capability at that meeting," but that at other meetings King **[*14]** "said that Mr. Lapaz needed my data analysis and reports because Mr. Lapaz did not know how to obtain the correct information." (Xu Notes at 7.) Xu's notes also state that she was doing whatever Hansen needed her to do at the time because she was helping him with a CIR project, and that she was training him on programming but also doing all of the programming herself. (Xu Notes at 7.)

Also on December 11, Xu received a positive email from a Julie Lazaroff, who she identifies as a "Perinatal Hep B Unit Chief City Research Scientist," stating, "Thank you so much

for all of your work on this data analysis project. It has been a pleasure working with you!" (Eval. Appeal at 18-19.)

In her deposition in this case and a written administrative appeal of her negative performance evaluation, Xu also recounts an alleged meeting with King on January 23, 2008. At the meeting, King allegedly told Xu that he had completed her evaluation; she asked if he wanted to discuss it, and he said no, because he was waiting for approval from Zucker, who was out of the office because his mother had passed away. (Xu 56.1 ¶ 71; Eval. Appeal at 2; Tr. 146:9-17, 148:2-6.) Xu testified that that conversation gave Xu the impression that King **[*15]** thought her performance had been "good." (Tr. 148:2-6.) Xu also stated, however, that during the meeting, King told her that she "needed to improve [her] communication skills." (Tr. 146:11-17.) Xu sought a copy of that evaluation during discovery, but despite Defendants best efforts, no copy of the alleged evaluation was found. (*See* Dkts. 206, 207, 234 at 50.)

Xu remained in VFC for the rest of her time with the BOI, and for approximately four months between her departure from CIR and the following February 7, 2008 incident.

C. Merger of Units, and February 7, 2008 Incident

In early 2007, BOI decided to integrate VFC and CIR data reporting and analysis activities. (King Aff. ¶ 33; Zucker Aff. ¶ 46; King Notes at 4.) King scheduled a February 7, 2008 meeting to discuss the phased transition and "plan for the integration of the two units." (King Aff. ¶ 34; King Notes at 4.[15]) Prior to the larger meeting, King met with just Xu and Papadouka. (King Aff. ¶ 35; King Notes at 4.) King planned to tell Xu that she would again be temporarily reassigned to CIR and that, during the reassignment, she would receive "task supervision" from Hansen. (King Notes at 4; King Aff. ¶ 35.) King thought that Xu would benefit from Hansen's

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[15] The body of King's notes state that this meeting occurred on "7 March 2008" but the heading reads "Incident date: 7 February 2008," which is consistent with all of the other sources in the record referring to this incident.

experience since he had worked in both **[*16]** units and created the Provider Profile database. (King Aff. ¶ 38.)

When King conveyed that to Xu, she became "visibly agitated and upset" and "inappropriately disparage[ed] Hansen's qualifications." (King Notes at 4; King Aff. ¶ 39.) Xu understood King to be telling her that her "personal issues" would be reported to King and that her daily tasks would be directed by Hansen (Xu Notes at 1), which made her "very upset" (Tr. 166:5-9). Xu's deposition testimony, notes, and complaint reflect that she started to cry at the meeting and told King that the "change in supervision could not solve the serious data problems that existed at VFC" created by Hansen. (Tr. 166:7-9; Xu Notes at 1; Compl. ¶ 41.)

King's notes state that, because of Xu's negative response, King decided not to transfer Xu to CIR and did not include her in the "discussion and planning for the reorganization," which presented "a serious obstacle to timely reorganization." (King Notes at 4.) In his affidavit, King explains:

> It was at this point that I began to consider whether Ms. Xu was an adequate fit for her position with BOI. ... Ultimately, because Ms. Xu's communication skills failed to improve and because she continued to be unable to productively work with her colleagues, I recommended **[*17]** that Ms. Xu's employment be terminated.

(King Aff. ¶¶ 41-42.) Zucker also states that "[Xu's] attitude interfered with BOI's efforts in integrating the two units" and that "[t]his February[ ] 2008 meeting was a precipitating factor in the decision to terminate Ms. Xu from her position." (Zucker Aff. ¶¶ 54-55.)

Xu's description of King's response to her protestation differs from King's. Xu's notes state that King said that he appreciated her "straight and honest opinion," decided that she would continue to report to him, and told her that she would be leading the "CDC VFC Management Survey and VFC 317 funding projects" because of her "frank opinions."

(Xu Notes at 2.) In a February 25, 2008 email to numerous people, King wrote "thanks to [Xu] for coordinating the questions from BOI." (Eval. Appeal at 19.)

D. The Survey Report and Alleged Whistleblowing

BOI maintains a web-based data collection tool called the VFC Program Management Survey that it uses to generate an annual report that it must submit to the CDC. (King Aff. ¶ 20.) The reports allow the CDC and VFC affiliates to evaluate program activities. (Zucker Aff. ¶ 11.) For the 2007 report, Xu was tasked with gathering and analyzing a particular **[*18]** subset of data related to the number of enrolled and active VFC providers. (King Aff. ¶ 24.) Specifically, BOI had recently merged two databases that identified providers by their Provider Information Numbers ("PINs"), resulting in some providers having more than one PIN. (Zucker Aff. ¶¶ 16-17.) Xu was required to utilize BOI databases to account for any redundancies. (Zucker Aff. ¶ 17.)

Xu alleges that, on February 29, 2008, she told King that Lapaz had asked her to use 2006 data for the 2007 report and explained that the 2006 data contained numerous errors. (Compl. ¶¶ 17-18.) King asked her to draft a report explaining the problems, which she did. (Program Report at 1;[16] Compl. ¶¶ 18-21.) The report states that the data was incorrect for at least three reasons: (1) some providers had multiple PINS; (2) some providers did not appear in both databases; and (3) BOI did not require providers to sign VFC enrollment forms every year, in violation of CDC guidelines. (Program Report at 1; *see also* Compl. ¶¶ 20-21.) Xu alleges that the issues she raised were ignored, and Zucker "knowingly and unethically" directed King to submit the 2006 data in the 2007 report. (Compl. ¶ 24.) Xu believes she **[*19]** was terminated for raising concerns with the 2006 data and the fact that the 2006 data was used in the 2007

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[16] "Program Report" refers to the report that Xu drafted for King about the alleged problems she had identified in the VFC data, dated March 3, 2008 (Dkt. 260, Ex. R).

report. (Tr. 60:10-19.) She testified that previously, all was well with her employment, as evidenced by emails from King to Xu. (Tr. 60:19-23.)

Xu believes that her task was to point out inaccuracies in the data, not to fix it. (Tr. 92:25-94:16, 95:6-12). Lapaz, King, and Zucker all state that it was Xu's job to "account for" the discrepancies in the PINs for the 2007 survey. (Zucker Aff. ¶¶ 13-17; Lapaz Aff. ¶¶ 10-11; King Aff. ¶ 24.) Regardless, all three assert that Xu was unable to do what she was tasked with doing, resisted seeking or accepting guidance on how to do so from colleagues, including Hansen, and was thus unable to complete her portion of the report. (King Aff. ¶ 26; Zucker Aff. ¶¶ 17-21; Lapaz Aff. ¶¶ 11-14.). That is the reason why BOI used 2006 data as a "reasonable approximation" of the number of VFC providers for 2007. (King Aff. ¶¶ 26-27; Zucker Aff. ¶ 21.) CDC was fully apprised of the situation and approved of BOI's approach. (King Aff. ¶ 27.)

King and Zucker further explain that Xu's claim that not requiring providers to sign VFC enrollment forms every **[*20]** year resulted in inaccurate data actually demonstrated her misunderstanding of the VFC Program's activities. (Zucker Aff. ¶ 22; King Aff. ¶¶ 28-29.) They assert that an enrollment form states simply that a given VFC provider will comply with the requirements of the VFC program, that all providers were properly enrolled, and that compliance was assessed through site visits. (Zucker Aff. ¶ 37; King Aff. ¶ 29.) According to King, BOI's decisions, here with respect to the enrollment forms, were made "openly" and "in accordance with the CDC's guidelines and approval." (King Aff. ¶ 29.)

E. Xu's Termination

On March 5, 2008, King and Zucker conferred about Xu's continued employment and then submitted a confidential letter to McIntyre requesting that Xu be terminated. (Zucker Aff. ¶ 59; King Aff. ¶ 43; McIntyre Aff. ¶ 14; Termination

Req. at 1-2.[17]) The letter explained that Xu's effectiveness as a research scientist was severely compromised by her poor communication skills, which had not improved despite her attending a training course. (Termination Req. at 1.) It further noted that Xu "expressed extreme personal disregard for the professional competence of her colleagues," referring to the **[*21]** February 7, 2020 incident. (Termination Req. at 1.)

King also completed a performance evaluation for Xu's time with BOI, which was reviewed by Zucker. (King Aff. ¶ 45; Zucker Aff. ¶ 59.) Xu's evaluation, signed by King and Zucker, rated her performance as "unsatisfactory," the lowest possible rating, in all applicable categories, and also gave her an overall rating of "unsatisfactory." (Eval. at 1-4.[18]) The evaluation states some justifications for the poor rating, such as "demonstrat[ing] considerable difficulty in fully accessing or understanding the various data sources and methodologies required for VFC reports," being "unwilling to accept the experience of colleagues in report preparation, thereby prolonging the time dedicated to data assembly," and "express[ing] extreme reluctance to accept a critical work assignment involving the coordination of her activities with other staff." (Eval. at 2-3.)

By letter dated March 13, 2008, McIntyre terminated Xu "[e]ffective immediately." (Termination Letter at 1.[19]) On March 14, King met with Xu, gave her the performance evaluation and termination letter, and informed her that she was dismissed. (King Aff. ¶ 47.) Neither the termination letter nor evaluation advised Xu of any process

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[17] "Termination Req." refers to the letter from King to McIntyre requesting Xu's termination, dated March 5, 2008 (Dkt. 263, Ex. 3).

[18] "Eval." refers to Xu's performance evaluation, dated March 14, 2008 (Dkt. 263, Ex. 2).

[19] "Termination Letter" refers to the letter from McIntyre informing Xu of her termination, dated March 13, 2008 (Dkt. 263, Ex. 1).

for **[*22]** challenging her termination, although the evaluation did recite that Xu could offer a written rebuttal "for future reference." (Eval. at 4.)

Xu's appeal of her performance evaluation points to two positive emails she received during this period of time. On March 10, 2008, she received an email from someone she identifies as a provider, stating, "I received the report and it is in good order." (Eval. Appeal at 18-19 (cleaned up).) On March 13, 2008, Xu received an email from Papadouka saying "That's great [Xu]," which Xu says was in response to her "review[ing] the process of VFC Management Survey." (Eval. Appeal at 18-19.)

F. Grievances and Appeals

On May 19, 2008, Xu's union requested a Step II grievance hearing, alleging that her termination violated the CBA. (Dkt. 260, Ex. T at 2.) On October 27, 2008, DOHMH denied the request, stating that "Xu was terminated during her probationary year" and thus was not entitled to a grievance process. (Dkt. 260, Ex. T at 1.) On November 3, 2008, Xu's Union appealed and requested a Step III grievance hearing, which the City's Office of Labor Relations denied. (Dkt. 260, Ex. U.) The union took no further action.

On June 18, 2008, Xu sent a letter to McIntyre **[*23]** appealing her performance evaluation and termination. (Dkt. 260, Ex. V.) Xu's letter disputes all of the grounds for her termination and states that she "never received any criticism about [her] performance until the last day of [her] employment," and that her dismissal "happened just after I had refused to commit to unethical data." (Dkt. 260, Ex. U.) Believing that Xu was not entitled to any right to appeal her evaluation or termination because she was a "non-competitive employee who had served for less than one year," McIntyre took no action upon receiving the letter. (McIntyre Aff. ¶ 25.)

