10-308

To Be Argued By:
DAVID C. NELSON

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-308

ANCY A. MATHIRAMPUZHA,
Plaintiff-Appellant,

-vs-

JOHN E. POTTER, POSTMASTER GENERAL,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR JOHN E. POTTER,
POSTMASTER GENERAL**

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Statement of Jurisdiction

The district court (Janet B. Arterton, J.) had subject matter jurisdiction over this civil case arising under federal law pursuant to 28 U.S.C. § 1331. The district court issued a final decision granting summary judgment to the defendant on all of the plaintiff's claims on January 3, 2010. Government Appendix ("GA") at 5. Judgment entered on January 4, 2010. GA at 6. On January 27, 2010, the plaintiff filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). GA at 6. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues Presented for Review

1. Did the district court properly grant summary judgment in favor of the government on the plaintiff's Title VII claim where the government terminated the plaintiff after the plaintiff refused to take a mandatory competency test, and the plaintiff cannot show that this legitimate, non-discriminatory reason was a pretext for discrimination?

2. Did the district court properly grant summary judgment in favor of the government on the plaintiff's due process claims where: (1) the Civil Service Reform Act precludes *Bivens* claims challenging adverse employment decisions; (2) the plaintiff named the wrong defendant; (3) the plaintiff was a probationary, public employee; and (4) the government's actions did not shock the conscience?

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Preliminary Statement

Plaintiff Ancy Mathirampuzha ("Mathirampuzha"), a former window clerk at the United States Post Office in Falls Village, Connecticut, appeals from the district court's decision granting summary judgment to the government on Mathirampuzha's Title VII employment discrimination and due process claims. Mathirampuzha's claims arise

from her failure to take a competency test following her two weeks of mandatory training.

Specifically, on November 15, 2005, Mathirampuzha's supervisor, Postmaster Lois McKee, called her at home and told Mathirampuzha that her post-training final exam was scheduled for the next day, November 16, 2005. Mathirampuzha told McKee that she needed more time to study and would not take the exam. McKee informed Mathirampuzha that she was required to take the exam on the date in question and could not obtain an extension.

Mathirampuzha did not take the exam, and McKee terminated her employment on November 17, 2005. Mathirampuzha subsequently filed suit alleging that McKee discriminated against her in violation of Title VII based on Mathirampuzha's race (Asian-American) and national origin (Indian). Mathirampuzha later raised due process claims.

The district court properly granted the government's motion for summary judgment on Mathirampuzha's Title VII claim because Mathirampuzha failed to prove that the government's legitimate non-discriminatory reason, namely, Mathirampuzha's failure to take the exam, was a pretext for discrimination. The district court also properly held that Mathirampuzha's due process claims failed for a variety of procedural problems and, even if considered on the merits, would fail because Mathirampuzha was a probationary, public employee and the government's actions did not shock the conscience. Accordingly, the district court's decision should be affirmed.

Statement of the Case

This is a civil appeal from a final judgment of the United States District Court for the District of Connecticut (Janet B. Arterton, J.) granting summary judgment to John E. Potter, Postmaster General of the United States.

On May 5, 2008, Mathirampuzha brought this action as a disparate treatment claim under Title VII, 42 U.S.C. §§ 2000e *et seq*., against John E. Potter, Postmaster General, alleging that the United States Postal Service ("Postal Service") discriminated against her based on her national origin. GA at 4, 7. On August 4, 2009, she filed an amended complaint, alleging discrimination on the basis of her race and national origin. GA 5, 16. The Postal Service moved for summary judgment, GA 5, and, on January 3, 2010, the district court granted the Postal Service's motion for summary judgment on both Mathirampuzha's Title VI claim and her due process claims raised for the first time in her opposition to the motion for summary judgment, GA 5, 423. Judgment entered on January 4, 2010. GA at 6. Mathirampuzha filed a timely notice of appeal on January 27, 2010. GA at 6.

Statement of Facts and Proceedings Relevant to this Appeal

I. Factual background

On October 15, 2005, Lois McKee, the Postmaster of the United States Post Office in Falls Village, Connecticut, hired Ancy Mathirampuzha to work as a "Part Time Flexible Sales and Service Associate," commonly called a window clerk. GA at 198. McKee is a Caucasian woman whose ancestry is French and Spanish. GA at 198. Mathirampuzha is an Asian woman who is from India. GA at 16. McKee was aware of Mathirampuzha's race and national origin when she hired her. GA at 221, 226.

Mathirampuzha was hired as a 90-day probationary employee. GA at 220, 325. Before beginning her duties, Mathirampuzha underwent eighty hours of mandatory training. GA at 241. During this training, Mathirampuzha was told that she would be required to sit for and pass a final exam in order to continue working as a window clerk. GA at 241. To pass the exam, Mathirampuzha was required to answer correctly 40 of the 50 questions on the exam. GA at 246.

On November 14, 2005, McKee told Mathirampuzha that McKee would be calling her during the next two days to notify her of the date, time, and location of the final exam. GA at 114-16,198-99, 222. On November 15, 2005, while Mathirampuzha was off-duty, McKee called Mathirampuzha and told her that the final exam was scheduled for the next day, November 16, 2005. GA at

199, 213, 226. McKee also told Mathirampuzha that she scheduled the exam for late morning so that Mathirampuzha did not have to travel from her home in West Hartford, Connecticut, to New Haven during rush hour traffic. GA at 199.

