

1 twice failed to appear for the medical evaluation, and Defendants eventually
2 terminated Plaintiff's employment.

3 Plaintiff sued Defendants SUNY, Mary Dolan, and John Schwaller for (1)
4 deprivation of due process in violation of the Fourteenth Amendment, (2)
5 violation of the Equal Protection Clause of the Fourteenth Amendment, (3)
6 disability discrimination in violation of the New York State Human Rights Law,
7 and (4) retaliation in violation of the New York State Human Rights Law. The
8 district court granted summary judgment to SUNY and Dolan on all of Plaintiff's
9 claims. It allowed Plaintiff's disability discrimination claim against Schwaller to
10 proceed under the New York State Human Rights Law, but it dismissed Plaintiff's
11 equal protection and retaliation claims against Schwaller. The appeal before us
12 being interlocutory and all the above decisions not being intertwined with this
13 appeal, the validity of these judgments is not before us and remains to be decided
14 in possible appeals when a final judgment in Plaintiff's suit has been issued.

15 The district court also denied summary judgment to Defendant Schwaller
16 on Plaintiff's procedural due process claim against him. In doing this, it rejected,
17 on the grounds that Schwaller violated some requirements of the New York Civil
18 Service Law, Schwaller's claim that he was entitled to qualified immunity. This
19 was error. Because we further conclude that Schwaller's conduct did not violate
20 clearly established law, and that he therefore is entitled to qualified immunity, we
21 REVERSE the district court's decision in this respect and REMAND with
22 instructions to dismiss the procedural due process claim against Schwaller.

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32 of the State of New York; *on the brief*), Albany,
33 NY, *for Defendant-Appellant*.

1 GUIDO CALABRESI, *Circuit Judge*:

2 On December 23, 2013, Paul Tooly sued the State University of New York at
3 Potsdam (“SUNY”); Mary Dolan, Director of Human Resources at SUNY; and
4 John Schwaller, then-President of SUNY. Tooly claimed, *inter alia*, that the
5 defendants violated his procedural due process rights under the Fourteenth
6 Amendment when they placed him on involuntary leave and later terminated his
7 employment. The defendants moved for summary judgment, which the district
8 court granted in part and denied in part. In relevant part, the district court denied
9 summary judgment to Schwaller on Tooly’s procedural due process claim, holding
10 that Schwaller was not entitled to qualified immunity. In doing so, the district
11 court relied heavily on its finding that Schwaller had violated the requirements of
12 the New York Civil Service Law. Schwaller now brings an interlocutory appeal
13 from that denial.

14 The only issue in this appeal is whether the district court erred in denying
15 summary judgment to Schwaller on the ground of qualified immunity. We hold
16 that it did. Failure to comply with a state procedural requirement—such as the
17 New York Civil Service Law—does not necessarily defeat a claim for qualified
18 immunity under federal law. Moreover, because Schwaller’s conduct did not

1 violate clearly established federal law, we further hold that he is entitled to
2 qualified immunity as a matter of law. Accordingly, we reverse this portion of the
3 district court's decision and remand with instructions to dismiss the due process
4 claim against Schwaller.

5 **BACKGROUND**

6 **A. Facts**

7 Paul Tooly had been employed by SUNY as a motor vehicle operator
8 beginning in February 2000. On May 13, 2011, Melissa Proulx, Assistant Director
9 of Human Resources, wrote to the Employee Health Services division of the New
10 York State Department of Civil Service to request a mental stability evaluation of
11 Tooly. In the letter, Proulx identified a number of incidents that prompted the
12 request, including, *inter alia*, (1) that Tooly had interrupted a private meeting to
13 deliver a letter that made no sense to Schwaller, then-President of SUNY; (2) that,
14 while driving his truck, Tooly had swerved toward two employees and driven
15 through a narrow gap between them; (3) that Tooly had grabbed a report out of
16 another employee's hands and added information to the report, even after he had
17 been told he could not do so; and (4) that Tooly became agitated at work on

1 multiple occasions, including May 11, 2011,¹ when he walked off the job without
2 permission. Tooly alleges that he was not provided with a copy of the letter
3 requesting the medical evaluation and was never made aware of its contents prior
4 to this litigation.

5 On May 17, 2011, Schwaller sent Tooly a letter informing him that he was
6 being placed on an involuntary leave of absence effective the following day. This
7 letter stated that Schwaller believed Tooly's continued presence on the job severely
8 interfered with the operations of the department. Schwaller directed Tooly to
9 undergo a medical examination and advised him that "failure to attend this
10 medical examination may subject [him] to disciplinary action." Joint Appendix
11 (hereinafter "J.A.") 55. The letter indicated that, while on leave, Tooly could draw
12 on his accrued leave days, and, when those were exhausted, he would be eligible
13 for sick leave at half-pay.