Procedural History

A. Xu's Litigation in Three Different Fora

On July 14, 2008, Xu filed an Article 78 petition (the process

for appealing a New York state or local agency decision) in New York state court. *Xu v. New York City Department of Health, No. 109534/2008, 2009 N.Y. Misc. LEXIS 179, 2009 WL 222096, at *1 (N.Y. Sup. Ct. Jan. 23, 2009)*. Xu alleged that her termination was procedurally improper and violated a state whistleblower law, Civil Service Law § 75-b ("§ 75-b"), and sought removal of her unsatisfactory rating, reinstatement, and back pay. *Id.* On January 23, 2009, the court dismissed the petition, finding that (1) it was procedurally barred because Xu failed to file a timely **[*24]** Notice of Claim as required under New York law; (2) her § 75-b whistleblower claim failed because reporting her complaint about the 2006 data being used in the 2007 report did not sufficiently disclose her complaint to the agency; and (3) her termination was not procedurally improper because even if she was a "permanent" employee at the time of her termination, as she alleged and the City contested, she was required to "appeal her performance evaluation to the [agency's] appeals board" before filing an Article 78 petition, and thus her petition was "premature." *2009 N.Y. Misc. LEXIS 179, [WL] at *4-5*.

On March 13, 2009, Xu also filed a plenary action in New York state court, largely seeking the same relief, and based on largely the same claims, plus a claim that her union agreement violated the New York City Collective Bargaining Law ("CBL claim"). *Xu v. City of New York, No. 103544/2009, 2009 N.Y. Misc. LEXIS 6219, 2009 WL 3361681 (N.Y. Sup. Ct. Oct. 9, 2009)*. On October 9, 2009, after the initial decision in the Article 78 proceeding, the court dismissed Xu's complaint, finding that Xu's retaliation and due process claims were barred by collateral estoppel, and that her CBL claim was without merit. *2009 N.Y. Misc. LEXIS 6219, [WL], slip op. at 2-5*. (Xu also attempted to add a NYC False Claims Act claim that was dismissed and never revived. *See **[*25]** id., 2009 N.Y. Misc. LEXIS 6219, [WL], slip op. at 3-5*.)

After filing with the EEOC and receiving notice of her right to sue (Defs. 56.1 ¶¶ 11-13), Xu filed the instant action on

December 30, 2008 (Dkt. 1), and filed her Third Amended Complaint on June 26, 2009 (Dkt. 18). In addition to the City and McIntyre (the "Municipal Defendants"), Xu also sued King and Zucker of the CDC (the "Federal Defendants"), who moved to dismiss. (Dkt. 27.) On August 3, 2010, after the first decisions in the New York State Article 78 and plenary actions, the Honorable Denise Cote, United States District Judge, granted the Federal Defendants' motion to dismiss. *Xu v. City of New York, No. 08-CV-11339, 2010 U.S. Dist. LEXIS 78404, 2010 WL 3060815 (S.D.N.Y. Aug. 3, 2010)*.

Construing Xu's pro se complaint liberally "in an effort to consider all potential claims," Judge Cote found that Xu alleged employment discrimination in violation of Title VII, the *Equal Protection Clause*, NYSHRL, NYCHRL, and *42 U.S.C. §§ 1981*, *1983*, and *1985(3)*; a *First Amendment* retaliation claim; a Due Process Clause violation; and claims under state and local law, including the CBL and *§ 75* whistleblower law. *2010 U.S. Dist. LEXIS 78404, [WL] at *2-3, 2 n.3*. The claims for violations of the federal constitution — the Equal Protection, *First Amendment*, and Due Process Clauses — were cognizable against the Municipal Defendants pursuant to *42 U.S.C. § 1983* and against the Federal Defendants pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)*.

The Court noted that Title VII provides the exclusive remedy for employment **[*26]** discrimination claims against federal employees and liberally construed the complaint to bring Title VII claims against King and Zucker in both their individual and official capacities. *2010 U.S. Dist. LEXIS 78404, [WL] at *2-3*. Judge Cote found, however, that the official-capacity claim was barred by sovereign immunity because Xu was not a federal employee, and the individual-capacity claim failed because there is no individual liability under Title VII. *Id.*

Judge Cote dismissed the rest of the claims on preclusion grounds. *2010 U.S. Dist. LEXIS 78404, [WL] at *3-5*. She

found that the § 75-b whistleblower claim was barred by issue preclusion because it was squarely decided in the Article 78 proceeding. *2010 U.S. Dist. LEXIS 78404, [WL] at *3*. And, although not precluded by the narrow scope of the Article 78 proceeding, Xu's remaining claims were barred by the broader plenary action she had filed after the Article 78 proceeding. *See 2010 U.S. Dist. LEXIS 78404, [WL] at *3-5*.

B. First New York Appellate Decisions, and SDNY Reconsideration

Also on August 3, 2010 - the same day that Judge Cote dismissed Xu's claims against the Federal Defendants, based in part on the preclusive effect of the state court decisions — the New York Appellate Division, First Department, reinstated Xu's Article 78 petition and remanded on several key points. *Xu v. New York City Department of Health, 77 A.D.3d 40, 906 N.Y.S.2d 222 (1st Dep't 2010)*.

On the inadequate **[*27]** process claim, the court held that the union's May 19, 2008 request for a Step II hearing, and Xu's June 18, 2008 letter, demonstrated that Xu attempted to avail herself of the administrative appeals process under 55 RCNY Appendix A § 7.5.5; the court remanded the matter to determine if Xu was given the opportunity to do so, informing the trial court that if she was not, the matter should be remanded to the agency to afford her that opportunity. *Id. at 45-46, 906 N.Y.S.2d at 226*. On the § 75-b whistleblower claim, the Appellate Division held that there was no basis for concluding that Xu's notification of King, who told Zucker, was insufficient to inform the agency about Xu's complaint; the court thus remanded for an inquiry into whether there was someone else she was required to inform to maintain a § 75-b claim. *Id. at 46-47, 906 N.Y.S.2d at. 226-27*. Finally, the court remanded on the issue of a late Notice of Claim, instructing the trial court to inquire as to whether a letter to the Department of Investigations gave the requisite notice. *Id. at 47-50, 906 N.Y.S.2d at 227-29*.

Based on the state appellate decision, on December 1, 2010, Judge Cote granted in part a motion for reconsideration of

her August 3, 2010 decision in the present matter. *Xu v. City of New York, No. 08-CV-11339, 2010 U.S. Dist. LEXIS 127216, 2010 WL 4878949 (S.D.N.Y. Dec. 1, 2010)*. The Court vacated its holding that the § 75-b whistleblower claim **[*28]** should be dismissed based on issue preclusion, reinstating that claim, since the state trial court decision on which that holding was based had been reversed by the state appellate court. *2010 U.S. Dist. LEXIS 127216, [WL] at *3-4*. Judge Cote left intact, however, her dismissal of the remainder of Xu's due process and retaliation claims based on claim preclusion due to the New York State plenary action. *2010 U.S. Dist. LEXIS 127216, [WL] at *4*. Xu's discrimination claims against the Federal Defendants also remained dismissed for the reasons stated in the August 2, 2010 decision. *2010 U.S. Dist. LEXIS 127216, [WL] at *6*. The Court then stayed the present matter in its entirety pending the resolution of Xu's appeal of the plenary action and conclusion of the reinstated Article 78 proceeding. *Id.*

On March 17, 2011, the New York Appellate Division affirmed the New York trial court's decision in the plenary action. *Xu v. City of New York, 82 A.D.3d 559, 918 N.Y.S.2d 717 (1st Dep't 2011)*. The Appellate Division noted that the trial court's decision to dismiss the plenary action was based on the decision in the Article 78 proceeding, which had been reversed. *Id.*; *918 N.Y.S2d at 717*. Nevertheless, the Appellate Division held that dismissal of the plenary action was warranted because of the pending Article 78 proceeding, which had been remanded "without prejudice to [Xu] moving to amend her petition." **[*29]** *Id.* The New York Court of Appeals affirmed, noting that the Appellate Division's order "did not finally determine the action within the meaning of the Constitution." *Xu v. City of New York, 18 N.Y.3d 855, 962 N.E.2d 268, 938 N.Y.S.2d 845 (2011)*.

C. Remanded Article 78 Decision

On May 14, 2013, the New York trial court issued its order on the remanded Article 78 petition, dismissing it again. *Xu v. New York City Department of Health, No. 108534/2008, 2013 N.Y. Misc. LEXIS 2513, 2013 WL 5628802 (N.Y. Sup.*

Ct. May 14, 2013). For that decision, the court considered much of the evidence presented on summary judgment in this matter, including the affidavits of McIntyre, Zucker, King, and Lapaz, all of which were drafted in support of the of DOHMH's opposition to Xu's verified amended petition in that matter. *See id.*, *2013 N.Y. Misc. LEXIS 2513, [WL], slip op. at 2, 6-8*.

The court acknowledged that under 55 RCNY Appendix A § 5.2.1(b), the probationary period for a non-competitive class employee is "six months unless otherwise set forth in the terms and conditions for appointment as determined by the commissioner of citywide administrative services," and also that "[n]othing herein shall be deemed to grant permanent tenure to any non-competitive ... employee." *2013 N.Y. Misc. LEXIS 2513, [WL], slip op. at 18* (quoting 55 RCNY Appendix A § 5.2.1(b)) (second alteration in original). The court found, however, that the CBA and DOHMH's termination policy both "provide **[*30]** for a one-year probationary period," and "[i]n any event," even if Xu's probationary period ended before her termination, she would not have automatically had permanent tenure under 55 RCNY Appendix A § 5.2.1(b). *Id.* Moreover, under New York law, Xu had no right to challenge her termination by way of a hearing or otherwise, absent a showing that she was terminated in bad faith or for an improper or impermissible reason. *2013 N.Y. Misc. LEXIS 2513, [WL], slip op. at 19*. Based largely on the same evidence as in the record here, including the affidavits of McIntyre, King, Zucker, and Lapaz, the court found that Xu was not terminated in bad faith. Rather, "the evidence reflects that her refusal to comply with King's directives and her misunderstanding of the data not only prevented respondent from timely submitting the survey but also required that respondent submit the data from 2006." *Id.* The court found Xu's own "account of her response to her reassignment raised no issues of fact as to whether she was terminated in bad faith" because she admitted to protesting the reassignment. *Id.* The court also dismissed Xu's "claim that her work was never

criticized until she was terminated," pointing to the multiple courses she was referred to in order **[*31]** to improve her communication skills. *2013 N.Y. Misc. LEXIS 2513, [WL], slip op. at 19-20*. (Xu also claimed that many statements in the affidavits were hearsay and could not be considered in the Article 78 proceeding — arguments the court rejected. *2013 N.Y. Misc. LEXIS 2513, [WL], slip op. at 14-15*.)

As to Xu's § 75-b whistleblower claim, the court again dismissed it on several procedural grounds, finding in part that King, Zucker, and McIntyre "were unaware of petitioner's claim until she filed the instant action, and [Xu] offer[ed] no evidence to the contrary." *2013 N.Y. Misc. LEXIS 2513, [WL], slip op. at 21*. The court thus did not reach the merits of Xu's § 75-b claim, but said that if it did, it would be "clear that respondent has demonstrated a 'separate and independent basis' for [Xu]'s termination, namely her poor analytical and communication skills and her failure to work collegially with her peers." *2013 N.Y. Misc. LEXIS 2513, [WL], slip op. at 22*.