According to McKee, Mathirampuzha responded "that she wouldn't go because she hadn't had enough time to study. I told her that it was mandatory for her to take the test. She said no she wouldn't take it." GA at 199. At her deposition, Mathirampuzha did not dispute this version of events, but rather, stated that she was unable to recall what she had said during her phone conversation with McKee. GA at 116, 131-33.

Mathirampuzha did not take the final examination. GA at 112, 219. McKee called the Post Office Operations Manager ("POOM"), the personnel department, and labor relations regarding the situation and each agreed that McKee should terminate Mathirampuzha's employment. GA at 218, 227-28. Before terminating her employment, McKee met with Mathirampuzha on the day Mathirampuzha returned to work. GA at 219. At that meeting, according to McKee,

> [Mathirampuzha] explained to me why she thought she had the right to refuse the test. I explained to her that she did not have the right, and I terminated her. I told her that on the phone when I called her house when she said she didn't want to go. I said, You have to go, Ancy. It's the rules. If you don't go,

> I have to let you go. Ancy didn't go take the test. I even scheduled it so that she could do it at eleven or twelve o'clock in the morning so she didn't have to hire a babysitter and drive into rush hour traffic, and she didn't go and take the test. Taking that test is a requirement of the job.

GA at 219. During this meeting, Mathirampuzha did not inform McKee of a family or medical emergency that prevented her from taking the test. GA at 226-27. McKee issued Mathirampuzha a letter of termination, effective November 17, 2005, which stated that "you have failed to successfully complete the window training which is a requirement for the position. Specifically you refused to attend the final examination."[1] GA at 260.

Mathirampuzha filed suit against the Postal Service on May 5, 2008, alleging race discrimination. GA at 4, 7. On August 4, 2009, she filed an amended complaint, alleging discrimination on the basis of her race and national origin. GA 5, 16. During her deposition, Mathirampuzha's response to the question "[w]hat makes you believe that it was because of your race or national origin that these

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[1] This letter also referenced Mathirampuzha's unsatisfactory work performance as a basis for termination. For purposes of its summary judgment motion, the Postal Service did not rely on this reason and relied only on Mathirampuzha's failure to take the required exam.

things happened to you?" was, after a pause, "I don't recall." GA at 96.

II. Summary judgment proceedings

On May 1, 2009, the Postal Service filed a motion for summary judgment. GA at 5. The district court held oral argument on the Postal Service's motion for summary judgment on December 1, 2009. GA at 384.

At oral argument on the summary judgment motion, Mathirampuzha agreed that she was required to take the final exam and did not do so. GA at 392-93. Mathirampuzha also agreed that she had provided no evidence to support her claim that she provided McKee with a reason she could not attend the exam. GA at 395-99. Mathirampuzha argued, however, the complaints of her white male co-worker Jason Calabrese that he was not getting enough hours after McKee hired Mathirampuzha evidenced that discrimination was the real reason for her firing. GA at 390-91.

In her opposition to the Postal Service's motion for summary judgment, Mathirampuzha also articulated a due process claim. GA at 316-17. The Postal Service addressed the due process claim in its reply to Mathirampuzha's opposition to its motion for summary judgment. GA at 381-82. During oral argument, Mathirampuzha clarified that she was making both substantive and procedural due process claims. GA at 403-04.

In response to Mathirampuzha's clarification of her due process claims, the Postal Service argued that, as the Second Circuit recently noted, remedies under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), are not to be created by the courts when there is an already existing comprehensive body of law. GA at 405-06 (referring the district court to the case of *Arar v. Ashcroft*, 585 F.3d 559, 573 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010). The Postal Service also argued that Mathirampuzha's due process claims failed because she was a probationary employee and could be fired at will, and there was no evidence that Mathriampuzha's firing "shocked the conscience" as required to establish a substantive due process violation. GA 406-09.

By a ruling dated January 3, 2010, the district court granted summary judgment in favor of the Postal Service on all of Mathirampuzha's claims. GA 423.

Regarding the Title VII claim, the district court assumed that Mathirampuzha met her initial *de minimis* burden of showing a prima facie case of discrimination under the burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). GA at 428. The district court then held that the Postal Service had advanced a legitimate, non-discriminatory reason for Mathirampuzha's termination, namely, Mathirampuzha's "failure to take and pass the exam." GA at 429. The district court also stated: "It is undisputed that Ms. Mathirampuzha refused to sit for the exam on the date it was offered. She knew in advance about the test and was

given its time and location. She knew that the test was mandatory." GA at 429.

The district court then analyzed the evidence proffered by Mathirampuzha regarding pretext. GA 439. The district court held that the circumstances Mathirampuzha claimed established pretext were insufficient to support her claim of discrimination. GA 429-30. First, as to Mathirampuzha's claim that the manner in which McKee informed her of the test was evidence of pretext, the district court noted that "[e]ven assuming Ms. Mathirampuzha was caught off-guard by Ms. McKee's call, this method of notification does not translate into any inference that using Plaintiff's failure to sit for the exam as the reason for her termination was mere pretext for unlawful discrimination." GA at 431. The district court held that Mathirampuzha had adequate notice of the exam through both her prior training and McKee's telephone call. GA at 430-431. The district court explained that Mathirampuzha offered "no explanation why this notice was insufficient. There is no evidence in the record that Ms. Mathirampuzha was unable to take the test for any other reason, and in her deposition, she said that she could not recall any specifics from her phone conversation with Ms. McKee." GA at 431.