14 On May 24, 2011, Dolan sent Tooly a letter informing him that he must
15 appear for a medical evaluation on June 6, 2011. On June 3, Tooly sent Schwaller a
16 letter requesting a written statement of facts as to why he was placed on

¹ Dolan's letter actually identified May 10 as the date that Tooly abandoned his job. But other record evidence, including Tooly's termination letter, *see* J.A. 70, consistently states that this event occurred on May 11.

1 involuntary leave and required to undergo a medical evaluation. On June 7,
2 Schwaller responded with a letter denying Tooly's request. Tooly did not attend
3 the medical evaluation scheduled for June 6. The evaluation was then rescheduled
4 for June 27, and Proulx sent Tooly a letter on June 9 to inform him of the new date.
5 The letter again advised Tooly that "failure to keep this appointment may result
6 in disciplinary action." J.A. 59. Tooly again failed to appear on this second
7 rescheduled date.

8 On June 30, 2011, Dolan sent Tooly a letter directing him to report to the
9 Office of Human Resources for a disciplinary interrogation meeting on July 6,
10 2011. The letter stated that Dolan had received a report indicating that Tooly "may
11 have committed acts for which formal disciplinary action may be initiated." J.A.
12 60. It added that the purpose of the disciplinary interrogation meeting was to
13 question him concerning this matter. The letter again advised that "failure or
14 refusal to report as directed may, in itself, be grounds for disciplinary action." *Id.*

15 To allow Tooly time to consult with an attorney, the disciplinary
16 interrogation meeting was subsequently postponed to July 8, 2011. On July 6,
17 Tooly's attorney, James D. Hartt, sent a letter to Dolan requesting information
18 about the purpose of the meeting and a general description of Tooly's alleged

1 disciplinary issues. Twice—once on July 11 and again on July 12—Dolan called
2 and left a message with Hartt’s office, asking Hartt to call her back to discuss the
3 upcoming meeting. But Dolan never received a return call or any communication
4 from Hartt.

5 On July 12, the disciplinary interrogation meeting was again rescheduled,
6 this time for July 18, 2011. On July 14, Tooly requested that the meeting be
7 postponed a third time. Dolan declined to reschedule the meeting and sent Tooly
8 letters on July 14 and 15 to remind him that he needed to appear on July 18. The
9 July 15 letter additionally stated:

10 If you fail to apply [sic] with this directive you are
11 waiving your right to provide information about
12 potential disciplinary action that could be issued against
13 you. Your failure or refusal to report as directed may, in
14 itself, be grounds for disciplinary action against you.
15 Any disciplinary action taken against you will proceed
16 without the interrogation.

17 J.A. 68. Tooly did not appear at the disciplinary interrogation.

18 On July 18, 2011, after Tooly failed to appear, SUNY sent Tooly a Notice of
19 Discipline, informing him that he would be fired. The Notice included three
20 charges of misconduct: (1) abandoning his job on May 11, 2011; (2) failing to report
21 for medical examinations on June 6, 2011 and June 27, 2011; and (3) failing to report
22 to the disciplinary interrogation meeting on July 18, 2011. A letter from Dolan,

1 included with the Notice, stated that the termination would be effective 14 days
2 after receipt of the Notice and that Tooly could challenge the Notice by filing a
3 grievance form within those 14 days. But the Notice itself and an additional
4 accompanying letter from Schwaller stated that the termination would be effective
5 on July 18, 2011 at the close of business.

6 SUNY noticed the inconsistent effective dates, and, on August 8, 2011,
7 Proulx sent Tooly a letter withdrawing the Notice of Discipline issued on July 18,
8 2011. The letter also suspended Tooly without pay, effective August 8, and issued
9 a new Notice of Discipline. The new Notice of Discipline included eight charges of
10 misconduct, all of which concerned the same incidents as the prior Notice. The
11 new Notice also informed Tooly that he would be fired effective 14 days after his
12 receipt of the Notice.

13 Tooly asserts that he attempted to file a grievance to challenge the
14 termination, but that he was unable to do so because he was provided with the
15 wrong address. And, as a result, he claims, grievance procedures were never
16 initiated. On August 21, 2011, Tooly instead submitted a complaint to the Public
17 Integrity Bureau of the Office of the Attorney General. That complaint alleged that
18 Tooly had reported to SUNY an instance of workplace violence committed by

1 another employee and that the disciplinary actions taken against him were in
2 retaliation for this action. The complaint was referred to the SUNY Auditor's
3 Office for investigation, and the Auditor's Office determined that there was no
4 evidence to support Tooly's allegations.