D. First SDNY Judgment on the Pleadings

After the Article 78 decision on remand, the District Court in this matter lifted the stay of litigation. All Defendants then filed motions for judgment on the pleadings, which, the Court granted in a February 20, 2014 decision.[20] *Xu v. City of New York, No. 08-CV-113399, 2014 U.S. Dist. LEXIS 186904, 2014 WL 11462734 (S.D.N.Y. Feb. 20, 2014)*. As to the § 75-b claims against the Federal Defendants — the only claims remaining against the Federal Defendants in this action — the Court found that it had no jurisdiction **[*32]** over the Federal Defendants in their official capacity due to sovereign immunity, that they did not fit § 75-b's definition of "public employees" in their individual capacities, and that they could not be sued as City employees under § 75-b because the City was also being

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[20] The February 20, 2014 decision was rendered by the Honorable Analisa Torres, United States District Judge, to whom the case had been reassigned on May 17, 2013. (Dkt. 76.)

sued. *2014 U.S. Dist. LEXIS 186904, [WL] at *5-7*.

With respect to the City and McIntyre (the "Municipal Defendants"), the Court found that all of the claims were barred because of (1) issue preclusion from the decision in the remanded Article 78 proceeding, as well as (2) claim preclusion from the decisions in the state plenary action. *2014 U.S. Dist. LEXIS 186904, [WL] at *7-11*. Accordingly, the Court granted judgment to Defendants. *2014 U.S. Dist. LEXIS 186904, [WL] at *1, *11*.

E. Second Article 78 Appellate Decision

On October 23, 2014, the New York Appellate Division affirmed the state trial court's dismissal of Xu's § 75-b whistleblower claim because the trial court "properly found that respondent was prejudiced by the delay in serving notice,"[21] but reinstated the remainder of her petition. *Xu v. New York City Department of Health and Mental Hygiene, 121 A.D.3d 559, 995 N.Y.S.2d 23 (1st Dep't 2014)*. The court rejected the contention that the CBA or DOHMH termination policy extended Xu's probationary period to one year and squarely held that, under 55 RCNY Appendix A § 5.2.1, Xu "was subject to a probationary period of only six months," and that "[u]pon expiration of that **[*33]** six-month period, [Xu] became a permanent employee." *Id. at 560, 995 N.Y.S.2d at 25*.

The court reiterated that, under 55 RCNY, Appendix A § 7.5.5, the City was required to provide Xu a way "'to appeal unfavorable performance evaluations'" to an "'appeals board,'" that Xu had attempted to avail herself of that process, and that the court had remanded the matter for a finding on

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[21] The Court of Appeals denied Xu's motions for leave to appeal and to reargue. *See **Xu v. New York City Department of Health and Mental Hygiene, 27 N.Y.3d 902 (2016)***; *Xu v. New York City Department of Health and Mental Hygiene, 27 N.Y.3d 1081, 35 N.Y.S.3d 303, 54 N.E.3d 1176 (2016)*. The United States Supreme Court denied Xu's petition for writ of certiorari. ***Xu v. New York City Department of Health and Mental Hygiene, 137 S. Ct. 641, 196 L. Ed. 2d 522 (2017)***.

whether that process had taken place. *Id. at 560-61, 995 N.Y.S.2d at 25* (quoting 55 RCNY Appendix A § 7.5.5). The court noted that, "far from permitting [Xu] to avail herself of the appeals process," the City "took 'no action' because of its ostensible belief that petitioner was a probationary employee, who 'did not have a right to appeal her evaluation and termination.'" *Id. at 561, 995 N.Y.S.2d at 25*. Accordingly, the Appellate Division remanded the matter to the agency for "implementation of the appeals process provided for in [55 RCNY, Appendix A §] 7.5.5." *Id., 995 N.Y.S. 2d at 25*.

F. First Second Circuit Decision

On April 29, 2015, after the second state appellate court decision in the Article 78 proceeding, the Second Circuit reviewed the District Court's first judgment on the pleadings in the instant matter. *Xu v. City of New York, 612 F. App'x 22 (2d Cir. 2015)*. The Second Circuit affirmed dismissal of all retaliation claims against all Defendants because Xu "made the report pursuant to her **[*34]** official duties" and thus "was not speaking as a citizen for *First Amendment* purposes"; affirmed dismissal of all CBL and § 75-b retaliation claims against all Defendants because of collateral estoppel; and affirmed dismissal of the discrimination claims against the Federal Defendants based on the reasons given by the District Court. *Id.* at 25.

However, because the Appellate Division had modified the decision in the plenary action to not be a decision on the merits and subsequently reinstated the Article 78 proceeding, the Second Circuit reversed the District Court's dismissal based on issue and claim preclusion of the remainder of Xu's claims. *Id. at 25-27*.

G. Second SDNY Judgment on the Pleadings

With its reversal, the Second Circuit reinstated Xu's due process claims against the Municipal Defendants under *42 U.S.C. § 1983* and against the Federal Defendants under *Bivens, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619*, and reinstated her discrimination claims against the Municipal Defendants. At the time, in addition to Title VII and the NYS

and NYC HRLs, Xu maintained discrimination claims based on *42 U.S.C. §§ 1981*, *1983*, and *1985(3)*. *Xu v. City of New York*, No. 08-CV-11339, 2016 WL 8254781, at *1 (S.D.N.Y. Sept. 27, 2016).

Following the Second Circuit's mandate, all Defendants once again filed motions for judgment on the pleadings, which the Court granted on September 27, 2016. *Id.* On the due process claim, **[*35]** the Court "assume[d] without deciding that Xu had a constitutionally protected property interest in her continued employment." *Id.* at *2. When someone has such an interest, the Court explained, they are typically entitled to a pre-termination hearing, unless the deprivation is "random and unauthorized," in which case a post-termination hearing satisfies due process. *Id.* (quoting *DiBlasio v. Novello, 344 F.3d 292, 302 (2d Cir. 2003)*). The Court found that Xu did not allege that she was terminated pursuant to established procedures or policy but also found that Defendants failed to comply with existing procedural requirements. Accordingly, the Court determined that a post-deprivation hearing was sufficient, and the Article 78 proceeding was "an adequate post-deprivation remedy." *Id.* at *3.

For similar reasons, the Court found that the due process claims against the Federal Defendants in their individual capacities under *Bivens* must be dismissed. *Id.* The Court also found that the due process claims against the Federal Defendants in their official capacities must be dismissed due to sovereign immunity. *Id.*

On the discrimination claims, which only remained against the Municipal Defendants, the Court dismissed the *§ 1985(3)* claim because Xu had not pleaded a "conspiracy **[*36]** motivated by racial animus." *Id.* at 5 (quoting *Brown v. City of Oneonta, 221 F.3d 329, 341 (2d Cir. 2000)* (brackets omitted)). As to the Title VII, *§ 1981*, *§ 1983*, and NYSHRL claims, the Court noted that a plaintiff must allege "'(1) she is a member of a protected class; (2) her job performance was satisfactory; (3) she suffered adverse employment action; and (4) the action occurred under conditions giving rise to an inference of discrimination.'" *Id.*

at 4 (quoting *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*). One method of raising an "inference of discrimination," the Court explained, is through "'disparate treatment,'" meaning that "'the employer treated plaintiff less favorably than a similarly situated employee outside [her] protected group.'" *Id.* (quoting *Mandell v. County of Suffolk, 316 F.3d 368, 379 (2d Cir. 2003)* (internal quotation marks omitted)). Despite Xu and Hansen having the same job title, they were not similarly situated. Specifically, "Hansen had considerably more experience working for the DOHMH, and previously served in Xu's past role," and "[g]iven Xu's allegations, and particularly the difference in seniority, Xu ha[d] not alleged facts sufficient to 'support at least a minimal inference that the difference of treatment may be attributable to discrimination.'" *Id.* (quoting *McGuiness v. Lincoln Hall, 263 F.3d 49, 54 (2d Cir. 2001)*).

As for the NYCHRL, the Court noted that although broader than its state and **[*37]** federal analogues, "'plaintiff still bears the burden of showing that the conduct is caused by discriminatory motive,'" and found that "Xu has not pleaded facts sufficient to show discriminatory motive." *Id.* at 5 (quoting *Mihalik v. Credit Agricole Cheuvreux North America, Inc., 715 F.3d 102, 109 (2d Cir. 2013)*). Once again, the Court granted judgment in favor of Defendants. *Id.*

H. Second Second Circuit Decision

On November 2, 2017, the Second Circuit vacated and remanded the District Court's dismissal of Xu's "procedural due process claim against [the] Municipal Defendants" as well as her Title VII, NYSHRL, and NYCHRL claims. *Xu v. City of New York, 700 F. App'x 62, 63-64 (2d Cir. 2017)*. On the due process claim, the Second Circuit, like the District Court, "[a]ssum[ed] without deciding that Xu possessed a property interest in her position." *Id. at 63*. While the Court acknowledged that a post-deprivation hearing "may satisfy due process when the claim is 'based on random, unauthorized acts by state employees,'" it also noted that a post-deprivation remedy "may not suffice when the alleged

violation was perpetrated by 'officials with final authority over significant matters.'" *Id.* (first quoting *Hellenic American Neighborhood Action Committee v. City of New York*, 1010 F.3d 877, 880 (2d Cir. 1996); and then quoting *Burtneiks v. City of New York, 716 F.2d 982, 988 (2d Cir. 1983)*). By alleging that she was fired by McIntyre, an Assistant Commissioner and the Director of HR, the Court found that, "[a]t this early stage **[*38]** of litigation," Xu's allegations were "sufficient to state a facially plausible claim that the 'high-level official' exception should apply to this case." *Id.*

Regarding the discrimination claims, the Second Circuit started with the Title VII claim and employed a similar disparate treatment framework as the District Court, though limited to instances of discharge rather than adverse employment actions. *Id. at 63-64* (quoting *Brown v. Daikin America Inc., 756 F.3d 219, 229 (2d Cir. 2014)*). The Court found that Xu alleged that she and Hansen were both employed at the same occupational level, that she trained Hansen on some aspects of programming, took over some of his responsibilities, and performed higher-quality and higher-level work than him, and yet she received negative feedback from Zucker and King while Hansen received positive feedback and was improperly tasked with supervising her. *Id. at 64*. The Court found that "[t]hese allegations of disparate treatment from a similarly situated colleague are sufficient to establish a prima facie case for discriminatory termination in violation of Title VII," and that the Court was "compelled to vacate the dismissal of Xu's claims under the NYSHRL and NYCHRL [as well], ... as those claims rest on the same allegations of disparate **[*39]** treatment." *Id.*

The Court did not squarely explain why the same due process analysis that applied to the Municipal Defendants would not apply to the Federal Defendants in their individual capacities, or why the same disparate treatment analysis would not apply to the *§ 1981* and *§ 1983* claims, but made it clear that it had "reviewed the remainder of Xu's claims and ... found them to be without merit," affirming dismissal

of all claims except "Xu's procedural due process claim against *Municipal Defendants* and ... Xu's Title VII, NYSHRL, and NYCHRL claims on the basis of disparate treatment." *Id.* (emphasis added).

As a result of the Second Circuit's decision, the following claims remain at issue: a *Fourteenth Amendment* due process claim for wrongful termination brought pursuant to *§ 1983*, and discriminatory termination claims brought pursuant to Title VII, NYSHRL, and NYCHRL.

I. Remanded Administrative Appeal

After the New York Appellate Division's October 23, 2014 decision ordering the City to allow Xu to avail herself of the appeals process under 55 RCNY Appendix A § 7.5.5, Xu completed a DOHMH Performance Evaluation Appeal Form on June 19, 2019, requesting that her evaluation rating be changed to "outstanding." (Eval. Appeal at 1.) **[*40]** She raised several procedural issues that she has raised elsewhere: that her evaluation was reviewed with her after, not before, her termination; that neither Sarecha nor Papadouka reviewed the evaluation; and that the evaluation said it was for the calendar year 2007 but included three months of 2008. (Eval. Appeal at 2.) Xu also referenced the alleged January 2008 incident, in which King told her that he had completed her evaluation. (Eval. Appeal at 3.)