Mathirampuzha also argued that McKee violated Postal Rule § 365.324. That rule states that "[s]upervisors may recommend separation-disqualification, but such recommendations must be referred for decision to the official having authority to take the action." GA at 258. The district court held that the record demonstrated that

McKee was an individual with authority to make the decision to terminate an individual within the context of § 365.324. GA at 432-33. The district court explained that Mathirampuzha

> offers no evidence that Ms. McKee in fact lacked authority to take the employment action in question. Ms. McKee explained in her deposition that in the small Falls Village post office, she is the official with authority to take employment actions, including the termination of Ms. Mathirampuzha's employment.

GA at 432. The district court therefore held that McKee did not deviate from the Postal Rule. GA at 433.

The district court also found that "Ms. Mathirampuzha has pointed to no evidence that could allow for an inference of a causal link between the complaints made by Mr. Calabrese and Ms. McKee's ultimate decision to terminate her employment, thus Mr. Calabrese's complaints cannot constitute circumstantial evidence of discriminatory intent." GA at 433-34.

The district court noted that "[f]urther undermining her argument that Ms. McKee fired her for discriminatory reasons, Plaintiff explained in her deposition 'I don't know what [Ms. McKee] believe[s] . . . . I don't know why she did it. I don't recall. I don't know anything about it.'" GA 434 (quoting Mathirampuzha Dep. 113:17–21).

The district court also granted summary judgment in favor of the Postal Service on Mathirampuzha's new due process claims. The district court first noted that Mathirampuzha failed to plead these claims in her amended complaint. GA at 435. The district court nevertheless decided to hear the claims, because Mathirampuzha "did allege [in her opposition to summary judgment] that she was entitled to and denied an interview with an independent Postal Service official and that the Postal Service failed to follow its guidelines for firing employees" as the basis for her procedural due process claim, and the district court "construed liberally" those allegations "as a motion to amend pleadings." GA at 435. The district court also noted that Mathirampuzha raised a substantive due process claim in her opposition "without explaining its basis." GA 438.

The district court found several problems with the due process claims. First, the claims were time-barred. GA 436. Following Second Circuit law, the district court held that a three-year statute of limitations applied to the *Bivens* claims. GA 436. The district court held that "Ms. Mathirampuzha's claim that her constitutional rights were violated by a federal actor, a *Bivens* claim, is time-barred by this three-year statute of limitations because she was terminated more than three years before May 21, 2009, when she raised her procedural due process claim in opposition to summary judgment." GA at 436. Second, the district court held that a *Bivens* action could not be brought against John E. Potter because he had no involvement. GA at 436-37. The district court found that McKee would have

been a proper defendant but that she was never named. GA at 437.

Even if Mathirampuzha could overcome these problems, the district court held, her claims would fail on the merits. GA 437. The district court noted that a prerequisite of a procedural due process claim is a protected property or liberty interest and that Mathirampuzha, as a probationary employee, "did not have an entitlement to or expectation of continued employment and thus did not have a protected property interest in her employment." GA at 438. Indeed, the district court noted, Mathirampuzha "could be terminated 'at any time in the probationary period' for 'failure to qualify by conduct or capacity during the probationary period' (ELM § 365.325) and therefore could have had no reasonable expectation of or entitlement to employment during that period." GA at 438. Without a protected property interest, the procedural due process claim failed. GA at 437-38.

The district court also held that Mathirampuzha's substantive due process claim failed procedurally and on its merits. GA at 439-40. The district court noted that "[b]ecause there is no recognized fundamental interest in public employment," Mathirampuzha must demonstrate "that the state action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" in order to establish a substantive due process violation. GA at 439 (internal quotation marks omitted). The district court held that the Postal Service's actions did not reach the level of shocking the conscience, but rather, the Postal Service gave a legitimate reason for

Mathirampuzha's termination. GA at 439-40. As the district court explained, "[f]ollowing Postal Service protocol and terminating her for failure to sit for a required qualifying examination hardly shocks the conscience." GA at 439.

Summary of Argument

The district court properly granted summary judgment to the Postal Service on Mathirampuzha's Title VII claim. The Postal Service presented a legitimate, non-discriminatory reason for Mathirampuzha's termination, namely, her failure to take the exam. Mathirampuzha's arguments concerning the notice and scheduling of the exam, McKee's alleged failure to follow Postal Rule § 365.324, McKee's alleged false statement, and Mathirampuzha's white male co-worker's complaints, do not demonstrate that the Postal Service's reason was pretextual. As an additional matter, Mathirampuzha's claim that McKee fired her because of her race and national origin is belied by the fact that McKee *hired* Mathirampuzha just one month prior, knowing her race and national origin.

Mathirampuzha has waived her due process claims by failing to raise them in her appellate brief. In any event, the district court properly granted summary judgment to the Postal Service on Mathirampuzha's due process *Bivens* claims, which appear to relate to her failure to be afforded a disciplinary hearing and to the alleged failure to follow Postal Rule § 365.324. First, it would be inappropriate for the this Court to create a *Bivens* remedy in light of the

comprehensive and remedial nature of the Civil Service Reform Act ("CSRA"). The due process claims also fail because they were were brought against the wrong party. Even if this Court reached the merits of the due process claims, however, it should affirm the judgment of the district court because Mathirampuzha has no protected property interest sufficient to support a procedural due process claim and the Postal Service's actions do not sufficiently "shock the conscience" in order to support a substantive due process claim.

ARGUMENT

I. The district court properly granted summary judgment to the Postal Service on Mathirampuzha's Title VII claim.

A. Governing law and standard of review

1. The standard of review and the law governing summary judgment

This Court reviews *de novo* a district court's grant of summary judgment. *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 46 (2d Cir. 2007).

