UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NICOLE S. LATREILLE,

Plaintiff,

v. 15 CV 6388 (CS)

STEVE GROSS, DARCY MILLER,

Defendants.

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U.S. Courthouse
White Plains, N.Y.
October 27, 2016
12:20 p.m.

Before: HON. CATHY SEIBEL,
United States District Judge

APPEARANCES

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Sue Ghorayeb, R.P.R., C.S.R.
Official Court Reporter

THE CLERK: Latreille against Gross.

THE COURT: Good afternoon, Mr. Sussman and Ms. Kim. You can have a seat.

MR. SUSSMAN: Good afternoon, Your Honor.

MS. KIM: Good afternoon, Your Honor.

THE COURT: Sorry to keep you waiting.

MR. SUSSMAN: Understood.

THE COURT: That took longer than I thought. That clock is driving me crazy --

MR. SUSSMAN: Yes.

THE COURT: -- and I don't want to be like George Bush, Sr. and constantly be looking at my watch in a way that suggests my mind isn't there.

All right. I have the summary judgment motion. Anything either of you would like to add that's not covered by the papers?

MS. KIM: No, Your Honor.

THE COURT: All right. Defendants have moved for summary judgment. I'm going to set forth the facts necessary to my ruling. These facts come from the 56.1 submissions and are undisputed except as noted.

Oh, before I get to that, though: Do you remember, Mr. Sussman, that I have a rule about 56.1 Statements?

MR. SUSSMAN: Do I remember?

THE COURT: Do you remember that?

And do you remember that many times I had to put footnotes in decisions about how you were violating my rule?

And do you remember that, ultimately, I entered an order saying I was going to hold you in contempt the next time you violated the rule?

Is any of this ringing a bell?

MR. SUSSMAN: Yes.

THE COURT: You violated the rule again.

MR. SUSSMAN: In what way?

THE COURT: You didn't follow it. Rule -- my Individual Rule -- let me find it -- 2(C)(i). It says, "the moving party shall provide all other parties with an electronic copy of the 56.1 Statement. Opposing parties must reproduce each entry in the moving party's Rule 56.1 Statement, and set out the opposing party's response directly beneath it."

And in the case of Frawley v. Putnam Hospital Center, 12 CV 3374, I issued an order on July 17th, 2014, and it listed previous occasions on which I had to admonish you regarding your failure to abide by that rule, and ordered, among other things, in Paragraph 3, "Plaintiff's counsel, specifically Michael Sussman, Esq., is hereby ordered to abide by Part 2(C)(i) of my Individual Practices in all cases before me. Should he fail to do so, he will be subject to penalties for contempt of court."

I assume that's kind of an unusual thing to have happened and it might have stuck in your mind, and I thought that it had the desired effect, because a couple of years went by and you were actually following the rule and all was well.

So, at the end, once I finish ruling, I'm going to give you the opportunity to show cause why I shouldn't hold you in contempt, because I must tell you, it's maddening.

There's a really good reason for that rule --

MR. SUSSMAN: I'll address it when you give me a chance.

THE COURT: -- which I've explained, and it's, you know, it's like talking to a wall sometimes.

All right. The undisputed facts, where they are disputed, I will note that:

In December -- excuse me.

Since 2009, Plaintiff was employed by the Orange County Department of Social Services, which I'm going to call DSS, as a Social Welfare Examiner. In 2014, she was transferred to the Undercare Unit and was responsible for "recertifying individuals for continued eligibility in the Medicaid program."

In December 2014, Defendant Miller was appointed by the County Executive, Steven Neuhaus, as Commissioner of DSS and Commissioner of Mental Health. Before that, she had been Commissioner of Mental Health since 2012.

In 2010, Defendant Gross was appointed by the former County Executive, Edward Diana, as Commissioner of the County Department of Human Resources and he was reappointed to the same position by Neuhaus in 2016.

According to Plaintiff, in the fall of 2014, she asked for additional work from her supervisors because her assigned caseload did not occupy her full time. She took on responsibility for some portion of the "RFI" list, which was a state-generated list of recipients whose high earnings made them potentially ineligible for continued receipt of DSS benefits.

To verify an individual's continuing eligibility, she would verify the individual's reported income in electronic databases containing DSS records, either the Welfare Management System, which is called WMS, or something called Docuware or both. This is all coming from her deposition, by the way.

Plaintiff would also check the County Clerk's website to determine whether the individual owned businesses or rental property that could provide income that wasn't reported or that would render the individual ineligible.

She testified that her direct supervisor, Ms. Keane, as well as Ms. Keane's supervisor, Ms. Dodd, approved of Plaintiff's working on the RFI list.

While working on the list in November 2014, she came

across two people living on the same street in the Village of Kiryas Joel who reported income low enough to qualify for public assistance but who owned property, the value of which had supposedly dropped a great deal in a short amount of time. Plaintiff found this unusual and searched the County's public mortgage records and discovered that these individuals had high value mortgages for their properties, despite their low income and low property value.

She made referrals to the Department's Special Investigation Unit or SIU, which is tasked with investigating suspected fraud in DSS benefits.

According to Plaintiff, SIU found nothing out of the ordinary and closed the investigation. She testified that she understood her job responsibility was only to flag instances of suspected fraud for SIU, but she was not responsible for further investigation.

She testified that she took three weeks of medical leave and returned to work in early December 2014.