Xu repeated her claims that her supervisors never informed her of any performance issues, that there was "nothing to indicate that [she] was failing to meet the standards and needs of DOHMH," and that she uncovered data discrepancies indicating that BOI was not following CDC requirements. (Eval. Appeal at 3-4.) Xu confirmed that she "disagreed with" having her daily tasks directed by Hansen, and included twenty-eight exhibits, including a list of positive comments that she had received about her work, supported by the emails referenced above. (Eval. Appeal at 4, 18, 19-21.)

By letter dated August 19, 2019, the City denied Xu's appeal. The letter addressed each category in which Xu received a

rating of "unsatisfactory," determined that **[*41]** she "submit[ted] no documents to demonstrate" that she deserved a rating of "outstanding," and concluded that her rating would thus "remain unchanged." (Eval. Appeal Decision at 1-2.[22]) The letter noted that "the emails provided do not indicate that any work performed exceeded expectations. Staff are expected to submit reports that are clear and easy to read, doing so would not warrant a rating of outstanding." (Eval. Appeal Decision at 2.)

J. The Current Proceeding

After remand, the parties engaged in discovery, which concluded on November 18, 2019. Defendants moved for summary judgment on all remaining claims. (Dkt. 259.) Xu opposed and cross-moved on her due process claim. (Dkt. 262.) The matter was referred to the undersigned for a Report and Recommendation on the motions. (Dkt. 272.)

Standard of Review

To obtain summary judgment under *Rule 56 of the Federal Rules of Civil Procedure*, the movant must show that there is no genuine dispute of material fact. *Fed. R. Civ. P. 56(a)*. A fact is material "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The moving party bears the initial burden of identifying "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The opposing party must then come forward with specific **[*42]** materials establishing the existence of a genuine dispute; conclusory statements or mere allegations are not sufficient to defeat summary judgment. *Anderson, 477 U.S. at 248*; *Geyer v. Choinski, 262 F. App'x 318, 318 (2d Cir. 2008)*. Where the nonmoving party fails to make "a showing sufficient to establish the existence of an element essential to that party's case, and on

[22] "Eval. Appeal Decision" refers to the City's denial of Xu's appeal of her negative performance evaluation, dated August 19, 2019 (Dkt. 260, Ex. W).

which that party will bear the burden of proof at trial," summary judgment must be granted. *Celotex, 477 U.S. at 322*; *accord El-Nahal v. Yassky, 835 F.3d 248, 252 (2d Cir. 2016)*.

The moving party may demonstrate the absence of a genuine issue of material fact "in either of two ways: (1) by submitting evidence that negates an essential element of the non-moving party's claim, or (2) by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim." *Nick's Garage, Inc. v. Progressive Casualty Insurance Co., 875 F.3d 107, 114 (2d Cir. 2017)* (quoting *Farid v. Smith, 850 F.2d 917, 924 (2d Cir. 1988)*). A party asserting that a fact cannot be, or is genuinely, disputed "must support the assertion by" either "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Fed. R. Civ. P. 56(c)(1)*; *see also Powell v. National Board of Medical Examiners, 364 F.3d 79, 84 (2d Cir. 2004)* (if movant demonstrates absence of genuine issue of material fact, nonmovant bears burden of **[*43]** demonstrating "specific facts showing that there is a genuine issue for trial") (quoting *Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993)*).

In assessing the record to determine whether there is a genuine issue of material fact, a court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. *Anderson, 477 U.S. at 255*; *Smith v. Barnesandnoble.com, LLC, 839 F.3d 163, 166 (2d Cir. 2016)*; *Sutera v. Schering Corp., 73 F.3d 13, 16 (2d Cir. 1995)* ("The district court must draw all reasonable inferences and resolve all ambiguities in favor of the nonmoving party and grant summary judgment only if no reasonable trier of fact could find in favor of the nonmoving party."). At the same time, the court must inquire whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson, 477*

U.S. at 249. Summary judgment may be granted, however, where the nonmovant's evidence is conclusory, speculative, or not significantly probative. Id. at 249-50. If there is nothing more than a "metaphysical doubt as to the material facts," summary judgment is proper. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Pro se litigants, like Xu, are afforded "special solicitude ... particularly where motions for summary judgment are concerned." Harris v. Miller, 818 F.3d 49, 57 (2d Cir. 2016) (internal quotation marks and citations omitted). However, the obligation to read pro se pleadings liberally "does not relieve [a party] of [its] duty to meet **[*44]** the requirements necessary to defeat a motion for summary judgment." Jorgensen v. Epic/Sony Records, 351 F.3d 46, 50 (2d Cir. 2003) (internal quotation marks and citation omitted); *see also Triestman*, 470 F.3d at 477 ("pro se status 'does not exempt a party from compliance with relevant rules of procedural and substantive law'") (quoting *Traguth*, 710, F.2d at 95).

Discussion

I. Due Process

To prove a procedural due process violation, a plaintiff must demonstrate that (1) she had a constitutionally protected liberty or property interest and (2) she was deprived of that interest without the requisite process. *See* Ciambriello v. County of Nassau, 292 F.3d 307, 313 (2d Cir. 2002). "Assuming without deciding that Xu possessed a property interest in her continued employment," the Second Circuit found that Xu stated a plausible due process violation by alleging that she "was improperly fired without a predeprivation hearing because Municipal Defendants wrongly believed her to be a probationary employee who was not entitled to such a hearing" and "her firing was approved by Brenda McIntyre, who was the Assistant Commissioner and Director of [HR] for [DOHMH]." Xu, 700 F. App'x at 62.

The parties agree that there is no disputed issue of material fact as to Xu's due process claim. (Xu 56.1 at 1.) There is no question that McIntyre was an Assistant Commissioner of and **[*45]** the Director of HR for DOHMH, that McIntyre approved Xu's firing, and that Xu did not receive a pre-termination hearing. Therefore, if Xu had a property interest in her continued employment, she would be entitled to summary judgment. On the other hand, Defendants would be entitled to summary judgment if Xu did not have a property interest in her continued employment.

The Court will first address the issue passed on by the District and Circuit Courts — whether Xu had a property interest in her continued employment. The Court will then briefly discuss the matter of Xu's negative performance evaluation and Xu's newly alleged claim that the City also deprived her of a liberty interest.

A. Property Interest in Continued Employment

"Property interests are not created by the Constitution; rather, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Ciambriello, 292 F.3d at 313* (quoting *Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)*). To have a property interest in continued employment, a plaintiff "must have had 'a legitimate claim of entitlement to it.'" *Id.* (quoting *Roth, 408 U.S. at 577*). "An abstract need, desire or unilateral expectation is not enough." *Abramson v. Pataki, 278 F.3d 93, 99 (2d Cir. 2002)*. Courts have stated that "independent **[*46]** sources" sufficient to establish such an entitlement include statutes, regulations, collective bargaining agreements, employment contracts, rules, and policies. *Roth, 408 U.S. at 578* (statutes, rules, policies); *Ciambriello, 292 F.3d at 314* (statutes, regulations, collective bargaining agreements); *Atterbury v. U.S. Marshals Service, 805 F.3d 398, 407 (2d Cir. 2015)* (employment contracts).

A public employee has a legitimate claim of entitlement to continued employment "if the employee is guaranteed

continued employment absent 'just cause' for discharge." *Roth*, 292 F.3d at 313 (quoting *Moffitt v. Town of Brookfield, 950 F.2d 880, 885 (2d Cir. 1991)*; *Taravella v. Town of Wolcott, 599 F.3d 129, 134 (2d Cir.2010)* ("In the employment context, a property interest arises only where the state is barred, whether by statute or contract, from terminating (or not renewing) the employment relationship without cause.") (internal quotation marks and citation omitted). The relevant question in determining whether Xu had a property interest in continued employment is thus whether she had a legitimate entitlement to continued employment absent just cause for termination under one of the independent sources sufficient to establish such an entitlement. To be clear, the question is not whether there was just cause for Xu's termination, but whether that standard applied to her. To answer that question, the Court will review the various sources of rules and understandings **[*47]** governing Xu's employment.

1. NYC Personnel Rule 5.2.1, *NY Civil Service Law § 75*, and "Permanent," Non-Competitive Class Employees

55 RCNY Appendix A is known as New York City's "Personnel Rules," which, by their terms, "have the force and effect of law." 55 RCNY Appendix A § 2.2; *accord Xu, 121 A.D.3d at 560, 995 N.Y.S.2d at 24*. As explained above, it is undisputed that Xu was a "non-competitive" class employee, as opposed to a competitive class employee. Under Personnel Rule § 5.2.1(b), non-competitive class employees are subject to a six-month probationary period "unless otherwise set forth in the terms and conditions for appointment as determined by the commissioner of citywide administrative services." 55 RCNY Appendix A § 5.2.1(b). Probationary employees, whether in the competitive or non-competitive class, can be terminated at will and have no property interest in continued employment. *See, e.g., Russell v. Hodges, 470 F.2d 212, 217-19 (2d Cir. 1972)*. In Xu's Article 78 proceedings, the City apparently argued that Xu's probationary period had been extended to one year through operation of the CBA or DOHMH's termination policy, and

Xu was thus a probationary employee at the time of her termination, having served only nine months and ten days. *Xu, 121 A.D.3d at 560-61, 995 N.Y.S. 2d at 24-25*.

The New York Appellate Division found, however, that as a matter of New York law, Xu's **[*48]** probationary period was not modified from the six months specified in Rule 5.2.1(b); that she was thus "subject to a probationary period of only six months," and "[u]pon expiration of that six-month period, [Xu] became a permanent employee." *Xu, 121 A.D. 3d at 560, 995 N.Y.S. 2d at 24-25*. At the time of Xu's termination, having served for nine months and ten days, Xu was therefore a "permanent," non-competitive class employee. The question, then, is whether completing the probationary period under Rule 5.2.1(b) and becoming a "permanent," non-competitive class employee entitled Xu to continued employment absent just cause for termination. The Appellate Division did not determine that issue. It held only that becoming a "permanent," noncompetitive class employee under Rule 5.2.1(b) entitled Xu to avail herself of the Rule 7.5.5 appeals process, which concerns only appealing negative performance evaluations and did not entitle her to continued employment absent just cause for termination, as discussed in greater detail below.

The Court must thus turn to other sources to determine if an employee like Xu who has completed her probationary period under Rule 5.2.1(b) and becomes a "permanent," non-competitive class employee is entitled to continued employment absent just cause for termination. **[*49]** In doing so, the Court has found, under every source considered, that they are not.

A review of the relevant sources begins with Rule 5.2.1 itself. Rule 5.2.1 sets the length of probationary periods for both competitive and non-competitive class employees. In full, it reads:

> (a) Every appointment and promotion to a position in the competitive or labor class shall be for a probationary period of one year unless otherwise set forth in the terms and conditions of the certification for appointment or

> promotion as determined by the commissioner of citywide administrative services. Appointees shall be informed of the applicable probationary period.
>
> (b) Every original appointment to a position in the noncompetitive or exempt class shall be for a probationary period of six months unless otherwise set forth in the terms and conditions for appointment as determined by the commissioner of citywide administrative services. Appointees shall be informed of the applicable probationary period. However, such probationary period may be terminated by the commissioner of citywide administrative services or by the agency head before the end of the probationary period, and the appointment shall thereupon be deemed revoked. Nothing **[*50]** herein shall be deemed to grant permanent tenure to any non-competitive or exempt class employee.