5 Tooly asserts that he was fired in August 2011 and that he has not received
6 any paychecks or benefits since.²

7 **B. Proceedings Below**

8 On December 23, 2013, Tooly filed a complaint in the United States District
9 Court for the Northern District of New York, asserting four claims against SUNY,
10 Dolan, and Schwaller: (1) deprivation of due process in violation of the Fourteenth
11 Amendment; (2) violation of the Equal Protection Clause of the Fourteenth
12 Amendment; (3) disability discrimination in violation of the New York State
13 Human Rights Law; and (4) retaliation in violation of the New York State Human
14 Rights Law. The defendants moved for summary judgment, which the district
15 court granted in part and denied in part. Specifically, the district court granted

² Before the district court, Schwaller stated that Tooly is still an employee of SUNY and is currently suspended without pay pending termination, despite the fact that the August 8, 2011 Notice of Discipline stated that Tooly would be terminated 14 days after receipt of that Notice. For purposes of this appeal, however, Schwaller accepts Tooly's allegations that he was fired in August 2011.

1 summary judgment to SUNY and to Dolan on all claims. The district court also
2 granted summary judgment to Schwaller on Tooly's equal protection and
3 retaliation claims. The district court denied summary judgment and permitted
4 Tooly to proceed, however, on his due process claim and his state law disability
5 discrimination claim against Schwaller. At this time, Schwaller appeals only the
6 district court's decision on the due process claim, asserting that he is entitled to
7 qualified immunity and hence permitted to make an interlocutory appeal.

8 The district court based its ruling allowing Tooly's procedural due process
9 claim to proceed against Schwaller on the ground that a reasonable jury could find
10 that, because Schwaller had failed to comply with some requirements of the New
11 York Civil Service Law, Tooly had not been afforded adequate process. *Tooly v.*
12 *Schwaller*, No. 7:13-CV-1575, 2017 WL 6629227, at *6-*7 (N.D.N.Y. Oct. 2, 2017). In
13 doing so, the court further found that, because a reasonable jury could find that
14 Schwaller had violated New York state law, he was not entitled to qualified
15 immunity. *Id.* at *8.

16 The New York Civil Service Law requires that, prior to ordering a medical
17 examination, an employer must give its employee "[w]ritten notice of the facts
18 providing the basis for the judgment . . . that the employee is not fit to perform the

1 duties of his or her position.” N.Y. Civ. Serv. Law § 72(1). It also requires that, prior
2 to taking disciplinary action, the employer must provide the employee with
3 “written notice thereof and of the reasons therefor,” as well as a “copy of the
4 charges preferred against him,” and allow the employee “at least eight days for
5 answering the same in writing.” N.Y. Civ. Serv. Law
6 § 75(2). Because the district court found that Schwaller had not satisfied these
7 requirements, it held that a genuine dispute of material fact existed as to whether
8 Tooly’s due process rights had been violated.

9 Moreover, on largely the same basis, the district court then rejected
10 Schwaller’s claim that he was entitled to qualified immunity:

11 As a reasonable juror could conclude that Schwaller’s
12 failure to follow the clear requirements of New York
13 Civil Service Law would lead to the deprivation of
14 Tooly’s procedural due process rights under the
15 Fourteenth Amendment, such actions would violate
16 clearly established constitutional rights and it would not
17 be objectively reasonable to believe their acts did not
18 violate plaintiff’s rights.

19 *Tooly*, 2017 WL 6629227, at *8. In short, the district court concluded that, since a
20 reasonable jury could find that Schwaller’s violation of the New York Civil Service
21 Law deprived Tooly of his due process rights, Schwaller was not entitled to
22 qualified immunity.

1 “[W]here the district court denied immunity on summary judgment because
2 genuine issues of material fact remained, we have jurisdiction to determine
3 whether the issue is *material*, but not whether it is *genuine*.” *Id.* at 140-41 (emphasis
4 in original).

5 Tooty argues that Schwaller’s interlocutory appeal is not properly before
6 this Court because it turns on the district court’s determination of whether genuine
7 issues of material fact exist. Schwaller agrees, however, for purposes of this appeal,
8 to rely “only upon facts plaintiff has alleged or admitted.” Appellant’s Br. at 3 n.1;
9 *see Bolmer*, 594 F.3d at 141. Therefore, this court has jurisdiction to decide whether,
10 on the facts alleged by Tooty, Schwaller is entitled to qualified immunity as a
11 matter of law. Our review thus cabined, we assess the district court’s denial of
12 summary judgment *de novo*. *Lauro v. Charles*, 219 F.3d 202, 206 (2d Cir. 2000).