While she was on leave, she investigated other properties on that same street in Kiryas Joel using publicly available property records and found many that followed the same pattern she had identified earlier, where a property with a large mortgage would suddenly and greatly decline in value.

She discovered that all of these suspicious properties were connected to four different developers, so

she expanded her search to nearby properties also owned or connected to these developers.

She also performed similar searches on streets she picked at random in Newburgh and Circleville, but did not find any similarly suspicious declines in property values.

She testified that she disclosed to Ms. Dodd and to Janette Hendrick, the Head Social Welfare Examiner of the SIU, the potential inconsistencies in property values and mortgage values she discovered as part of the investigation.

According to Plaintiff, Dodd instructed her to maintain a spreadsheet of her findings and to keep up her investigation on her work computer as long as she maintained her caseload. Plaintiff testified that Dodd was aware of the methods Plaintiff was using to investigate potential fraud and "was good with it."

During this time, Plaintiff devoted about 50 percent of her time to the investigation of potential mortgage or welfare fraud.

In addition to searching public records, she searched WMS to determine if the individuals were receiving benefits, how long they had been receiving benefits, and whether they still qualified.

By December, the spreadsheet contained 104 names, the majority of whom had addresses in Kiryas Joel, which I'm going to abbreviate KJ. It contained the following categories

for each individual: name, Social Security number, property location, purchase amount, fair market value, purchased from, recorded with, lender/address, last/latest DSS, which set forth the case file numbers for public assistance, if applicable. Plaintiff recognized that some of the individuals were not recipients of DSS benefits.

In December 2014, according to Plaintiff, Dodd recommended taking Plaintiff's findings directly to law enforcement, because Hendrick and the SIU were ineffective at exposing and prosecuting fraud.

Dodd connected Plaintiff to somebody named Mr. Hutchital, who worked with the FBI. He was a local officer but attached to an FBI Task Force.

In late December 2014, Hutchital called Plaintiff on the phone and asked for a copy of the spreadsheet during that conversation. Later Hutchital and a colleague met with Plaintiff at her workplace, where Plaintiff answered additional questions and gave Mr. Hutchital the spreadsheet.

Defendants say this meeting took place on January 8th of 2015. Plaintiff recalled it was "around the holidays," but wasn't sure if it was December 2014 or January 2015, but the dispute is immaterial.

According to Plaintiff, she was reassured by Hutchital that, under HIPAA, she could disclose the information on the spreadsheet, because the two agencies

were "under the same umbrella."

Around January 8th, 2015, Ms. Hendrick learned that Plaintiff had met with the FBI. On January 12th, 2015, Ms. Hendrick informed Defendant Miller of Plaintiff's investigation and her disclosure to the FBI.

I note that Ms. Hendrick's affidavit, which is Document 21, says, "January 12th, 2016," but that must be a typo.

In a letter dated January 9th, 2015, Denise Bradshaw, a coworker in the same unit as the Plaintiff, wrote to Miller complaining that Plaintiff was "targeting the Hasidic Community of Kiryas Joel." The letter is attached to Exhibit A of Mr. Gross's declaration, which is Document 43.

In the letter, Bradshaw described Plaintiff's investigation and alleged that Plaintiff and Dodd were "investigating property rolls and mortgage loans in this particular community looking for fraud" under the pretext of investigating individuals on the RFI list.

After getting the letter, Miller asked Gross to assist her in investigating the claims against Plaintiff. Miller asserts that Neuhaus did not "influence or in any way participate in the investigation" or its results. That's Ms. Miller's affidavit at Paragraph 24. Gross, on the other hand, testified that he shared the letter with Neuhaus, who apparently instructed Gross to handle the investigation "the

way you would handle any other investigation." That's from Mr. Gross's deposition, at Pages 62 to 63, Exhibit D to Ms. Kim's declaration.

As part of the Defendants' investigation, they interviewed Plaintiff in January 2015, soon after receiving Bradshaw's letter. According to Plaintiff, the questioning concerned the nature of her investigation, what prompted her to investigate, whether she was targeting certain people, who else was involved, and who had given her permission to perform the investigation.

An administrative officer named Richard Moguch was also present at this first meeting.

According to Plaintiff, Defendants also asked her about her affiliation with an organization that opposed certain "high-density" residential developments in the area, as well as comments that Bradshaw claimed Plaintiff had made regarding participation in the Jewish holidays, which comments Plaintiff denies making.

During the spring of 2015, Plaintiff initiated the second meeting with Defendants to defend her position and to assert that she "was telling the truth, had nothing to hide, had been honest with them from the beginning, and that she was expecting the worst, because they were going against her so vehemently." This is from Plaintiff's deposition at 151. She feared she would be fired and escorted out of the

building without notice, and according to her, Gross assured her that that would not happen.

According to Plaintiff, Miller referred many times to KJ during the course of the investigation. The frequency with which KJ was mentioned, the fact that a routine disciplinary charge was being investigated by two Commissioners and the Deputy Commissioner, and the hostile manner in which Miller and Moguch treated Plaintiff led her to believe that their investigation was retaliation for Plaintiff's exposure of potential fraud in KJ.

Pending completion of the investigation, Plaintiff was placed on administrative leave with pay from the second week in February until she received formal disciplinary charges on April 17th, 2016. That must be 2015. It's a typo on my end.