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall render summary judgment when a review of the entire record demonstrates "'that there is no genuine issue as to any material fact.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). The relevant question is not whether the non-moving party has provided any evidence, but

> whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict – whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (internal quotation marks omitted; alteration in original). In determining whether there is a genuine issue of material fact, the court must resolve ambiguities and draw factual inferences in favor of the non-moving party. *Id.* at 255.

Although the court has a duty to resolve ambiguities in favor of the non-moving party, "[a] defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial." *Parker v. Sony Pictures Entm't, Inc.*, 260 F.3d 100, 111 (2d Cir. 2001). When the moving party points to an absence of evidence regarding an essential element, the non-moving party must "show the presence of a genuine issue by coming forward with evidence that would be sufficient, if all reasonable inferences were drawn in his favor, to

establish the existence of that element at trial." *Grain Traders v. Citibank, N.A.*, 160 F.3d 97, 100 (2d Cir. 1998).

On summary judgment, the court's "obligation to draw all reasonable inferences in favor of plaintiffs does not mean [the court] must credit a version of the facts that is belied by the record." *Tabbaa v. Chertoff*, 509 F.3d 89, 93 n.1 (2d Cir. 2007). "The Supreme Court held in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 202 (1986), that a plaintiff may not defeat summary judgment by merely asserting that the jury might, and legally could, disbelieve the defendant's denial." *LaFrenier v. Kinirey*, 550 F.3d 166, 167 (1st Cir. 2008). As such, summary judgment is appropriate "'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 884 (1990) (quoting *Celotex*, 477 U.S. at 322).

2. The standard for Title VII disparate treatment claims

The plaintiff's disparate treatment claim is analyzed under the *McDonnell Douglas* burden-shifting framework. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To make a prima facie case, the plaintiff must show that (1) she is a member of a protected class; (2) she was competently performing her duties; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination based on the

plaintiff's protected class. *Ruiz v. County of Rockland*, 609 F.3d 486, 491-92 (2d Cir. 2010); *Mario v. P & C Food Mkts.*, 313 F.3d 758, 767 (2d Cir. 2002).

If the employee can make a prima facie case, the burden shifts to the employer to offer a legitimate, non-discriminatory reason for its actions. *Howley v. Town of Stratford*, 217 F.3d 141, 150 (2d Cir. 2000). Mathirampuzha claims that an employer must present "clear and convincing evidence" of its legitimate non-discriminatory reason. Pl. Br. 20. As the Supreme Court has explained, however, the employer's burden to produce a legitimate non-discriminatory reason is "is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993)).

The plaintiff is then given an opportunity to present evidence sufficient to permit a rational fact finder to infer that the employer's proffered reason is pretext for discrimination. *Reeves*, 530 U.S. at 143. However,

> merely showing that the employer's proffered explanation is not a genuine explanation does not in itself entitle the plaintiff to prevail; the plaintiff is not entitled to judgment unless she shows that the challenged employment decision was more likely than not motivated, in whole or in part, by unlawful discrimination. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

Howley, 217 F.3d at 150 (internal citations and quotation marks omitted). "[A] reason cannot be proved to be a pretext *for discrimination* unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's Honor Ctr.*, 509 U.S. at 515 (internal quotation marks omitted).

When evaluating the defendant's legitimate non-discriminatory reasons and the plaintiff's arguments regarding pretext, a court may not substitute its business judgment for that of the defendant. The business judgment rule is well established in this Circuit. *See Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001) (quoting with approval *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999) ("Our role is to prevent unlawful hiring practices, not to act as a super personnel department that second guesses employers' business judgments.")). "'[F]ederal courts are not in the business of

adjudging whether employment decisions are prudent or fair. Instead, [a federal court's] sole concern is whether unlawful discriminatory animus motivates a challenged employment decision.'" *Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002) (quoting *Rojas v. Florida*, 285 F.3d 1339, 1342 (11th Cir. 2002) (internal quotation marks omitted)). As the court explained in *Chapman v. AI Transport*:

> A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason. . . . [F]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions. . . . Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior.

229 F.3d 1012, 1030 (11th Cir. 2000) (internal citations and quotation marks omitted).

In implementing the business judgment rule, courts focus on what an employer reasonably believed at the time it made its decision, not post-hoc proof of what might have happened. For example, in *Soto v. Core-Mark Int'l, Inc.*,

the plaintiff's co-workers observed him sleeping at his workstation. 521 F.3d 837, 840 (8th Cir. 2008). Both co-workers gave statements to managers indicating that they observed the plaintiff sleeping. *Id*. The defendant-employer terminated the plaintiff for sleeping on the job. *Id*. At summary judgment, the plaintiff argued that the employer's reason for terminating him was a pretext for discrimination. He relied on his deposition testimony to prove that he was not sleeping. *Id.* at 841-42.

The Eighth Circuit noted, however, that what was relevant was not whether the plaintiff provided sufficient evidence that he was not sleeping, but whether he created a factual dispute about "the employer's good faith belief he was sleeping on the job." *Id.* at 842. The Eighth Circuit went on to hold that the employer made its decision based on the statements of two witnesses and information from a manager and that the plaintiff's deposition testimony did not change the employer's good faith reliance on the witnesses. *Id.*

The plaintiff has an additional hurdle to overcome when the same individual hires and fires the plaintiff: the same-actor inference. Stated generally,

> when the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire. This is especially so when the firing has occurred only a short time after the hiring.

Grady v. Affiliated Cent., 130 F.3d 553, 560 (2d Cir. 1997).

