Corp. v. Green, 411 U.S. 792, 802-04 (1973), the district court essentially required Miller to allege a prima facie case as to these claims."

The Circuit Court found that the lower court had (1) dismissed Miller's race discrimination claim because he offered no facts to support that he was performing his job in a satisfactory manner; (2) dismissed the failure to promote claim because Miller did not identify a specific position; and (3) dismissed the retaliation claim because Miller did not sufficiently allege that he had engaged in protected activity. The Fourth Circuit held that these elements were needed to establish a prima facie case, and their omission did not invalidate the sufficiency of Miller's complaint. Affirmed in part, reversed in part, and remanded.

http://www.ca4.uscourts.gov/Opinions/Unpublished/131856.U.pdf (last accessed Mar. 20, 2014).

Qualified Immunity: Regulations Allowing Revocation of Permit Do Not Preserve Immunity Where Officials Had Discretion to Take Less Onerous Action

Royal Crown Day Care LLC v. Department of Health and Mental Hygiene of the City of New York, No. 12-4959-cv (2d Cir. Mar. 19, 2014).

In a case involving retaliation against a day care that complained to a state senator of unfair regulatory action, the Second Circuit has confirmed that qualified immunity is not preserved merely because government officials can point to regulations authorizing their taking of adverse action, if there is a degree of discretion on their part and a less onerous approach.

Royal Crown LLC was issued a permit by New York City's Department of Health and Mental Hygiene (DOHMH) in 2009, to operate as a children's day care center. The operator of a rival day care informed Royal Crown that she had connections at DOHMH and would have Royal Crown "shut down" unless it paid her. Royal Crown informed defendant Aurora Villareal, a manager at DOHMH, about the threat, but Villareal did not take action (in fact, she subsequently pleaded guilty to charges of conspiracy to commit fraud for accepting bribes from the rival day care in exchange for giving it favorable treatment).

Royal Crown wrote to a state senator asking for help, alleging that the DOHMH was corrupt and was helping rival day cares to shut it down. The senator's office contacted DOHMH. In mid-2010 the DOHMH commenced an investigation of Royal Crown, developed reports showing code violations by Royal Crown and revoked its authority to operate.

Royal Crown and its owner brought suit against the DOHMH and various officials, alleging due process violations, unconstitutional takings, and retaliation in contravention of the First Amendment. The district court granted defendants' motion for summary judgment on plaintiffs' procedural due process and takings claims but refused to their motion as to First Amendment retaliation and qualified immunity. Three individually named defendants (including Villareal) appealed the denial of their qualified immunity.

HELD: The Second Circuit upheld the denial of defendants' motion for summary judgment on the qualified immunity question.

DISCUSSION: Denial of a motion for summary judgment is generally not appealable; however, an exception applies where the denial is based on rejection of qualified immunity—if that appeal turns on issues of law. Here, the district court had rejected defendant's immunity motion based on genuine issues of fact as to whether they revoked Royal Crown's operating permit in retaliation for the incendiary letter written by Royal Crown to the state senator; a jury could reasonably conclude that the decision to suspend Royal Crown's permit was motivated by "retaliatory animus." However, because defendants had in fact discovered "critical violations" at the day care, which required that the DOHMH close it, the court found sufficient issues of law to justify the appeal.

Irrespective of the existence of violations which would provide legal grounds for closing Royal Crown, the day care could still prove First Amendment retaliation by showing improper motive, if defendants retained some discretion in how they performed their regulatory enforcement functions. Here, the applicable Health Code provisions did not require the closure of Royal Crown; rather, the DOHMH could have identified the violations and required that Royal Crown take immediate corrective action. This slim degree of discretion made defendant's qualified immunity defense vulnerable.

To defeat the qualified immunity defense, plaintiffs had to show that (1) a constitutional right was violated; or (2) that right was clearly established at the time. The analysis includes an inquiry into whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). The constitutional issue here was First Amendment retaliation: for plaintiffs' claim to survive, they had to demonstrate (1) that they engaged in protected speech, and (2) that the speech was a substantial or motivating factor in defendants' adverse actions.

The retaliation claim thus turned on defendants' actual motivations. The timing and sequence of Royal Crown's letter to the senator and the DOHMH's subsequent enforcement actions created genuine issues of material fact.

http://www.ca2.uscourts.gov/decisions/isysquery/8244693d-2b67-4aac-8b5f-7dee2227594d/2/doc/12-4959_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/8244693d-2b67-4aac-8b5f-7dee2227594d/2/hilite/ (last accessed Mar. 20, 2014).