Two notable aspects of this rule stand out. By its terms, the rule does not grant permanent tenure to non-competitive employees like Xu. Second, the Rule does not provide for continued employment absent just cause for termination — it says nothing about termination or termination procedures. A separate NYC Personnel Rule discusses termination procedures for probationary employees, who can be fired at will, but not "permanent" employees. *See* 55 RCNY Appendix A § 5.2.7. Another rule, Rule 6.4.1, discusses the removal procedures for "a person who has been removed from a position for cause," but that Rule did not apply to Xu, as addressed in more detail below.

This Court has found no case holding that completion of the probationary period in Rule 5.2.1 itself gives an employee a right to continued employment absent just cause for termination. Instead, every case discussing completion of the probationary period under Rule 5.2.1 and a right to continued employment absent just cause for termination discusses that right arising not under Rule 5.2.1, but by operation of another law — *New York Civil Service Law § 75*, which provides that certain civil service employees can

be **[*51]** terminated only "for incompetency or misconduct shown after a hearing upon stated charges." *See Tchodie v. Brann, No. 154601/2019, 2019 NYLJ LEXIS 3173, 2019 WL 4015056, at *3 (N.Y. Sup. Ct. Aug. 23, 2019)* (competitive class employee who completed probationary period under Rule 5.2.1(a) and became "permanent," competitive class employee thus gained pre-termination rights under Civil Service Law *§ 75*); *cf. Bethel v. McGrath-McKechnie, 95 N.Y.2d 7, 14, 731 N.E.2d 604, 709 N.Y.S.2d 888, 892 (2000)* (competitive class employee who had not completed probationary period under Rule 5.2.1 had not acquired pre-termination rights under Civil Service Law *§ 75*); *Gagedeen v. Ponte, 170 A.D.3d 1013, 1014-5, 96 N.Y.S.3d 349, 351 (2d Dep't 2019)* (same), *appeal dismissed, 34 N.Y.3d 948, 110 N.Y.S.3d 860 (2019)*; *Bonacci v. Quinones, 124 A.D.2d 659, 660, 508 N.Y.S.2d 42, 43 (2d Dep't 1986)* (same); *Tomlinson v. Ward, 110 A.D.2d 537, 538, 487 N.Y.S.2d 779, 780 (1st Dep't 1985)* (same), *aff'd, 66 N.Y.2d 771, 488 N.E.2d 114, 497 N.Y.S.2d 368 (1985)*.

All of those cases discuss competitive class employees. With competitive class employees, the relationship between Rule 5.2.1 and Civil Service Law *§ 75* is simple because Civil Service Law *§ 75* provides its pre-termination rights to all competitive class employees who have completed their probationary periods and thus become "permanent." N.Y. Civ. Serv. *§ 75(1)(a)*. Thus, when a competitive class employee subject to the City's Personnel Rules completes their probationary period under Rule 5.2.1(a), they gain the pre-termination rights of Civil Service Law *§ 75*. *Tchodie, 2019 NYLJ LEXIS 3173, 2019 WL 4015056 at *3*; *cf. Bethel, 95 N.Y.2d at 14, 709 N.Y.S.2d at 892* (employees who have not completed their probationary periods under 5.2.1(a) have not obtained rights under Civil Service Law *§ 75*); *Gagedeen, 170 A.D.3d at 1014-5, 96 N.Y.S.3d at 351* (same); *Bonacci, 124 A.D.2d at 660, 508 N.Y.S.2d at 43* (same); *Tomlinson, 110 A.D.2d at 538, 487 N.Y.S.2d at 780* (same). **[*52]**

Similarly, the relationship between Civil Service Law *§ 75* and a *Fourteenth Amendment* property interest in continued

employment is quite clear. The Second Circuit has repeatedly held that "*§ 75* gives covered employees a property interest in their employment, so that they may not be terminated without notice and hearing." *O'Neill v. City of Auburn, 23 F.3d 685, 688 (2d Cir. 1994)* (collecting cases). Thus, a competitive class employee who has attained "permanent" status by completing their probationary period under Rule 5.2.1(a) has gained the pre-termination rights under *§ 75* that give them a property interest in continued employment under the *Fourteenth Amendment's due process clause*. *See id.*

For non-competitive class employees, however, the relationship between Rule 5.2.1 and Civil Service Law *§ 75* is considerably different. That is because Rule 5.2.1 sets a six-month probationary period for non-competitive class employees, 55 RCNY Appendix A. § 5.2.1(b), but Civil Service Law *§ 75*'s pre-termination rights extend only to non-competitive class employees who have "completed at least five years of continuous service," N.Y. Civ. Serv. *§ 75(1)(c)*.

The Court has found almost no cases that deal with Rule 5.2.1 and noncompetitive class employees in the context of termination. The exceptions are the two Appellate Division cases in Xu's Article 78 proceeding. Neither of those cases, however, **[*53]** found that Xu, by completing her probationary period under Rule 5.2.1 or otherwise, gained pre-termination rights or a property interest in continued employment under Civil Service Law *§ 75* (or any other statue or rule). In fact, neither decision even mentions Civil Service Law *§ 75*.

The Court thus turns to cases that have addressed non-competitive class employees who attained "permanent" status by operation of some other rule or law, besides Rule 5.2.1, to see whether courts have found that such employees possessed a right to continued employment absent just cause for termination and thus a property interest in their continued employment under Civil Service Law *§ 75* or other sources. In short, the Court has found that all existing precedent on

the issue has reached the same conclusion: absent an independent contract such as a CBA, "permanent," noncompetitive class employees gain a right to continued employment absent just cause for termination only by operation of Civil Service Law *§ 75*, and that until they have met the statutory requirement of five years of continuous employment, they do not obtain that right and thus do not have a property interest in continued employment. Notably, Subsection (c) of Civil Service Law *§ 75*, affording **[*54]** protections to some non-competitive class employees, but requiring five years of continuous employment, was added to the statute in 1965, long before any of the cases discussed below were decided. 1965 N.Y. Laws 1761; *see Russell v. Hodges, 470 F.2d 212, 219 (2d Cir. 1972)* ("the passage of *§ 75(1)(c)* in 1965 reflected a laudable decision of the legislature that employees in the non-competitive class should not be forever barred from the protection afforded persons in the competitive class merely because it was impracticable to devise an examination for their positions").

The New York Appellate Division case of *In re Voorhis v. Warwick Valley Central School District*, which has been relied on by the Second Circuit, several district courts in the Circuit, and numerous New York State Appellate Division decisions, squarely addresses whether "permanent," non-competitive class employees who have not worked for five continuous years have a property interest in continued employment. *92 A.D.2d 571, 459 N.Y.S.2d 325 (2d Dep't 1983)*. In *Voorhis*, a school bus driver was a public employee in the non-competitive class who had completed her probationary period — and thus attained "permanent" status — and was later fired after several years. *Id. at 571, 459 N.Y.S.2d at 326*. She sued on the theory that "her dismissal without a hearing constituted **[*55]** a violation of her rights as a permanent civil service employee and a denial of her right to due process of law under the *Fourteenth Amendment to the United States Constitution*." *Id. at 571, 459 N.Y.S.2d at 326*. The court found that she did not fall within any "of the

enumerated groups of civil service employees who are afforded the protection of *section 75*" and thus had "no right to a hearing under that section."[23] *Id. at 571, 459 N.Y.S.2d at 327*.

The *Voorhis* court reasoned that the characterization of a position as "permanent" "means only that [the employee] has passed her probationary period. It does not establish that she is entitled to the tenure protections afforded by *section 75*." *Id. at 572, 459 N.Y.S.2d at 327*. Therefore, under New York Law, even "permanent," non-competitive class employees remain "'at will' employees subject to dismissal upon a proper exercise of the appointing authority's discretion." *Id. at 572, 459 N.Y.S.2d at 327*;[24] *see also Tyson v. Hess, 109 A.D.2d 1068, 1069, 487 N.Y.S.2d 206, 208 (2d Dep't 1985)* ("Public employees in the noncompetitive class ... are protected from bad-faith discharge but they remain 'at-will' employees subject to dismissal upon a proper exercise of the appointing authority's discretion"). Notably, the Second Circuit has repeatedly held that "at will" employees do not have a protected property interest in continued employment. *See Abramson, 278 F.3d at 100*.

Although not a case about a "non-competitive" class employee, **[*56]** the Second Circuit has favorably cited

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[23] Voorhis completed her probationary period in 1972 but was not finally terminated until 1981. It thus does not appear that the five-year bar, but rather some other provision of subsection (c), prevented her from satisfying *§ 75*.

[24] In a case that turned on the terms of a CBA, the New York Court of Appeals cited *Voorhis* in noting that it had "no occasion to consider here the extent to which *section 75* or the due process clauses of the State and Federal Constitutions protect a noncompetitive civil service employee who has completed the probationary period but has served for less than five years in the position." *Montero v. Lum, 68 N.Y.2d 253, 257 n.3, 501 N.E.2d 5, 508 N.Y.S.2d 397, 399 n.3 (1986)*. The Court of Appeals still has not had occasion to answer this question. Nonetheless, the extent to which courts have followed and adopted *Voorhis* has firmly established the principle.

Voorhis for the critical holding that "[t]he successful completion of the period of probation ... is not germane [to having a property interest in continued employment], because all civil service employees are required to undergo a probationary period, regardless of whether they will have 'protected' employment upon its completion." *Wright v. Cayan, 817 F.2d 999, 1003 (2d Cir. 1987)* (citing *Voorhis, 92 A.D.2d at 572, 459 N.Y.S.2d at 327*)).

At least one district court decision, affirmed by the Second Circuit, has reached the same conclusion as *Voorhis* and stated that, absent modification by another agreement, even a "permanent," non-competitive class employee would not receive a property interest in continued employment until after serving five years of continuous service and receiving pre-termination rights under *New York Civil Service Law § 75*. *Clark v. Mercado, No. 96-CV-0052E, 1998 U.S. Dist. LEXIS 8998, 1998 WL 328637, at *2 (W.D.N.Y. June 8, 1998), aff'd, 182 F.3d 898 (2d Cir. 1999)*. Another district court in this Circuit has deferred to an agency's interpretation of Civil Service Law *§ 75* to find that a non-competitive class employee must have five years of continuous employment *and* be classified as "permanent" to have pre-termination rights under *§ 75* and thus a property interest in continued employment. *Tavarez v. State of New York Office of Parks, Recreation and Historic Preservation, No. 04-CV-9541, 2007 U.S. Dist. LEXIS 22951, 2007 WL 945383, at *6 (S.D.N.Y. March 28, 2007)*.

And while not specifying that the employees involved had attained **[*57]** "permanent" status, numerous other courts in the Circuit have concluded that, absent some other agreement such as a CBA, "non-competitive" class employees do not have a property interest in continued employment until they have completed five continuous years of service and gained pre-termination rights under *§ 75*. *Donley v. Village of Yorkville, No. 6:14-CV-1324, 2019 U.S. Dist. LEXIS 136612, 2019 WL 3817054, at *8 (N.D.N.Y. Aug. 13, 2019)* ("Because Plaintiff had not satisfied the statutory conditions [of five years of continuous service in the

noncompetitive class], he had no property interest in his continued employment"); *Rotundo v. Village of Yorkville, No. 6:09-CV-1262, 2011 U.S. Dist. LEXIS 21663, 2011 WL 838892, at *8 (N.D.N.Y. March 4, 2011)* (non-competitive class employee who had not served five consecutive years did not have pre-termination rights under *§ 75* and thus did not have property interest in continued employment); *Cruz v. New York City Housing Authority, No. 03-CV-8031, 2004 U.S. Dist. LEXIS 17793, 2004 WL 1970143, at *4 (S.D.N.Y. Sept. 3, 2004)* (same); *Recchia-Hansemann v. BOCES, 901 F. Supp. 107, 110 (E.D.N.Y. 1995)* (same); *cf. Russell, 470 F.2d at 218* (upholding legality of requiring five years of continuous service for non-competitive class employees to attain pre-termination rights, and thus property interest in continued employment, under Civil Service Law *§ 75*);[25] *Carter v. Incorporated Village of Ocean Beach, 693 F. Supp. 2d 203, 213 (E.D.N.Y. 2010)* (seasonal and part-time, noncompetitive class employees did not have property interest in employment because they did not serve for five continuous years and thus gain pre-termination rights under **[*58]** *§ 75*), *aff'd, 415 F. App'x 290 (2d Cir. 2011)*.