Miller sent Plaintiff a letter on April 17th, 2015 notifying her that she would be suspended without pay for thirty days as a result of the findings of the Defendants' investigation. The letter listed six charges. They are set forth in the letter, which is Exhibit 4 to Mr. Sussman's affidavit, which is Document 51. I'm not going to take the time to read them all, but I'll summarize.

The first alleged a violation of the County Electronic Communications Policy.

The second was poor judgment.

The third was destruction of evidence.

The fourth was violation of work rules.

The fifth was conduct discrediting the employer, and the sixth was noncompliance with State law.

After getting the letter, Plaintiff filed a grievance with DSS. Miller denied it.

Plaintiff served her thirty-day suspension, and returned to work in May 2015.

After she returned, Moguch indicated that Plaintiff would be transferred to the Valley View nursing home saying it would be "a nice change" for her. Plaintiff recalled, however, that a County spokesman had reported to the press that Plaintiff had been transferred because she had used a racial slur.

Plaintiff maintained the same title and pay despite the transfer. She testified she was unhappy with the transfer, because she enjoyed diminished job responsibilities and the new work was tedious. Other than the spokesman's comment to the press and the undesirability of her new position, Plaintiff testified that Defendants gave no indication that the transfer was punitive.

She then filed a demand for arbitration. According to Plaintiff, Defendants brought Bradshaw to the arbitration in March 2016 to testify that Plaintiff had told her about attending cross burnings.

The arbitration was settled on April 26th, 2016. The Plaintiff says that the false accusation of cross burning was so upsetting to her that she wanted to bring the arbitration to an end.

Under this settlement, DSS withdrew the second charge relating to poor judgment, resulting in Bradshaw's complaint of discrimination, and it withdrew Charge 3 resulting in destruction of evidence, which Plaintiff said was a purging of evidence that had been approved by her supervisors.

DSS agreed to modify Charge 1 relating to the Communications Policy to remove any reference to Bradshaw's allegations of discrimination and harassment, and Plaintiff admitted to modified language to the effect that she violated electronic communication system rules by using that system for purposes that fell outside the scope of her and her unit's responsibility.

She also admitted to Charge 4, using confidential information in WMS in an investigative capacity despite not being assigned to investigative -- to an investigative function.

She admitted to Charge 5 relating to her disclosure of that information to law enforcement rather than to SIU, and to Charge 6 relating to violation of State law through that disclosure.

During the pendency of the investigation, in March 2015, Plaintiff indicated her interest in a promotion to fill a vacancy as an investigator in the SIU, but the promotion went to somebody else named Katie Marse. Plaintiff says she was more qualified because she received a higher test score and performed well at her then-current job. Two other candidates applied for the position.

According to Hendrick, in her affidavit, all four had been interviewed for the same position in 2012, so they were not re-interviewed. Only Marse was re-interviewed and that was, according to Hendrick, because Marse was also applying for a separate position for which she had not already been interviewed.

According to Hendrick, she hired Marse based on her interview performance, the fact that neither her background within DSS, nor her town of residence were already represented in SIU, and because she had good reviews from her supervisors.

Hendrick maintained that the investigation Plaintiff had done in KJ did not affect the decision to promote her, and, according to Hendrick, Miller didn't participate in the decision to select Marse over Plaintiff, despite the fact that Miller's approval was required.

It's a motion for summary judgment, so the familiar standards apply.

Defendants make three basic arguments:

One, that Plaintiff hasn't established a prima facie case of First Amendment retaliation because her speech was not protected, because she disclosed confidential information, and she hasn't established a causal connection between her speech and the adverse employment actions.

Even if she -- second, that even if there is a prima facie case, under Pickering, the Defendants' interest in efficiently discharging their duties outweighs Plaintiff's interest in her speech; and, third, that the Defendants are entitled to qualified immunity.

Starting with the prima facie case, the Plaintiff has to demonstrate constitutionally protected speech, an adverse employment action, and a causal connection between the two such that it can be said the speech was a motivating factor in the determination. Washington v. County of Rockland, 373 F.3d 310, at 320; Gronowski v. Spencer, 424 F.3d 285, at 292.

Starting with the first element, speech is constitutionally protected in the government employee context where the matter on which the employee spoke is of public concern and the speech was not pursuant to the employee's official duties. Birch v. City of New York, 2016 LEXIS 58793, at Page 15 (E.D.N.Y. May 3, 2016); see Garcetti v. Ceballos, 547 U.S. 410, at 418.

The parties don't dispute that Plaintiff's

investigation was outside of her official job responsibilities.

I note that Defendants, in their reply brief, argue for the first time that the investigation was either related to welfare fraud and thus a part of her responsibilities, or unrelated to welfare fraud and thus not a part of her responsibilities.

A, arguments raised for the first time in a reply can be disregarded, but, B, just because the Plaintiff's investigation hadn't related to welfare fraud and was based on some information obtained by virtue of her employment does not mean that she was acting in her capacity as an employee pursuant to her job responsibilities. See Lane v. Franks, 134 Supreme Court 2369, at 2379.

The record here suggests, and I don't think it's disputed, that Plaintiff's job responsibilities did not include fraud investigation, and thus the speech was protected even though it had some connection to her employment.

Speech is on a matter of public concern if it relates to a matter of political, social or other concern to the community as opposed to matters personal to the employee. Johnson v. Ganim, 342 F.3d 105, at 112. The fact that Plaintiff has a personal interest in the subject matter doesn't remove it from the First Amendment's protection. Johnson, at 114.