This Court has applied the same-actor inference in the Age Discrimination in Employment Act context, *see id.*, and has assumed, without deciding, that it applies in the Title VII context, *see Feingold v. New York*, 366 F.3d 138, 155 n.15 (2d Cir. 2004).[2] Other circuits have adopted the same-actor inference in Title VII cases. *See, e.g.*, *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 744 & n.3 (7th Cir. 1999) (collecting cases); *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995).

The same-actor inference "is based on a common-sense psychological assumption, that [i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job." *Johnson*, 170 F.3d at 745 (internal quotation marks omitted; alteration in original). As this Court noted, "this remains a *highly relevant factor* in adjudicating a motion for summary judgment." *Schnabel v. Abramson*, 232 F.3d 83, 91 (2d Cir. 2000) (emphasis added). Indeed, this Court has applied the same-actor inference even when the firing occurred three years after the hiring. *Id*.

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[2] The Court has applied the same-actor rule in the Title VII context in an unpublished opinion. *See Cordell v. Verizon Communs., Inc.*, 331 Fed. Appx. 56, 58 (2d Cir. 2009).

B. Discussion

Mathirampuzha failed to establish a prima facie case and failed to prove that the Postal Service's legitimate non-discriminatory reason was a pretext for discrimination.

1. Prima facie case

As to the prima facie case, even assuming that Mathirampuzha can meet the first three elements (she was a member of a protected class, she was competently performing her duties, and she suffered an adverse employment action) of the prima facie case, Mathirampuzha cannot meet the fourth element of the prima facie case, that the adverse employment action occurred under circumstances giving rise to an inference of discrimination based on the plaintiff's protected class. *Mario*, 313 F.3d at 767.

It is undisputed that Mathirampuzha did not take the final exam, GA 112, which she was required to take, GA 220 (McKee's undisputed testimony that exam was "requirement of the job"), 246 (Postal handbook providing that exam was required). In her deposition, Mathirampuzha stated "I took window training. I pass the window training, but I didn't took my final exam which is in New Haven, yes." GA at 112. Because Mathirampuzha failed to complete a necessary requirement for her job, she cannot show that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *See Deebs v. Alstom Transp., Inc.*, 550 F.

Supp. 2d 385, 392 (W.D.N.Y. 2008) ("Having failed to establish that he was qualified for the technician position by virtue of having passed the electronic skills test - an undisputed prerequisite for maintaining employment as a technician - Deebs has failed to set forth a prima facie case of discriminatory discharge."). Mathirampuzha submitted no evidence that individuals from outside her protected class refused to take the exam but were permitted to keep their positions.

2. Pretext

Even assuming Mathirampuzha has made out a prima facie case, her refusal to take the exam also forms the basis of the Postal Service's legitimate, non-discriminatory reason for the termination. McKee stated in her deposition that Mathirampuzha was terminated because she refused to take the exam. GA at 222. McKee's deposition testimony is consistent with her letter terminating Mathirampuzha, where she stated, "you have failed to successfully complete the window training which is a requirement for the position. Specifically you refused to attend the final examination." GA at 260. This decision was in accord with Postal Service rules, which required future window clerks to "answer correctly 40 of the 50 questions (80%) on the exam in order to be deemed qualified and eligible to assume the bid or assignment." GA at 246.

Mathirampuzha has also failed to prove that the Postal Service's legitimate, non-discriminatory reason was a pretext for discrimination. *Howley*, 217 F.3d at 150. First,

Mathirampuzha failed to set forth any evidence that she was treated worse than an individual similarly situated to her. Indeed, the evidence established that McKee had fired a Caucasian window clerk, Cynthia Strattman, because Strattman was unable to pass the final exam. GA at 254-55.

Second, Mathirampuzha's excuses for her failing to take the test are unsupported by the record, and, in any event, do not establish that the Postal Service's reason was a pretext for discrimination. For example, Mathirampuzha notes in her brief to this Court that she was unable to take the test because she lacked a ride to New Haven and she had to care for a sick child. *See* Pl. Br. 6, 7, 9. There is no support in the record for this argument. The district court found that Mathirampuzha merely told McKee that she needed more time to study and "[t]here [was] no evidence in the record that Ms. Mathirampuzha was unable to take the test for any other reason, and in her deposition, she said that she could not recall any specifics from her phone conversation with Ms. McKee." GA at 431. Even during oral argument, Mathirampuzha failed to offer any evidence that she could not get a ride or had family problems. The district court specifically questioned Mathirampuzha about this issue:

> THE COURT: All right, and that says that – that's Ms. McKee saying that you said you wouldn't go because you hadn't had enough time to study, and that's one of the things you are telling me here today. We have her saying that they scheduled the exam for late

> morning so you wouldn't have to drive to and from New Haven in rush hour traffic. *I don't see anything in here about your not having a ride and for family reasons, but I'm happy to be shown what I've overlooked.*
> MS. MATHIRAMPUZHA: *Whatever they say in the file, that's all.*

GA at 398-99 (emphasis added). This is consistent with Mathirampuzha's deposition testimony, where she testified that she could not recall the details of the conversation she had with McKee on November 15. GA at 116. Even when she met with McKee on the date she came back to work, Mathirampuzha did not claim that medical or family issues prevented her from taking the exam. GA at 226-27. There is no evidence that the lack of a ride or a sick child prevented Mathirampuzha from taking the exam, therefore, Mathirampuzha cannot rely on this argument to prove that the Postal Service's reason for the termination was a pretext for discrimination.