The next logical question is, what termination rights, if any, does a "permanent," non-competitive employee have? *Voorhis* squarely addressed that question too. It found that "permanent," non-competitive class employees are protected from "bad faith" termination. *Voorhis, 92 A.D.2d at 572, 459 N.Y.S.2d at 327*. Protection from "bad faith" termination, the court explained, protects employees only from "discharge in contravention of the fundamental purposes of the civil service system (e.g., discharge for patronage purposes ...)." *Id., 459 N.Y.S.2d at 327*. The court made clear that the right not to be terminated in "bad faith" is a lesser protection than

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[25] The Court noted that the petitioners "may lack standing" to challenge the legality of Civil Service Law *§ 75(1)(c)*, but still discussed the issue "[o]n the merits" and concluded that "[t]he choice of what would constitute a reasonable period of service to work as a substitute for the combination of an examination and a probationary period was for the legislature to determine." *Id.*

the right to be terminated only for "just cause," and thus did not give rise to a property interest in continued employment. *Id., 459 N.Y.S.2d at 327*; *see also Carmody v. Village of Rockville Center, 661 F. Supp. 2d 299, 336-37 (E.D.N.Y. 2009)* (right not to be terminated in bad faith does not give rise to a property interest in continued employment).

Protection from bad faith termination is the same protection afforded to probationary employees under New York law.[26] *E.g., Kahn v. New York City Department of Education, 18 N.Y.3d 457, 471, 963 N.E.2d 1241, 940 N.Y.S.2d 540, 548 (2012)*; *Duncan v. Kelly, 9 N.Y.3d 1024, 1025, 882 N.E.2d 872, 853 N.Y.S.2d 260, 260 (2008)*; *Swinton v. Safir, 93 N.Y.2d 758, 762-63, 720 N.E.2d 89, 697 N.Y.S.2d 869, 871 (1999)*. And the Second Circuit has repeatedly held that probationary employees do not have a property interest in their continued employment under New York law. *E.g., Castro v. Simon, 778 F. App'x 50, 51 (2d Cir. 2019), cert. denied, 140 S. Ct. 2511 (2020)*; *Jannsen v. Condo, 101 F.3d 14, 16 (2d Cir. 1996)*; *Finley v. Giacobbe, 79 F.3d 1285, 1297 (2d Cir. 1996)*. It is thus clear that the protection from bad **[*59]** faith termination afforded to "permanent," non-competitive class employees who have served fewer than five years does not give them a property interest in continued employment under the *Fourteenth Amendment*. *See Voorhis, 92 A.D.2d at 572, 459 N.Y.S.2d at 327*; *Carmody, 661 F. Supp. 2d at 336-37*.[27]

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[26] While both "probationary" and "permanent" employees in the non-competitive class are governed by the same bad faith termination standard, "permanent" non-competitive employees are entitled to some non-termination rights and benefits that "probationary" employees are not. For example, they are eligible for promotions, 55 RCNY Appendix A § 5.3.14; they can appeal negative performance evaluations, 55 RCNY Appendix A § 7.5.5; and if their positions are reclassified into the competitive class, they gain all the rights of a competitive class employee, 55 RCNY Appendix A § 3.4.4.

[27] It is possible to construct a logical argument that Civil Service Law *§ 75* effectively sets a probationary period of five years,

To summarize, non-competitive class employees do not gain a right to continued employment absent just cause for termination merely by completing their probationary periods and becoming "permanent," non-competitive class employees. Absent a supplementary agreement such as a CBA, as discussed in greater detail below, "permanent," non-competitive class employees gain a right to continued employment absent just cause for termination only through Civil Service Law *§ 75*, which requires five years of continuous employment. "Permanent," non-competitive class employees who have not served for five consecutive years are protected only from bad faith termination, which does not give rise to a property interest in continued employment. Since Xu had not served for five consecutive years, she was not entitled to continued employment absent just cause for termination under Civil Service Law *§ 75* despite completing her probationary period under Rule 5.2.1 and becoming a "permanent," noncompetitive class employee.

The Court **[*60]** turns next to the other provision of New York City's Personnel Rule discussed by the New York

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Russell, 470 F.2d at 219 ("The requirement of five years of service was intended to provide a probationary period to evaluate the performance of these employees"), that that probationary period can be reduced through other laws, and that Rule 5.2.1 lowers that probationary period to six months, *Clark, 1998 U.S. Dist. LEXIS 8998, 1998 WL 328637 at *2, aff'd, **182 F.3d 898*** (noting that the "[five-year] probationary period set forth in *section 75(1)(c)*" can be reduced through other sources governing the terms of employment — in that case, a CBA). That argument, however, is not supported by any case — state or federal — identified by this Court, and is contradicted by the cases cited above, in which non-competitive class employees attained "permanent" status under other rules, but had not served for five consecutive years, and thus did not obtain termination rights under *§ 75* and a property interest in their continued employment. As noted, the New York Appellate Division did not find that Xu, by completing her probationary period under Rule 5.2.1, gained pre-termination rights under Civil Service Law *§ 75*, but rather only that she gained the right to appeal her negative performance evaluation under Rule 7.5.5.

Appellate Division in Xu's Article 78 proceeding — Rule 7.5.5.

2. Personnel Rule 7.5.5

The New York Appellate Division referred to its earlier decision in which it found that Xu, as a "permanent," non-competitive class employee, had a right to avail herself of the appeals process outlined in Personnel Rule 7.5.5. *Xu, 121 A.D.3d at 560-61, 995 N.Y.S. 2d at 25*. Xu heavily relies on this finding, and this Personnel Rule, to argue that she had a property interest in her continued employment.

In its entirety, Personnel Rule 7.5.5 reads as follows:

> 7.5.5. Appeals.
>
> (a) Each agency shall establish and maintain an appeals board which shall determine appeals by permanent sub-managerial employees of their performance evaluations.
>
> (b) The determination of the appeals board may be appealed by such permanent employee to the head of the agency.
>
> (c) Procedures for such appeals shall be contained in the sub-managerial performance evaluation program submitted by the agency to the commissioner of citywide administrative services.

By its terms, nothing in Personnel Rule 7.5.5 gives an employee a right to termination only for just cause and thus a property interest in their continued employment. The Rule entitles **[*61]** "permanent" employees to appeal only their performance evaluations, not terminations. The bulk of the discussions of Rule 7.5.5 in the New York Appellate Division decisions in Xu's case do not suggest otherwise. The first Appellate Division decision stated that Rule 7.5.5 "provide[s] a mechanism for 'permanent sub-managerial employees' to appeal unfavorable *performance evaluations*," that Xu had attempted to avail herself of that mechanism but been rebuffed because DOHMH wrongly believed that she was still a probationary employee, and ordered the trial court to determine if she had ever been afforded that opportunity.

Xu, 77 A.D.3d at 45, 906 N.Y.S.2d at 226 (emphasis added). The second Appellate Division decision reiterated that Xu had "sought administrative review of her negative *performance evaluation*" and that it had remanded for determination of whether she had been able to avail herself of the appeals process "*provided for in Personnel Rule 7.5.5.*" *Xu, 121 A.D.3d at 561, 995 N.Y.S.2d at 25* (emphasis added). Having remanded for a decision on the same issue that was before it again, the Appellate Division tfhat time squarely found that DOHMH had *not* allowed Xu to avail herself of the appeals process, and remanded directly to the agency "for implementation of the appeals process *provided* ***[*62]*** *for in Personnel Rule 7.5.5.*" *Id., 995 N.Y.S.2d at 25* (emphasis added). That is consistent with the only other case dealing with Rule 7.5.5 that this Court has located, in which the rule was invoked exclusively as a method of appealing negative performance evaluation, not termination. *See Fitzgerald v. Feinberg, No. 98-CV-8885, 1999 U.S. Dist. LEXIS 12584, 1999 WL 619584, at *5 (S.D.N.Y. Aug. 16, 1999).*

To be sure, the last line of the second Appellate Division decision in Xu's Article 78 proceeding appears to suggest that, in the Rule 7.5.5 appeals process, Xu would be able to challenge whether her *termination* was unlawful. *Id., 995 N.Y.S.2d at 25-26* ("In light of our remand to respondent for further consideration of [Xu]'s claim of *unlawful termination* ... we need not reach any of [Xu]'s remaining contentions" (emphasis added)). That is the only place in either decision that suggests that a Rule 7.5.5 hearing would allow Xu to challenge her termination, rather than just her evaluation, and the Court is aware of no other court decision suggesting that Rule 7.5.5 would allow an employee to challenge a termination. The Appellate Division may have been suggesting — though it did not explicitly state — that Xu's performance evaluation was inextricably linked to her termination, and thus appealing her performance evaluation would necessarily give Xu the right to appeal her termination. In other words, **[*63]** if Xu succeeded in challenging the

negative performance evaluation, which she did not,[28] her termination would necessarily be in question.

However, even if Rule 7.5.5 permitted Xu to appeal whether her termination was "unlawful," that would not have given Xu a property interest in her continued employment. That is because, as discussed in the previous section, as a "permanent," non-competitive employee who had served fewer than five years, Xu's termination would have been "unlawful" only if she were terminated in bad faith, and a right not to be terminated in bad faith is a lesser protection than a right to be terminated only for just cause, and thus does not create a property interest in continued employment. *See Voorhis, 92 A.D.2d at 571-72, 459 N.Y.S.2d at 327*; *Carmody, 661 F. Supp. 2d at 336-37*. Under New York law, even probationary employees have a right not to be fired in bad faith, *Kahn, 18 N.Y.3d at 471, 940 N.Y.S.2d at 548*; *Duncan, 9 N.Y.3d at 1025, 853 N.Y.S.2d at 260*; *Swinton, 93 N.Y.2d at 762-63, 697 N.Y.S.2d at 871*, and the Second Circuit has repeatedly held that probationary employees do not have a property interest in continued employment under New York law, *Castro, 778 F. App'x at 51*;*Jannsen, 101 F.3d at 16*; *Finley, 79 F.3d at 1297*.

In sum, the text of Rule 7.5.5 and the case law addressing it strongly suggest that the Rule only gave Xu a right to appeal her negative performance evaluation, not her termination. And, even if Rule 7.5.5 gave Xu a right to appeal whether her termination was **[*64]** "unlawful," that did not give her either a right to continued employment absent just cause for termination, or in turn a property interest in continued employment.

That, however, does not end the inquiry. Xu could still have protection from termination without just cause under another

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[28] As set forth earlier, after the New York Appellate Division's remand, Xu availed herself of the right to appeal her performance evaluation under Rule 7.5.5, and her negative performance evaluation was affirmed. (Eval. Appeal at 1-5; Eval. Appeal Decision at 1-2.)

source governing her employment. In that regard, the Court next considers the CBA.

3. The CBA

The Second Circuit has "repeatedly recognized that a collective bargaining agreement may give rise to a property interest in continued employment." *Ciambriello, 292 F.3d at 314*; *see also Danese v. Knox, 827 F. Supp. 185, 190 (S.D.N.Y. 1993)* ("courts have uniformly held that a collective bargaining agreement can be the source of a property right entitled to due process protection" (collecting cases)). To do so, a CBA, like any other source of property interest in continued employment, must protect the employee from discharge absent "just cause." *See, e.g., Ciambriello, 292 F.3d at 313*.