Here, Plaintiff's investigation into and disclosure of potential welfare fraud or mortgage fraud -- the information she obtained suggested one or the other, if not both -- is clearly a matter of public concern, a conclusion the Defendant does not dispute. See Cioffi v. Averill Park, 444 F.3d 158, at 163 to 64, where the court said -- well, I don't need to quote it.

Defendant argues instead that Plaintiff disclosed confidential information to the FBI, in violation of New York statutes and rules, and a Local Commissioners Memoranda or LCM, and that therefore the First Amendment can't protect her speech. See Harman v. City of New York, 140 F.3d 111, at 119, where the Circuit said that "disclosure of statutorily confidential information is not protected speech."

New York Social Services Law 136 Subsection (2) says that "all communications and information relating to a person receiving public assistance or care obtained by any social services official, service officer, or employee in the course of his or her work shall be considered confidential" and disclosed only in certain situations.

See also Section 21(3), which governs WMS, and 18 New York Code of Rules and Regulations Section 357.2(a), which says, social services employees "shall not reveal information obtained in the course of administering public assistance for purposes other than those directly connected

with the administration of public assistance."

Section 357.1(a) of the same title of the N.Y.C.R.R. specifies the information to be protected.

357.2(a) -- excuse me. 357. -- I'm sorry.

357.2(a) prohibits the disclosure of confidential information "for purposes other than those directly connected with the administration of public assistance," but 357.3(e) specifically allows for disclosure of confidential information "to any properly constituted authority," which includes "law enforcement officers."

Even when a disclosure is made for purposes "directly connected to the administration of public assistance" or to law enforcement, the disclosing officer must be satisfied that the three safeguards set forth in 357.3(a) are met; that is, that "the confidential character of the information will be maintained; the information will be used for the purposes for which it is made available," said purposes being "reasonably related to the purposes of the public welfare program and the function of the inquiring agency; and the information will not be used for commercial or political purposes."

The parties agree that the Plaintiff's spreadsheet contained Social Security numbers, addresses, and property values, which constitutes confidential information, and that Social Security numbers were included on the spreadsheet even

for non-welfare recipients, and that Plaintiff's disclosure to the FBI was thus prohibited unless the three safeguards in 357.3(a) were met.

Defendants don't seem to contest the first or third safeguards, see, generally, Krauskopf v. Giannelli, 121 Miscellaneous 2d 186, at 188 (Supreme Court New York County 1983). Instead, their main argument seems to be that the disclosure fails to satisfy 357.3(a)(2), because under -- because under "no stretch of the" -- sorry. Because "no stretch of the imagination would support a finding that mortgage fraud is related to" the purposes of the public welfare program. That's Defendants' memorandum at Page 11.

Plaintiff correctly points out in her memorandum, at Page 9, that the investigation uncovered that some individuals were either falsifying their applications for social welfare benefits or their mortgage applications.

Defendants respond that the existence on the spreadsheet of individuals who were not getting welfare benefits negates the entire investigation's relation to the public welfare program. I don't agree.

The fact that some, but not all, of the individuals on the spreadsheet were not receiving welfare benefits makes sense. Plaintiff was investigating an apparent pattern of fraud that implicated welfare and mortgage transactions, and following the trail led Plaintiff to some transactions that

involved individuals not on the welfare rolls. This does not negate the connection of her efforts to welfare fraud.

Investigation of fraudulent applications for welfare benefits is clearly related to the purposes of the public welfare program, and a conspiracy involving recipients of welfare and others is not obviously outside, and indeed appears to be within, the scope of Section 357.3(a)(2).

Defendants cite to Krauskopf, but that's not particularly helpful. There, the grand jury wanted a welfare recipient's address, because the grand jury was trying to track her down as a witness. The court found that while that was not "reasonably related to the purposes of the public welfare program" under 357.3(a)(2), Section 136(1) allowed disclosures of names and addresses to a body that required the information to discharge its duties, without also requiring that the disclosure satisfy the stricter requirement in 357.3(a)(2). And, here, for reasons just discussed, I find the Plaintiff's disclosure was reasonably related to a public welfare program.

Defendants also point to the two LCMs concerning treatment of confidential information, but they merely remind social services districts of the requirements to maintain confidentiality and that -- what the consequences would be for failing to do so, but they are not an independent source of obligations or prohibitions. Whether a disclosure is

"authorized" necessarily turns on the relevant statutes and regulations.

I note some tension between Social Services Law 136(2) and Section 357.3, but I do not understand Defendants to be arguing, nor do I think they reasonably could argue, that it would be improper for an employee to make disclosures that were permitted by 357.3.

Further, even if some of Plaintiff's disclosures to the FBI -- specifically, those relating to mortgagors who are not on the welfare rolls -- did violate the statute or regulations, other disclosures -- specifically, those relating to welfare recipients -- did not, and, therefore, at least some of Plaintiff's speech was clearly protected.

Turning now to adverse employment action, Plaintiff has to show that "the alleged acts 'would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.'" Dillon v. Morano, 497 F.3d 247, at 254, and Zelnik v. FIT, 464 F.3d 217, at 225.

It's clear, and Defendants don't contest, that the 30-day suspension was an adverse employment action, and they likewise don't contest that the decision not to promote was an adverse employment action. They do argue -- the Defendants do argue that the transfer to the Valley View nursing home was not adverse action.