Mathirampuzha also cannot overcome the same-actor inference, which provides that an invidious motivation will not likely be found when the person who made the decision to fire was the same person who made the decision to hire. *Grady*, 130 F.3d at 560. When McKee hired Mathirampuzha, she was aware of Mathirampuzha's race and national origin. GA at 221, 226. McKee fired Mathirampuzha one month later, on November 17, 2005. GA at 260. In that month, the only change in the relationship between Mathirampuzha and McKee was

Mathirampuzha's refusal to take the exam. The exceptionally short time between the hiring and firing make the same-actor inference overwhelming in this case. *Jones v. Yonkers Pub. Schs.*, 326 F. Supp. 2d 536, 546 (S.D.N.Y. 2004) (noting that the inference is "significant where the time period between the hiring and firing is less than two years") (internal quotation marks omitted). Mathirampuzha offers no evidence to rebut this.

Mathirampuzha also alleges that McKee failed to follow Postal Rule § 365.324 and that this failure is evidence of pretext. Pl. Br. 25. Postal Rule § 365.324 states that "[s]upervisors may recommend separation-disqualification, but such recommendations must be referred for decision to the official having authority to take the action." GA at 258.

As the district court found, Postal Rule § 365.324 allowed McKee to make the decision. The district court accepted McKee's statement in her deposition that "[w]hen you are the Postmaster in a small office, you have the right and the authority to hire and to fire without getting permission from someone higher than you. . . . I do not need permission from my supervisor to either hire or fire a person, ..." GA at 218. Accordingly, McKee, as the Postmaster of a small Post Office, was the individual with authority to fire Mathirampuzha under § 365.324.

Mathirampuzha argues that McKee was not "the official having authority," but Mathirampuzha does not indicate whom she believes to be the proper official. She merely states that she "provided proof of McKee's

deposition testimony where McKee admitted that she had to get higher official authority approval from the POOM (post office operations manager), whose name was never given." Pl. Br. 23. McKee did not make such an admission. Rather, McKee stated that she consulted with others, but was not required to:

> Q. In this section, are you – under 365.324, are you considered the supervisor or the official having the authority to take the action?
> A. I am the official having the authority to take the action.
> Q. So that section applies to you, but since you're not the supervisor, you're the official having the authority to take the action?
> A. Right.
> Q. You don't need to consult with anyone?
> A. No, I don't.
> Q. Although you did call for advice?
> A. I did call for advice. I called three different authorities. I called the POOM office. I called Personnel and talked to Vinny Mottolo, and I called Employee and Labor Relations and talked to Vern Tyler.
> Q. And the recommendation from each of those offices was?
> A. Was that she must be fired. It's required for her to take that test to keep the job. She has to be terminated.

GA at 227-28.

This passage also makes clear that, even if McKee was not the "official having authority," at a minimum, such official was a supervisor in the POOM (Postal Office Operations Manager) office, whom she did consult. Thus, even under Mathirampuzha's (incorrect) reading of § 365.324, McKee still followed procedure.

Moreover, Mathirampuzha cannot carry her burden to prove pretext by arguing with the Postal Service's interpretation of its own policy. Absent discrimination based on protected characteristics, an employer is entitled to interpret and apply its own policies according to the needs of its business. *See Schultz v. General Elec. Capital Corp.*, 37 F.3d 329, 334 (7th Cir. 1994); *see also Sybrandt v. Home Depot, U.S.A., Inc.*, 560 F.3d 553, 558-59 (6th Cir. 2009) ("[D]isputes about the interpretation of company policy do not typically create genuine issues of material fact regarding whether a company's stated reason for an adverse employment action is only a pretext designed to mask unlawful discrimination."). There is nothing inherently discriminatory about the Postal Service's interpretation of its policy.

This Court does not sit as a super personnel department, *Byrnie*, 243 F.3d at 103; therefore, its "inquiry is limited to whether the employer gave an honest explanation of its behavior," *Chapman*, 229 F.3d at 1030. Even if the Court decided to deviate from its traditional role, however, and re-read § 365.324 to require that

McKee needed to consult with a higher authority, Mathirampuzha's claim would still fail.

Mathirampuzha also argues that she proved pretext by the evidence that McKee falsely stated that Vern Tyler instructed McKee to fire Mathirampuzha. Pl. Br. 24. However, McKee's statement was not false: Tyler stated in an affidavit that he provided technical guidance to McKee at her request regarding the termination. GA at 330. McKee testified that she consulted with Tyler and that he instructed her about how to terminate Mathirampuzha's employment: "He then instructed me to send her a certified letter terminating her. *He emailed me a sample letter to use*." GA at 326 (emphasis added). Thus, there was no false statement in this case.

Mathirampuzha also argues that McKee's decision to schedule Mathirampuzha's test on her day off and the manner of notice of the exam is a pretext for discrimination. There is no support in the record, however, for a finding that these actions evidence discrimination. Mathirampuzha set forth no evidence that final exams were scheduled differently for other individuals or that Postal procedures required a different manner of notice or timing of the exam. The bare facts of the manner and scheduling do not constitute evidence of pretext.

Furthermore, Mathirampuzha does not argue that she voiced a complaint to McKee about the scheduling of the exam nor that she was rebuffed by McKee. Rather, during the telephone conversation between Mathirampuzha and McKee, Mathirampuzha simply refused to take the exam.