A CBA can specifically replace or modify the rights granted under Civil Service Law *§ 75*. *N.Y. Civ. Serv. Law § 76(4)* ("*[Sections 75* and *76]* may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization ...."). More specifically, it can modify the rights under *§ 75(1)(c)*, the subsection governing non-competitive class employees. *See Ciambriello, 292 F.3d at 314*. And, directly **[*65]** on point here, it can reduce the five-year period that non-competitive class employees must work before obtaining the rights set forth in *§ 75*. *Clark, 1998 U.S. Dist. LEXIS 8998, 1998 WL 328637 at *2, aff'd, 182 F.3d 898* ("The probationary period set forth in *section 75(1)(c)* is five years, but it is undisputed that a collective bargaining agreement can reduce that five-year period.")

Here, however, whatever additional protections from termination the CBA granted other employees, it did not grant them to Xu. Article VI, outlining the "Grievance Procedure," appears to be the only section of the CBA that entitled any employees to any additional procedures that may affect the terms under which they are terminated. (CBA at 51-58.) By its terms, however, those grievance procedures were applicable only to non-competitive class employees "with one year of service in title, except for employees during the period of a mutually-agreed upon extension of

probation." (CBA at 51-52.) Xu had not served for a year (or fallen within the exception); consequently, she did not have grievance procedure rights under the CBA. The CBA thus did not provide Xu with a right to continued employment absent termination for "just cause," and therefore did not provide her with a property interest in continued employment.

4. [*66] Xu's Property Interest Arguments

Xu points primarily to five potential sources for a property interest in her continued employment: (1) her status as a "permanent" employee; (2) additional sections of NYC's Personnel Rules; (3) an internal memorandum regarding DOHMH's termination policy; (4) an allegedly well-established pattern or practice where "permanent" public employees who have received an overall "unsatisfactory" performance evaluation have not been fired; and (5) that she allegedly was fired in bad faith. None of these arguments stand up to scrutiny. The Court will briefly address each in turn.

Xu argues that she had a property interest in her continued employment simply by nature of her status as a "permanent" employee. (Xu Mem. at 2-3; Xu Reply at 5.[29]) For the proposition that simply being a "permanent" employee gave Xu a property interest in continued employment, she cites to *Meyers v. City of New York, 208 A.D.2d 258, 262, 622 N.Y.S.2d 529, 532 (2d Dep't 1995)*. (Xu Mem. at 3.) *Meyers*, however, does not support that proposition. It supports only the inverse proposition, that "probationary" employees have no property interest in their continued employment: "It is well settled that a probationary employee, unlike a

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[29] "Xu Mem." refers to Xu's "Memorandum of Law in Support of Her Cross-Motion for Partial Summary Judgment of Her Due Process Claim for Xu and in Opposition to Defendant's Motion for Summary Judgment" (Dkt. 264), and "Xu Reply" refers to Xu's "Reply in Support of Her Cross-Motion for Partial Summary Judgment of Her Due Process Claim & in Further Opposition to Defendant's Motion for Summary Judgment" (Dkt. 276).

permanent employee, has no property rights in **[*67]** his position and may be lawfully discharged without a hearing and without any stated specific reason." *Id., 622 N.Y.S.2d at 532*. *Meyers* does not state that any employee labeled as "permanent" has a property interest in continued employment. On the more specific point about whether a "permanent," non-competitive class employee has a property interest in continued employment, the cases discussed above control. *See, e.g., Voorhis, 92 A.D.2d at 572, 459 N.Y.S.2d at 327*; *Donley, 2019 U.S. Dist. LEXIS 136612, 2019 WL 3817054 at *8*; *Rotundo, 2011 U.S. Dist. LEXIS 21663, 2011 WL 838892 at *8*; *Cruz, 2004 U.S. Dist. LEXIS 17793, 2004 WL 1970143 at *4*; *Recchia-Hansemann, 901 F. Supp. at 110*; *cf. Russell, 470 F.2d at 218*; *Carter, 693 F. Supp. 2d at 213*.

Aside from Rules 5.2.1 and 7.5.5, discussed extensively above, Xu points to other sections of NYC's Personnel Rules for the proposition that "permanent" - as opposed to probationary — employees can be terminated only for just cause. (Xu Mem. at 3; Xu Reply at 5.) First, she suggests that Rule 6.4.1 requires that all "permanent" employees can be terminated only "for cause," because the words "for cause" appear in Rule 6.4.1 but not in Rules 5.2.7(a) and (c), which suggests that employees in their probationary periods can be terminated without cause. (Xu Mem. at 3.) Rule 6.4.1, however, does not entitle all "permanent" employees to termination only "for cause." Rather, it states, in its entirety, that "[w]here a person has been removed from a position for cause, a copy of the reasons therefor together with a copy of the proceedings thereon **[*68]** shall be transmitted to the department of citywide administrative services." 55 RCNY Appendix A § 6.4.1. The plain language of the rule does not confer any substantive right on "permanent" employees, either for continued employment absent just cause or for pre-termination rights, and the Court has identified no case or other authority suggesting that it does.

Xu points to Rule 7.5.6(b), the foil to Rule 7.5.5, providing that probationary employees do not have a right to appeal

negative performance evaluations, and Rules 7.5.4(e) and 7.5.6(a), which state that "permanent" employees should receive performance evaluations annually and probationary employees should receive evaluations every three months, to further emphasize that different procedures apply to "probationary" and "permanent" employees. (Xu Reply at 5.) None of these rules address termination, however, let alone suggest that a "permanent" employee can be terminated only for "just cause" as required to establish a liberty interest.

Next, Xu argues that an internal DOHMH memorandum about its termination policy gave her a property right to continued employment. (Xu Mem. at 3.) The memorandum, dated March 10, 2008, is from McIntyre to DOHMH commissioners, managers, and supervisors. **[*69]** (Termination Mem. at 1.[30]) The memorandum is styled as a "guideline" for an internal process, largely comprised of communications between the "requesting manager" and "Director of Labor Relations," that is intended to be followed for all "planned termination[s]" in order to ensure that they are conducted "in accordance with civil service laws, collective bargaining agreements and policies and procedures of the Agency & City of New York." (Termination Mem. at 1.) By its terms, the guideline "is applicable to any employee regardless of their tenure, title and/or civil service status." (Termination Mem. at 1.) At one point, the memorandum notes that "[r]egardless of the employee's civil service status and probationary period, all plans for termination should be accompanied by sufficient written documentation." (Termination Mem. at 4.) That procedure appears to be exclusively for internal consumption, however, as it goes on to note that "[a]ll plans will be reviewed by HR/Labor Relations to determine its accuracy and completeness before approval to proceed with the termination." (Termination Mem. at 4.)

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[30] "Termination Mem." refers to the memorandum from McIntyre to DOHMH commissioners, managers, and supervisors about DOHMH's termination policy, dated March 10, 2008 (Dkt. 263, Ex. 7).

Specifically with respect to non-competitive class employees, the memorandum notes that **[*70]** while employees are on probationary status, they "do not have disciplinary rights," but that "upon completion of the probationary period, these employees cannot be terminated without formal charges." (Termination Mem. at 3.) The same memorandum, however, states that Xu's position, a City Research Scientist, is subject to a one-year probationary period — the probationary period consistent with the CBA and which Xu did not surpass. (Termination Mem., Attach. A, at 1.)

Xu appears to argue that, combined with the Appellate Division's conclusion that she was subject only to a six-month probationary period under Rule 5.2.1, the memorandum entitled her to formal charges before termination after six months. (Xu Mem. at 3.) That assumes, however, that the memorandum refers to the six-month probationary period in Personnel Rule 5.2.1. Nothing in the memorandum suggests that, and inferring otherwise would not be reasonable. To the contrary, the CBA is the only source of law, consistent with the memorandum, setting a probationary period at one year, the shortest period after which a non-competitive class employee potentially has a right to pre-termination process under any of the sources of law related to Xu's employment. **[*71]** Further, the memorandum does not purport to extend existing rights to employees, but instead only to advise managers on how to comply with existing laws.

Xu also argues that she had a property interest in continued employment because of an alleged pattern or practice where "permanent" employees who received an overall "unsatisfactory" performance evaluation were not terminated. (Xu Mem. at 3-4; Xu Reply at 6.) As support, Xu points to spreadsheets produced by the City during discovery indicating that two "permanent" employees who received "unsatisfactory" evaluations were not terminated. (Xu Mem. at 4.) Xu also points to three employees who were allegedly terminated just before being classified as "permanent," apparently to suggest that employees are only terminated

during their probationary period. (Xu Reply at 6.)

That evidence, however, does not establish a genuine issue of fact as to whether Xu was entitled to continued employment absent termination for just cause. That some other employees were terminated before the end of their probationary period, or were not terminated after being evaluated as unsatisfactory, would not change the law, which does not confer a property interest **[*72]** upon noncompetitive employees absent five years of continuous service. *See Carter, 693 F. Supp. 2d at 213, aff'd, 415 F. App'x at 290* ("Since finding a property interest in ... noncompetitive part-time employment that was not continuous for five (5) years contravenes New York Civil Service Law, plaintiffs cannot rely on their 'mutually explicit understandings' to establish a property interest in their employment."). Moreover, Xu has presented no evidence of the particular circumstances of those other employees' employment and termination that would even make an inference of pattern or practice possible.

Finally, Xu appears to argue that her due process rights were violated because she allegedly was terminated in bad faith. (Xu Mem. at 8; Xu Reply at 10.) As a matter of law, that is incorrect. As explained above, the right not to be terminated in "bad faith" is a lesser protection than the right to be terminated only for "just cause," and thus does not give rise to a property interest in continued employment. *Voorhis, 92 A.D.2d at 572, 459 N.Y.S.2d at 327*; *Carmody, 661 F. Supp. 2d at 336-37*. Under New York law, even probationary employees have a right not to be fired in bad faith, *Kahn, 18 N.Y.3d at 471, 940 N.Y.S.2d at 548*; *Duncan, 9 N.Y.3d at 1025, 853 N.Y.S.2d at 260*; *Swinton, 93 N.Y.2d at 762-63, 697 N.Y.S.2d at 871*, and the Second Circuit has repeatedly held that probationary employees do not have a property interest in continued employment **[*73]** under New York law, *Castro, 778 F. App'x at 51*; *Jannsen, 101 F.3d at 16*; *Finley, 79 F.3d at 1297*.

Without a property interest in her continued employment, Xu's termination could not violate the *Fourteenth*

Amendment's due process clause even if she were terminated in bad faith. *Jannsen, 101 F.3d at 16* ("'Where no constitutionally protected property interest is at stake, there is no basis for a federal court to examine the claim that the procedures actually followed were not proper'") (quoting *Flood v. County of Suffolk, 820 F. Supp. 709, 713 (E.D.N.Y. 1993)*). Such a claim would be properly cognizable only if the "bad faith" violated some other substantive right. For example, in this case, Xu alleged that her bad faith termination was retaliatory in violation of the *First Amendment* and New York's § 75-b whistleblower law. But all such claims were dismissed.[31] *See Xu, 612 F. App'x at 25*.