Defendants cite the "materially adverse change"

standard, but that is not the correct inquiry. The correct inquiry is whether the transfer would have deterred a similarly situated employee of ordinary firmness from exercising her rights. See Zelnik, at 227.

Here, Plaintiff's title and salary were not affected by the transfer. Nevertheless, an involuntary "transfer from an 'elite' division to a 'less prestigious' unit can constitute an adverse employment action." Dillon, 497 F.3d, at 254, citing De la Cruz v. New York City, 82 F.3d 16, at 21.

"Reductions in workload or inferior or less desirable assignments can constitute adverse employment actions where they impact a plaintiff's opportunity for professional growth and career advancement." Amato v. Hartnett, 936 F.Supp.2d 416, at 434 (S.D.N.Y. 2013).

Plaintiff has offered sufficient evidence to create a fact issue as to whether her involuntary transfer to Valley View constituted an adverse employment action.

Notwithstanding Defendants' argument that "the only thing that materially changed was the situs of Plaintiff's work," Plaintiff has offered evidence beyond her subjective feelings. See Garber v. New York City, 1997 LEXIS 12590, at Pages 12 to 14 (S.D.N.Y. August 21, 1997), pointing out "purely subjective feelings" don't do the trick, but Plaintiff has pointed to more:

She testified that her duties at Valley View were

limited to "wading through piles of paper." That's her deposition at 196.

She testified the work -- because the work at Valley View is "extremely tedious and boring," and because patients "die every day there," DSS typically only places employees there voluntarily.

Further, Plaintiff testified that a County official reported to the press that Plaintiff was transferred because she had used a racial slur, indicating that the Defendants viewed the assignment as punitive, and therefore significantly less desirable.

A reasonable jury could conclude that a person similarly situated to Plaintiff would have been deterred by the transfer to Valley View, both because it is an apparently depressing location and the work is boring and tedious compared to the work she was previously doing. In other words, that it was the equivalent of being sent to Siberia.

Defendants point out as evidence that "Plaintiff did not want to be at her previous location" that there was an e-mail exchange between Plaintiff and Moguch on May 21st, 2015, Exhibit F to Ms. Kim's declaration. It reflects that after her administrative leave, suspension without pay, and transfer, Plaintiff expressed apprehension at returning to the location of her previous position for a training session. That Plaintiff may have been uncomfortable returning to her

previous position directly following the absence of four months and the transfer is understandable and does not change my objective analysis as to whether the transfer constituted an adverse employment action.

Defendants don't argue and there's no evidence that the transfer was done at Plaintiff's behest, but it having been thrust upon her, the fact that she felt awkward returning to her old workplace doesn't suggest that she went voluntarily or that it was not the equivalent of being sent to Siberia.

I next turn to whether Plaintiff has presented sufficient evidence to create a dispute as to causal connection. A plaintiff has to show that the speech "was a substantial motivating factor in the adverse action." That's Cioffi v. Averill Park, 444 F.3d 158, at 167 to 68, quoting Morris v. Lindau, 196 F.3d 102, at 110.

Plaintiffs have to aver some tangible proof demonstrating that the speech animated the adverse employment action. Washington, 373 F.3d 310, at 321. Plaintiffs may do so by offering direct evidence of retaliatory motive, or indirectly by showing that the adverse employment action followed closely in time after the protected speech. See Cioffi, at 168.

The relevant inquiry is whether Plaintiff's investigation into KJ and her disclosure of the spreadsheet to the FBI was a substantial factor in motivating the

suspension, the refusal to promote, or the transfer.

Defendants' argument seems to be that Plaintiff has not offered any direct evidence of retaliatory motive. To the contrary, Plaintiff has indeed provided direct evidence of retaliatory motive for the decision to suspend Plaintiff without pay.

The plain language -- "The plain language of several of the disciplinary charges at the heart of the adverse action directly implicates not only the fact that Plaintiff had engaged in protected speech, but also the content of that speech." Smith v. County of Suffolk, 776 F.3d 114, at 121.

For example: Charge 2 says, "it was identified by witnesses and Plaintiff's own statement that much of her work time had been spent developing a spreadsheet analysis of real estate properties located entirely within a religiously-based Orange County community."

Charge 5 says -- refers again to the project using internal and outside information, which was then provided to outside agencies.

The fact that Defendants' own statement of reasons for disciplining Plaintiff refers to the content of her protected speech could lead a reasonable jury to conclude that there was a causal connection between the speech and the adverse employment action. Indeed, it's hard to see how a reasonable jury could avoid that conclusion or why the

Defendants even made the argument.

Further, Plaintiff has offered indirect evidence of a causal connection as to all three of the alleged adverse employment actions:

Defendants' actions were close enough in time to Plaintiff's protected speech for a reasonable jury to infer that they were causally connected. There's no bright line that defines the outer limits, Cioffi at 168, although, it needs to be reasonably close -- more than reasonably close, pretty close.

Here Defendants learned of Plaintiff's investigation and disclosure to the -- excuse me.

Here Defendants learned of Plaintiff's investigation and disclosure to the FBI in early January 2015. Plaintiff was rejected from the SIU position in March 2015 while she was on leave and while the Defendants' investigation was ongoing.

Defendants argue that there is no evidence indicating that the disclosure to the FBI played a role in the determination not to promote, but the timing of the determination by itself presents a fact issue, see Cioffi at 168, and the jury is not obligated to believe Defendants' assertions that Plaintiff's conduct had nothing to do with it and Ms. Marse was the better candidate.