GA at 199; *see also* GA at 116, 131-33. Nor did Mathirampuzha raise this issues when she met with McKee prior to her termination. GA at 219. Mathirampuzha cannot make a showing of pretext based on problems she might have had with the exam when she did not make those problems known to the employer at the time of the incident. *See Perez v. Tex. Dep't of Crim. Justice*, 395 F.3d 206, 210-11 (5th Cir. 2004) ("the evidence relevant to determining whether TDCJ treated Perez differently because of his race is evidence that goes to what [the supervisor] *knew at the time* he ordered the IA investigation and recommended Perez's termination") (emphasis added).

Mathirampuzha has not shown that the Postal Service's reason for the termination was a pretext for discrimination. Her arguments are factually unsupported and she offers no evidence to overcome the same-actor inference. The Court should therefore affirm the judgment of the district court regarding Mathirampuzha's Title VII claim.

II. Mathirampuzha has not appealed the district court's rejection of her due process claims; in any event, the district court properly granted summary judgment to the Postal Service on those claims.

A. Relevant facts

Mathirampuzha raised her due process claims in a memorandum in opposition to the Postal Service's motion for summary judgment. GA 315-19. Her memorandum characterized her procedural due process claim as stemming from her lack of "sufficient notice and opportunity to be heard at her termination proceeding on Nov[ember] 17[,] 2005." GA 316. Mathirampuzha's memorandum appears to characterize her substantive due process claim as relating to McKee's alleged failure to follow Postal Rule 365.324. GA 318-19.

At oral argument on the motion for summary judgment, the district court asked Mathirampuzha if she wanted her memorandum to be construed as a motion to amend the pleadings to articulate procedural and substantive due process claims. GA 402-04. Mathirampuzha replied in the affirmative. The district court then asked whether the basis of Mathirampuzha's procedural due process claim was the Postal Service's alleged failure to afford her a "pre-deprivation hearing." GA at 404. Mathirampuzha replied in the affirmative. GA at 404. The district court then asked Mathirampuzha whether there was "[a]ny other fact that goes into either of your Fourteenth Amendment claims?", and Mathirampuzha replied, "No." GA at 404.

Mathirampuzha's appellate brief does not indicate anywhere that she is appealing the district court's grant of summary judgment as to her due process claims. Rather, her brief address only her Title VII claims.

B. Governing law and standard of review

1. The standard of review and the law governing summary judgment

Please see section I.A.1. above.

2. Substantive and procedural due process standards

This Court has recently stated that *Bivens* actions to redress alleged constitutional violations are not available when there are comprehensive statutory schemes available to the plaintiff. *Arar*, 585 F.3d at 573. This Court has explicitly held that "the remedial scheme established by the [Civil Service Reform Act] precludes federal civil service employees from challenging adverse employment decisions through *Bivens* actions for money damages." *Dotson v. Griesa*, 398 F.3d 156, 168 (2d Cir. 2005). The CSRA applies to Postal Service employees. *Downey v. Runyon*, 160 F.3d 139, 142 (2d Cir. 1998). As this Court noted in *Dotson*, "no circuit court has ruled that a federal employee covered by the CSRA may pursue a *Bivens* damages action to challenge an adverse employment decision." 398 F.3d at 168.

There are procedural requirements that a plaintiff must fulfill to bring a *Bivens* action. The plaintiff cannot bring a *Bivens* action against the federal government directly, but, rather, *Bivens* actions must be brought against the federal employees in their individual capacity. *See Higazy v. Templeton*, 505 F.3d 161, 169 (2d Cir. 2007) ("The only remedy available in a *Bivens* action is an award for monetary damages from defendants in their individual capacities."). Futher, because there is no vicarious liability, "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

The starting point in a procedural due process analysis is whether the plaintiff had a protected property interest. *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). This Court has explained that "[i]n the employment context, a property interest arises only where the [employer] is barred, whether by statute or contract, from terminating (or not renewing) the employment relationship *without cause*." *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 967 (2d Cir. 1988). When an employee is classified as "probationary, the employee lacks a 'legal claim or entitlement' and therefore lacks a property interest in the expectation of continued employment." *Jannsen v. Condo*, 101 F.3d 14, 16 (2d Cir. 1996) (quoting *Donato v.*

Plainview-Old Bethpage Central Sch. Dist., 96 F.3d 623, 629-30 (2d Cir. 1996)).

When analyzing a claim under the substantive due process clause, courts first examine whether a fundamental right is at stake. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Courts have held that there is no fundamental right to public employment. *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976) (holding no fundamental right to public employment under due process clause of Fourteenth Amendment); *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 142-43 (3d Cir. 2000) (collecting cases).[3] If there is no fundamental right at stake, "[t]o establish a violation of substantive due process rights, a plaintiff must demonstrate that the state action was 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 431 (2d

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[3] *Nicholas* relies, in part, on this Court's decision in *Local 342, Long Island Pub. Serv. Employees v. Town Bd.*, 31 F.3d 1191 (2d Cir. 1994). In *Local 342*, the plaintiff argued "that its substantive due process rights were violated when the Town deprived it of its entitlement to the payments to the Local 342 Insurance Trust without due process of law." *Id.* at 1196 (internal quotation marks omitted). This Court held: "We do not think, however, that simple, state-law contractual rights, without more, are worthy of substantive due process protection. Such rights are not the type of important interests that have heretofore been accorded the protection of substantive due process." *Id.* (internal quotation marks omitted).

Cir. 2009) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)). In *Rochin v. California*, 342 U.S. 165 (1952), where the Supreme Court first set forth the "shocks the conscience" theory of liability, the Court noted that the conduct must be "so brutal and so offensive to human dignity," *id*. at 174, and "bound to offend even hardened sensibilities," *id*. at 172.