For all of the reasons explained above, Xu did not have a property interest in her continued employment. For the same reasons, Xu was not "*improperly* fired without a predeprivation hearing," which the Second Circuit found necessary for her due process claim even if she possessed a property interest in her continued employment. *Xu, 700 F. App'x at 63* (emphasis added). Rather, after examining the undisputed facts beyond Xu's pleadings, it is clear that Defendants were permitted to terminate her without a pre-termination hearing, absent violating some other **[*74]** substantive law, such as the discrimination laws

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[31] Absent a property right or some other violation of substantive law, any amorphous "bad faith" underlying Xu's employment would be properly redressable through a New York state court Article 78 proceeding, which is precisely what Xu pursued. *See, e.g., Morgan v. Safir, 281 A.D.2d 376, 377, 722 N.Y.S.2d 542, 543 (1st Dep't 2001)* (challenging termination as being made in bad faith). The trial court found that she was not terminated in bad faith and did not have a right to appeal her negative performance evaluation. *Xu, 2013 N.Y. Misc. LEXIS 2513, 2013 WL 5628802, slip op. at 19-20*. The Appellate Division reversed and remanded to DOHMH on the issue of the performance evaluation, finding that she had a right to appeal it under Rule 7.5.5, but "otherwise affirmed." *See Xu, 121 A.D.3d at 559-61, 995 N.Y.S.2d at 24-26*. On remand to the agency, Xu appealed her negative performance evaluation, and it was affirmed. (Eval. Appeal. at 1-6; Eval. Appeal Decision at 1-2.)

discussed below.

While the District Court and Second Circuit, liberally construing Xu's pleadings, found that she only had one possible theory of proving a due process violation — wrongful termination depriving her of a property interest — Xu now appears to put forth two additional theories upon which she believes she suffered a due process violation. For completeness, the Court will briefly address each.

B. Negative Evaluation

In her summary judgment papers, Xu appears to argue that she suffered a due process violation by not being able to appeal her negative evaluation. (Xu Mem. 6-7.) Defendants argue that any such claim must be dismissed because Xu was afforded the opportunity to appeal her negative evaluation under Rule 7.5.5 after the Appellate Division's remand to the agency. (Defs. Mem. at 8-9.[32]) Xu counters that she was not afforded that appeal "'at a meaningful time,'" as required to satisfy due process, given that the appeal commenced in 2019, more than eleven years after her termination. (Xu Mem. at 7 (quoting *Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)*). Defendants, in turn, argue that much of that delay was due to Xu's failure to avail herself of the appeals process for nearly **[*75]** five years after the New York Appellate Division's 2014 decision holding that she was entitled to do so, and note that, on appeal, her negative performance evaluation was affirmed. (Defs. Reply at 11.[33]) Regardless, with no property interest in her continued employment, Xu had no property interest in the ability to appeal her negative evaluation. *Jannsen, 101 F.3d at 16* ("Where there is no property interest in the employment, there can be no property interest in the

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[32] "Defs. Mem." refers to "Defendants' Memorandum of Law in Support of Their Motion for Summary Judgement" (Dkt. 261).

[33] "Defs. Reply" refers to "Defendants' Memorandum of Law in Opposition to Plaintiff's Cross-Motion for Partial Summary Judgment of Her Due Process Claim and Reply in Further Support of Their Motion for Summary Judgment" (Dkt. 265).

procedures that follow from the employment").

C. Liberty Interest

Xu alleges for the first time in her summary judgment papers that she was deprived of a liberty interest — as well as a property interest — without adequate process. (Xu Mem. at 5-6, 9-11; Xu Reply at 10-13.) The best argument advanced by Xu is a "stigma-plus" claim, which is a claim stating (1) "an injury to one's reputation (the stigma)"; (2) "coupled with the deprivation of some 'tangible interest' or property right (the plus)" (3) "without adequate process." *Segal v. City of New York, 459 F.3d 207, 212 (2d Cir. 2006)* (internal quotation marks and citation omitted). While loss of reputation alone is not cognizable under the Due Process Clause, but instead properly brought as a state-law defamation claim, the Supreme Court and Second Circuit have held that **[*76]** injury to reputation along with the "plus" may implicate a liberty interest. *Roth, 408 U.S. at 572-73*; *Patterson v. City of Utica, 370 F.3d 322, 329-30 (2d Cir. 2004)*. In a case such as this, the liberty interest at stake is the freedom to obtain employment in a chosen field. *See Valmonte v. Bane, 18 F.3d 992, 999 (2d Cir. 1994)*.

Even where an employee does not have a property interest in continued employment, termination from government employment is sufficient to demonstrate the plus. *Segal, 459 F.3d at 212* (noting that even a probationary employee can invoke the Due Process Clause where she can state a stigma-plus claim). Demonstrating the stigma requires showing three things. First, that "the government made stigmatizing statements about her," which are statements that (a) "call into question the plaintiff's good name, reputation, honor, or integrity" or (b) "denigrate the employee's competence as a professional and impugn the employee's professional reputation in such a fashion as to effectively put a significant roadblock in that employee's continued ability to practice his or her profession." *Id. at 212* (internal quotation marks, brackets, and citations omitted). Second, that "these stigmatizing statements were made public," *id. at 212* (internal quotation marks omitted), which can be

demonstrated by showing that "the stigmatizing charges are placed in the discharged employee's **[*77]** personnel file and are likely to be disclosed to prospective employers," *Brandt v. Board of Cooperative Educational Services, Third Supervisory District, Suffolk County, New York, 820 F.2d 41, 45 (2d Cir. 1987)*. And, third, that "the stigmatizing statements were made concurrently with, or in close temporal relationship to, the plaintiff's dismissal." *Segal, 459 F.3d at 212-13*. In this context, adequate process — which definitionally defeats a due process claim — is "a reasonably prompt post-termination name-clearing hearing." *Id. at 218*.

This new claim, made for the first time in Xu's cross-motion for summary judgment, is procedurally barred. *Evans-Gadsden v. Bernstein Litowitz Berger & Grossman, LLP, 491 F. Supp. 2d 386, 402 (S.D.N.Y. 2007)* ("Even given the considerable leeway in pleadings afforded to pro se litigants, Plaintiff here cannot raise a new claim for the first time in a cross-motion for summary judgment"), *aff'd sub nom. Gadsden v. Bernstein Litowitz Berger & Grossman, 323 F. App'x 59 (2d Cir. 2009)*. While it is not necessary for a complaint to correctly plead every legal theory supporting the claim,

> at the very least, plaintiff must set forth facts that will allow each party to tailor its discovery to prepare an appropriate defense. Because a failure to assert a claim until the last minute will inevitably prejudice the defendant, courts in this District have consistently ruled that it is inappropriate to raise new claims for the first time in submissions in opposition to summary judgment.

Kearney v. City of Rockland, 373 F. Supp. 2d 434, 441 (S.D.N.Y. 2005) (internal quotation marks **[*78]** and citation omitted), *aff'd sub nom. Kearney v. City of Rockland ex rel. Vanderhoef, 185 F. App'x 68 (2d Cir. 2006)*.

Xu argues that she could not have pleaded her liberty interest claim in her complaint because she did not know that her negative evaluation was in her personnel file until the month after she filed her Third Amended Complaint. (Xu Reply at

11; Xu Decl. ¶ 11(a).[34]) But, after learning of the negative evaluation, Xu litigated for years without moving to further amend and add a liberty-interest claim. Xu filed her Third Amended Complaint on June 26, 2009. A month later was July 2009. Discovery then went forward for eight months, but Xu did not move to amend her complaint. (*See* Dkts. 15-32). Instead, Xu and the Federal Defendants briefed a motion for judgment on the pleadings. (*See* Dkts. 33-39.)

After that motion was granted on August 3, 2010, discovery resumed for nearly two more months before it was stayed on Xu's motion for reconsideration on September 28, 2010. (*See* Dkts. 40-47.) Again, Xu did not move to amend during the period of resumed discovery. When the decision was issued on the reconsideration motion, litigation was stayed for the New York State Article 78 proceeding. (*See* Dkts. 51, 52, 56, 57, 58, 64, 72, 75.) After the New York state trial **[*79]** court issued its decision on the remanded Article 78 petition on May 14, 2013, litigation resumed, but Xu did not move to amend her complaint. Instead, the parities briefed, and the Court decided, a motion for judgment on the existing pleadings, and the case was closed. (*See* Dkts. 91-112.) Upon the Second Circuit's first reversal on April 29, 2015, the case was reopened, but Xu did not move to amend her complaint. Instead, the parties briefed, and the Court decided, a second motion for judgment on the existing pleadings, and the case was again closed. (*See* Dkts. 124-52.)

After the Second Circuit again reversed, the case was reopened and discovery resumed on May 7, 2018. (*See* Dkts. 160-176.) With several extensions and some assistance from the Court, discovery continued through November 18, 2019. (*See* Dkts. 176, 179, 185, 206, 208, 211, 214, 216-17, 226-241.) At no point during those eighteen months did Xu move to amend her complaint. Like the plaintiff in *Evans-Gadsen*, Xu's extensive litigation history and multiple complaints demonstrate that she "knows enough about the legal process

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[34] "Xu Decl." refers to Xu's "Declaration in Support of Her Cross-Motion & in Opposition to Defendants' Motion" (Dkt. 263).

to understand when and where new claims are properly raised." *Evans-Gadsden, 491 F. Supp. 2d at 402* ("Even if she did not, this Court would **[*80]** not permit Plaintiff to make an end-run around the most basic pleading requirements").

Allowing Xu's claim that was not pleaded until after the close of discovery would greatly prejudice Defendants. Their primary argument against Xu's stigma-plus claim is that she cannot satisfy the publication requirement under *Brandt*. (*See* Defs. Reply at 14.) Defendants' inability to seek discovery on whether and to what extent the performance evaluation has come up in any of Xu's attempts to seek employment significantly hinders their ability to mount a defense.[35]

Additionally, a liberty-interest claim likely would be futile as the facts would not satisfy the first prong of a stigma-plus claim. *See Aetna Casualty and Surety Co. v. Aniero Concrete Co., 404 F.3d 566, 603-04 (2d Cir. 2005)* (grounds for denying amendment to pleadings include delay, prejudice, and futility). The Second Circuit has noted that stigmatizing claims "will not support a cause of action ... unless the allegations go to the very heart of the employee's professional competence, and threaten to damage his professional reputation, significantly impeding his ability to practice his profession." *O'Neill v. City of Auburn, 23 F.3d 685, 692-93 (2d Cir. 1994)* (internal quotation marks, citations, and brackets omitted). "An employee charged with derelictions largely within her own power **[*81]** to correct is not deprived of such an interest." *Donato v. Plainview-Old Bethpage Central School District, 96 F.3d 623, 630 (2d Cir. 1996)*.

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[35] Defendants also argue that there is no evidence in the record to suggest that Xu's negative evaluation would be disclosed to a future employer — even within City administration — until after she is hired, and the terms of the City's release for personnel files implies the opposite. (Defs. Reply at 13-15.) Given the Court's conclusion that Xu is procedurally barred from belatedly asserting a liberty-interest claim, the Court need not address this argument.

The negative performance evaluation placed in Xu's personnel file explains that Xu had trouble understanding "various data sources and methodologies required for VFC reports," was reluctant to apply suggestions from colleagues, had poor communication and team work skills, and effectively refused a work assignment. (Eval. at 2-3.) These were comments specific to poor performance working for VFC. None were intractable character flaws outside of Xu's ability to correct going forward. She was even encouraged and given the opportunity to correct them before being terminated but was unable to do so. (*See* Defs. 56.1 ¶ 83; King Aff. ¶¶ 18-19, 26; Lapaz Aff. ¶¶ 11-14.)

Put succinctly, Xu's eleventh-hour liberty interest claim is too little, too late, and is insufficient to forestall summary judgment on her due process claim.

D. Due Process — Conclusion

In sum, the Court concludes that Xu did not have a property interest in her continued employment. Nor did Xu have a property interest in appealing her negative performance evaluation. And Xu's stigma-plus, liberty interest claim is procedurally barred and without merit. Xu's motion for summary judgment on her **[*82]** due process claim should be denied, and Defendants' motion for summary judgment on the due process claim should be granted.

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Conclusion

To the extent not explicitly addressed above, the Court has considered all other arguments made by Xu and finds them to be without merit. Xu's motion for partial summary judgment should be DENIED, and Defendants' motion for summary judgment should be GRANTED.