With respect to the 30-day suspension without pay in April 2015 and the transfer to Valley View immediately upon

return from the suspension, Plaintiff has met her burden.

While the suspension was three months after Defendants learned of the speech, their investigation was taking place in the interim. See Cioffi, at 168, where three months between the letter to the supervisor and the termination was not too attenuated to establish the causal connection. And while the transfer was four months after Defendants learned of the speech, because of the suspension, May was the first opportunity to transfer Plaintiff. See Blanco v. Brogan, 620 F.Supp.2d 546, at 557 (S.D.N.Y. 2009), which collects cases, where a longer temporal gap was sufficient to infer causal connection because the adverse action occurred at the first opportunity to retaliate in the manner alleged.

I cannot say on the facts here that as a matter of law too much time elapsed to support a reasonable jury inferring a causal connection, and, "as a general rule, summary judgment is precluded where questions regarding an employer's motive predominate in the inquiry regarding how important a role the protected speech played in the adverse" action. Pisano v. Mancone, 2011 Westlaw 1097554, at Page 10 (S.D.N.Y. March 18, 2011).

Plaintiff has raised several questions of motive sufficient to defeat Defendants' motion for summary judgment.

As support for their argument that there is no

evidence of political motivation, Defendants cite a passage from Plaintiff's deposition and argue that any -- and point to the Defendants' affidavits denying any alleged alliance between residents of Kiryas Joel and the County Executive, or that the investigation -- that the acts were based on anything other than what the facts supported, and that includes an affidavit from someone named Meredith McGovern to the effect that the County Executive does not show favoritism to anyone, including the Village of Kiryas Joel. The jury, however, would not be obligated to believe these witnesses; they are not disinterested.

In addition, Plaintiff points to an additional -- to additional circumstances that raise a fact issue:

First, Defendant Miller learned of the investigation and the potentially unauthorized disclosure of confidential information on January 8th 2015, according to Paragraph 3 of her affidavit, but she did not initiate her investigation into Plaintiff's behavior until after getting the letter alleging anti-Semitic behavior.

The Defendants might argue that Miller only realized the seriousness of the allegations after she got the letter, and only then decided that an investigation was warranted, but Plaintiff might argue in response that it was not until Miller learned that KJ was implicated, which according to Plaintiff was commonly known to be an important voting bloc

supporting Neuhaus, that's Page 204 of Plaintiff's deposition, it was only when Defendant learned that KJ was involved that she targeted Plaintiff for investigation. It is up to the jury, and not to me, to decide which explanation is true.

Second, the Plaintiff points to both Defendants' loyalty to Neuhaus.

In January, when she decided to investigate Plaintiff, Miller's appointment as Commissioner of Social Services was still subject to confirmation by the County legislature, and she testified that she thought it was important to support Neuhaus even at his fundraising -- including at his fundraising or especially at his fundraising events. Similarly, Gross's term as Commissioner of Personnel was set to expire in April of 2016, after which he would need Neuhaus and the legislature to let him continue.

A reasonable jury could conclude that both Defendants were motivated to stay in Neuhaus's good graces, and were aware of the common knowledge that Kiryas Joel had supported Neuhaus and would be motivated, with or without Neuhaus's knowledge, to deter any investigations into -- or bad press about -- Kiryas Joel.

Third, Plaintiff points to evidence that Neuhaus's office publicly prioritized uncovering fraud, waste and abuse, and the fact that despite the evidence that Plaintiff uncovered what looked like that, Defendants instead

disciplined her. A reasonable jury could conclude that Defendants were more interested in deterring investigations of Kiryas Joel than in revealing fraud.

Finally, even if Plaintiff had violated the statute or regulations in revealing some of the information she revealed to law enforcement, that would not remove the fact question as to retaliatory motive.

A defendant can be liable if retaliation is a motive, even if other legitimate motives exist. See Pekowsky v. Yonkers Board of Ed, 23 F.Supp.3d 269, at 279 (S.D.N.Y. 2014), quoting Royal Crown Day Care v. Department of Health & Mental Hygiene, 746 F.3d 538, at 544.

A jury here could find that Plaintiff's disclosures were treated more harshly than they otherwise would have been because of the identity of the possible targets, especially in light of the fact that Plaintiff's supervisors approved the project and the disclosures. Also, at least one of the disciplinary specifications is almost comically lame. That specification was that Plaintiff was responsible for "causing a coworker's discomfort." So, a jury might conclude that that was not a real effort to investigate -- that was not a real effort to discipline, but rather to deter.

A jury could find this charge especially suspect given that none of Bradshaw's allegations of discriminatory behavior were substantiated. On the other hand, the jury

could conclude that the Defendants acted only out of concern for confidentiality and workplace harmony. I cannot say, as a matter of law, which it was. So, I can't say there is no causal connection between Plaintiff's disclosure of potential fraud in Kiryas Joel and the Defendants taking adverse actions against her.

Defendants also argue that Plaintiff has not established Defendants' personal involvement in the decision to promote. They don't raise this argument as to the suspension or the transfer.

A Plaintiff has to show personal involvement, of course. Gronowski v. Spencer, 424 F.3d 285, at 293, and a government official can't be liable merely because he occupies a high position in an agency's hierarchy. Castagliuolo v. Danaher, 2011 LEXIS 33050, at Page 41 (District of Connecticut March 29th, 2011).