"The due process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." *Bishop*, 426 U.S. at 350. If the plaintiff has not been "physically abused, detained, prosecuted due to racial or political motivation or otherwise deprived of equal protection of the law, courts are reluctant to find conscience-shocking conduct that would implicate a constitutional violation." *Richards v. Conn. Dep't of Corr.*, 349 F. Supp. 2d 278, 292 (D. Conn. 2004) (internal quotation marks omitted). Generally, "intentionally inflicted injuries are the most likely to rise to the conscience-shocking level, . . . negligently inflicted harm is categorically beneath the threshold of constitutional due process, and . . . recklessly inflicted harms are context-dependent closer calls." *Okin*, 577 F.3d at 431 (internal citations and quotation marks omitted).

C. Discussion

Mathirampuzha has failed to raise her due process claims in her appellate brief. Her only mention of "due process" is in the context of her discussion of her prima facie case of discrimination where she states, "Plaintiff has been treated less favorably by not being afforded her due process Rights." Pl. Br. 24.

Accordingly, she has waived an appeal of the district court's decision on her due process claims. *See United States v. Pereira*, 465 F.3d 515, 520 n.5 (2d Cir. 2006). In any event, Mathirampuzha's due process claims fail procedurally and on the merits, for the reasons described below.

1. Mathirampuzha's due process claims fail procedurally.

As noted above, Mathirampuzha's due process claims in the district court were predicated solely on her lack of a pre-disciplinary hearing. GA at 404. The CSRA precludes the creation of a *Bivens* action for a claim of a lack of a pre-deprivation hearing claim. *See Dotson*, 398 F.3d at 168.

Even if the Court construed Mathirampuzha's due process claims as relating to the Postal Service's alleged failure to follow Postal Rule § 365.324 (as she argued in her memorandum in opposition to the motion for summary judgment), that claim would also be precluded under *Bivens*. Again, this Court has held that the CSRA

precludes *Bivens* claims that challenge adverse employment actions. *Dotson*, 398 F.3d at 168.

Furthermore, Potter is not a proper defendant in light of Mathirampuzha's allegations. Sovereign immunity bars any suit against the Postal Service directly, *Higazy*, 505 F.3d at 169 ; thus, Mathirampuzha cannot sue Potter in his official capacity. *See State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71, 85 n.8 (2d Cir. 2007) ("Official capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent. . . . [A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." (citations omitted; internal quotation marks omitted)). Mathirampuzha also cannot sue Potter in his individual capacity because there is no vicarious liability. "[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal*, 129 S. Ct. at 1949. There are no allegations in the operative complaint that Potter did anything to Mathirampuzha. *See* GA at 16-25. Thus, Mathirampuzha has failed to name a proper defendant in connection with her *Bivens* claims. It would be improper, moreover, in interpret Mathirampuzha's complaint as raising a claim against McKee individual has McKee has personal defenses, such as personal jurisdiction, and jurisdictional defenses, such as qualified immunity, that she has not had the opportunity to raise.

2. Mathirampuzha's procedural due process claim fails on the merits.

Mathirampuzha's procedural due process claim fails on the merits because, as a probationary employee, she is not constitutionally entitled to a pre-deprivation hearing. Mathirampuzha does not have a protected property interest in her employment. Mathirampuzha admitted in her deposition that she was still on probation when the Postal Service terminated her employment. GA at 97, 107-08. This Court has held that probationary employees lack a protected property interest. *Jannsen*, 101 F.3d at 16. Without a protected property interest, Mathirampuzha cannot make out a procedural due process claim. *Id.*

3. Mathirampuzha's substantive due process claim fails on the merits.

Mathirampuzha's substantive due process claim also fails on its merits. Because there is no fundamental right to public employment, *Bishop*, 426 U.S. at 349-50, Mathirampuzha's claim can only survive summary judgment if she can show that the Postal Service's behavior shocked the conscience, *Okin*, 577 F.3d at 431. She cannot.

There is no evidence that McKee intentionally or negligently harmed Mathirampuzha. McKee was responding to an employment situation. Mathirampuzha refused to take the mandatory exam. Because Mathirampuzha refused to take the exam, McKee terminated her employment. There is no evidence that the

termination proceeding was marred by violence, threats, abuse, public humiliation, or any other untold behavior. *Cf. Rochin v. California*, 342 U.S. 165 (1952) (forcible stomach pumping to obtain evidence in criminal case shocks the conscious and violates substantive due process).

"[T]he substantive component of the Due Process Clause does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer." *McClary v. O'Hare*, 786 F.2d 83, 89 (2d Cir. 1986). Indeed, if this Court were to hold that these facts were sufficient to survive summary judgment, it would turn every termination involving a public employee into a substantive due process claim. The Supreme Court has cautioned against turning the due process clause into a "font of tort law to be superimposed upon whatever systems may already be administered." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Holding in favor of Mathirampuzha on her substantive due process claim would turn the clause into a font of employment law. There was nothing about McKee's behavior that would shock the conscience. The Court should affirm the district court's decision granting summary judgment to the Postal Service on Mathirampuzha's due process claims.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: November 10, 2010

Respectfully submitted,

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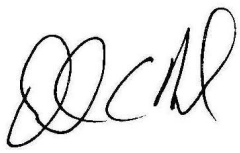
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,938 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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ADDENDUM

U.S. Postal Service Employee and Labor Relations Manual § 365.324: Who Initiates Action

Supervisors may recommend separation-disqualification, but such recommendations must be referred for decision to the official having authority to take the action.