Plaintiff has to show Defendants participated in the determination not to promote, intending the decision to be retaliatory. See Gronowski, at 293 to 94.

Personal involvement is a question of fact and the party seeking summary judgment has to establish that no such dispute exists. Williams v. Smith, 781 F.2d 319, at 323.

Defendants are correct that Plaintiff has not offered any evidence to show that Gross was involved in the decision not to promote Plaintiff. As to Miller, however,

Defendants concede that she "approved the selection," Paragraph 35 of Hendrick's affidavit, but they argue that that was a mere rubber-stamp, insufficient to establish personal involvement.

To raise a fact question, Plaintiff has to show more than Miller's mere approval or signing off on Hendrick's decision not to promote Plaintiff. See Beechwood v. Leeds, 811 F.Supp.2d 667, at 679 to 80 (Western District of New York 2011), where summary judgment was granted as to a supervisor who merely signed off on allegedly retaliatory decisions without having participated in the underlying investigation or proceedings; and Rodriguez v. City of New York, 644 F.Supp.2d 168, at 199 (E.D.N.Y. 2008), where the plaintiff did not establish personal involvement for supervisors who approved her termination "in reliance on the observations and recommendations of" those directly in contact with plaintiff.

Likewise, mere awareness of the circumstances giving rise to the alleged retaliation is not enough. See Beechwood, 811 F.Supp.2d, at 679 to 80, granting summary judgment to the defendant, because while the record indicated that she had been aware of the protected speech, it didn't suggest that she knew of plaintiff's complaints about, or disputes with, the agency over the years, much less that she had any retaliatory intent or that she knew of any such intent on her subordinates' part.

Miller's involvement here, however, went beyond mere awareness. She was intimately involved in the decision to investigate Plaintiff -- distinguishing this case from Beechwood -- and the decision to investigate preceded the decision not to promote. She was also involved in the actual investigation itself, which was ongoing at the time of the decision not to promote.

This is therefore not a case where a supervisor cursorily approves of a subordinate's decision without knowledge of the underlying issues. It's also not a case where a supervisor, before taking the adverse employment action, conducted his own inquiry untainted by allegations of retaliation. See Back v. Hastings on Hudson, 365 F.3d 107, at 127.

Here, Miller was familiar with Plaintiff and the allegations against Plaintiff, and it was her and Gross's investigation of the underlying facts that is at the heart of the retaliation claims. A jury could reasonably infer that Miller's involvement in the investigation of Plaintiff led her to actively participate in the decision not to hire as opposed to just rubber-stamping.

Though Plaintiff's evidence on this point is thin -- and I point out that Plaintiff really made no argument on this point except to incorrectly state that Defendants conceded personal involvement. Plaintiff has barely established a

fact issue as to whether Miller was personally involved in the decision to promote given that here the supposed decisionmaker and the supposed rubber-stamper/retaliator had conferred on the Plaintiff's alleged misconduct. In other words, Defendants say Hendrick is the decisionmaker and Miller is the rubber-stamper, but she is alleged to be the retaliator as well, and Hendrick concedes that she and Miller conferred on Plaintiff's alleged misconduct.

Next, turning to the Pickering defense, because I find Plaintiff has established a prima facie case.

Pickering v. Board of Ed, 391 U.S. 563, "safeguards the government's interest as an employer in promoting the efficiency of the public services it performs through its employees." Smith v. County of Suffolk, 776 F.3d 114, at 119, quoting Piscottano v. Murphy, 511 F.3d 247, at 269.

To avoid liability under Pickering's balancing test, Defendants "bear the burden of demonstrating that the plaintiff's expression was likely to disrupt the government's activities and that the harm caused by the disruption outweighs the value of the plaintiff's expression." That's also Smith, at 119, quoting Anemone v. MTA, 629 F.3d 97, at 115.

"Deference to the government's assessment of potential harms to its operations is appropriate when the employer has conducted an objectively reasonable inquiry

into the facts." Piscottano, 511 F.3d, at 271. "Evidence that such harms or disruptions have in fact occurred is not necessary. The employer need only make a reasonable determination that the employee's speech creates the potential for such harms." Also Piscottano, at 271.

To meet its burden, Defendants -- Defendant must show that the prediction of disruption that the speech will cause is reasonable; the potential for disruption outweighs the value of the speech; and that they took the adverse action not in retaliation for the speech, but because of the potential for disruption." Castine v. Zurlo, 756 F.3d 171, at 175.

As I've already discussed, Plaintiff has raised a triable issue of fact as to the third requirement; whether the discipline and other adverse action was because of legitimate workplace concerns or because Plaintiff exposed fraud in a community politically important to the County Executive. For that reason, I cannot say as a matter of law that Defendants have met their burden of establishing a Pickering defense.

The jury will have to find facts, after which I can apply the Pickering test. See Gorman-Bakos v. Cornell, 252 F.3d 545, at 557, where the court said, "As a general rule, the application of the balancing test is a question of law which is properly performed by the district court. In

the present case, however, the facts relevant to that determination are contested." The same is true here. The parties may submit special interrogatories of fact for the jury, which I will consider in making the balance required by Pickering.

At this stage, however, Defendants have not shown lack of retaliatory motive. I don't need to reach the balancing, but I also point out that Defendants have not shown that any significant disruption would outweigh the vital public interest in ferreting out crimes of fraud. See Shelton Police Union v. Voccola, 125 F.Supp.2d 604, at 630 (District of Connecticut 2001), which said, the more significant the public concern, the more disruption the defendant has to show, and in that case, the detection of corruption outweighed the Police Department's interest in effective functioning, and the same case, at 632, found that the Department's interest in protecting confidential information was outweighed by the public interest in disclosing corruption.

So, there is a distinct possibility that even if the facts are what Defendants say they are, I might conclude that the interest in ferreting out fraud, whether welfare fraud or mortgage fraud, outweighs the Defendants' concern with the provision of confidential information to law enforcement agencies. Much of -- many of the cases involve provision of that information to the public, but here it was

to the FBI. So, I'm not reaching any conclusion on that, I'm describing the issue.

Finally, as to qualified immunity, we all know the contours of qualified immunity, so I won't take the time to recite them. Defendants' argument seems to be they are entitled to qualified immunity because they reasonably believed they were permitted to discipline Plaintiff for her allegedly unauthorized disclosure of information.

Gross testified in his deposition that he didn't think the disclosure was incorrect, but my understanding of that testimony was he learned that after the fact and at the time believed it was appropriate.

While it may have been reasonable for Defendants to discipline Plaintiff for violating the confidentiality rules, the jury is not obligated to accept that that was indeed why she was disciplined.

Defendants' argument fails at summary judgment because it relies on Defendants' version of the facts rather than Plaintiff's. See Ricciuti v. Gyzenis, 2016 U.S. App. LEXIS 15556, at Page 14 (Second Circuit August 24th, 2016). Accepting instead Plaintiff's version of the facts, no reasonable commissioner would believe he was entitled to discipline Plaintiff because she had uncovered fraud in a population that was politically important to Defendants' supervisor.

Because there is a triable issue of fact as to motivation, I can't say as a matter of law that Defendants were not violating Plaintiff's clearly established rights by taking adverse action against her. Again, the parties may submit special interrogatories for the jury on the question of qualified immunity.

So, for these reasons, the motion for summary judgment is denied except as to Gross with respect to the promotion; with respect to that sliver of the case, the summary judgment motion is granted.

Let's go off the record for a moment. Let me see counsel at side bar.

(Discussion held off the record)

THE COURT: All right. So, back on the record.

All right. Let's set some dates.

Apparently, the parties have been notified for mediation and that's going to be a waste of time. So, the minute entry should reflect that I'm withdrawing the case from mediation, and the parties can convey that to the mediator.

MR. SUSSMAN: Thank you.

THE COURT: Mr. Sussman is going to send me a letter within a week regarding my order in 12 CV 3374 regarding why I shouldn't hold him in contempt with respect to his 56.1 Statement. And, now, let's set some dates. I can't -- yes.

MS. KIM: Your Honor, prior to setting dates, I do want to state for the record, in Mr. Sussman's defense, for the 56.1 Rule statement, in the past, his office has contacted our office to provide him a copy; they did not do so here, but I would like to state for the record that I do not believe that we affirmatively sent it over to them to begin with.

THE COURT: Well, you should have done that, and it's in my rules and you should do it going forward, but I don't have a track record with you of disregarding the rule like I have with Mr. Sussman and I don't have -- I appreciate your candor, and that does not get Mr. Sussman out of hot water.

MS. KIM: I just wanted to point that out to the Court.

THE COURT: But it's -- I appreciate it and I'm sure he does.

So, as is so often the case, I am not in a position to give you a firm date, but I can put you on seven days' notice. If you want a firm date, you may consent to a Magistrate Judge. And I know you both know that if I call you in and it turns out you're on trial elsewhere or you're on vacation, I'm not going to ruin your vacation or require you to clone yourselves, but let's set dates.

Let's have the Joint Pretrial Order -- where are we, October 27th. So, why don't we say November 23rd. That's

right before Thanksgiving. So, how about motions in limine December 7th, opposition December 14th, proposed voir dire questions and jury instructions December 14th.

And how long do you think the case will take to try, a week?

MR. SUSSMAN: Yes, Your Honor.

MS. KIM: Yes, Your Honor.

THE COURT: All right. Your earliest date will be January 3rd, 2017.

MR. SUSSMAN: Since we're both here, do you have any further guidance for us on the other case that --

THE COURT: Which is the one that you have?

MR. SUSSMAN: That's Zeppelin, Your Honor.

THE COURT: Zeppelin. Well, right now, I have a trial in November, which may or may not slip. I have some time in December.

MR. SUSSMAN: I realize -- I understand the burdens on the Court. The problem I have is that other judges set schedules and I don't know whether to advise you each time I have a trial scheduled that that's happened.

THE COURT: No. I think that if I call you in and you can't do it, you'll tell me.

MR. SUSSMAN: All right. Very well.

THE COURT: The only reason I'm hesitating is because that November trial, it's conceivable it will slip.

In which case, maybe I'll call you in in November. I just have to see. I have two trials in November, so.

MR. SUSSMAN: Okay. Thank you.

THE COURT: But I try to call them in based on how long they've been waiting. So, I will call that one in before this one.

MR. SUSSMAN: Thank you.

THE COURT: That's also a few days.

MR. SUSSMAN: Okay.

THE COURT: And that's also not going to settle?

MR. SUSSMAN: No.

THE COURT: What is it with you two?

The record should reflect I was just teasing.

All right. Thank you both.

MR. SUSSMAN: Thank you.

MS. KIM: Thank you, Your Honor.

(Case adjourned)