13 **B. Standard for Qualified Immunity**

14 A defendant is entitled to qualified immunity under federal law if “(1) [the
15 defendant’s] conduct does not violate clearly established statutory or
16 constitutional rights of which a reasonable person would have known, or (2) it was
17 objectively reasonable for [the defendant] to believe that his actions were lawful at

1 the time of the challenged act.” *Cerrone v. Brown*, 246 F.3d 194, 199 (2d Cir. 2001)
2 (internal quotation marks and citations omitted).

3 C. Schwaller’s Defense

4 Schwaller asserts qualified immunity solely against Tooley’s procedural due
5 process claim. The Due Process Clause is violated when a claimant is deprived of
6 a protected liberty or property interest without adequate process. *See Ciambrello v.*
7 *Cty. of Nassau*, 292 F.3d 307, 313 (2d Cir. 2002). In determining how much process
8 is adequate, we look to “[f]ederal constitutional standards rather than state
9 statutes [to] define the requirements of procedural due process.” *Robison v. Via*,
10 821 F.2d 913, 923 (2d Cir. 1987). “[T]he fact that the State may have specified its
11 own procedures that it may deem adequate for determining the preconditions to
12 adverse official action . . . does not settle what protection the federal due process clause
13 requires.” *Russell v. Coughlin*, 910 F.2d 75, 78 n.1 (2d Cir. 1990) (emphasis added)
14 (internal quotation marks and citation omitted); *see also Coles v. Erie Cty.*, 629 F.
15 App’x 41, 42-43 (2d Cir. 2015) (summary order).

16 It follows, and we have repeatedly held, that a state statute does not serve
17 as “clearly established law” for purposes of qualified immunity. Since a violation
18 of state law does not *per se* result in a violation of the Due Process Clause, it cannot

1 *per se* defeat qualified immunity. See *Brown v. City of New York*, 798 F.3d 94, 100 (2d
2 Cir. 2015) (“A defense of qualified immunity is not displaced by a violation of state
3 law requirements.”); see also, e.g., *Robison*, 821 F.2d at 922. To determine whether a
4 violation of state law overcomes federal qualified immunity, then, the court must
5 determine whether the conduct that violated the state statute also violates clearly
6 established federal law, and this is a distinct and separate inquiry. And, although
7 there may be some overlap, the requirements of federal due process law are “not
8 inherently coextensive” with those of the New York Civil Service Law. See *Coles*,
9 629 F. App’x at 43. Consequently, a defendant who violates the New York Civil
10 Service Law has not necessarily violated clearly established federal due process
11 law.

12 In this case, the district court appears initially to have recognized “that the
13 failure to comply with all or any requirements of New York State Civil Service
14 Law may not *per se* result in a violation of the due process clause of the Fourteenth
15 Amendment.” *Tooly*, 2017 WL 6629227, at *5. But, despite this statement, the
16 district court based its holding almost exclusively on Schwaller’s failure to comply
17 with the New York State Civil Service Law. Significantly, the district court did not

1 assess whether Schwaller’s conduct violated the procedural guarantees of the
2 federal Due Process Clause, as laid out by the Supreme Court.

3 This was legal error. But, whether this error justifies a remand, supports a
4 reversal, or is harmless depends on whether, accepting Tooly’s version of the facts,
5 Schwaller’s actions violated clearly established federal law. It is to this that we now
6 turn.

7 A procedural due process claim requires the plaintiff to establish (1)
8 possession by the plaintiff of a protected liberty or property interest, and (2)
9 deprivation of that interest without constitutionally adequate process. *See*
10 *O’Connor v. Pierson*, 426 F.3d 187, 195-96 (2d Cir. 2005). Tooly claims that he was
11 twice deprived of a protected property interest: first, when he was placed on
12 involuntary leave in May 2011 and, second, when his employment was terminated
13 in August 2011. The district court did not distinguish between the two
14 deprivations—termination and involuntary leave—and simply found that Tooly
15 had a protected property interest in his continued employment.

1 **D. Tooly’s Involuntary Leave**

2 Assessing separately whether, in the actual circumstances of his case,
3 Tooly’s placement on involuntary leave was a deprivation of a property interest
4 sufficient to trigger due process requirements, we conclude that it was not.

5 Under this Circuit’s precedents, an employee who is placed on *unpaid* leave
6 has been deprived of a protected property interest, but “an employee who is on
7 leave and receiving his normal salary” has not. *O’Connor*, 426 F.3d at 199. And this
8 remains so even though the employee is required to draw upon leave accruals,
9 such as sick leave, to maintain that salary. “As long as the employee is receiving a
10 paycheck equivalent to his normal salary, that the employee is drawing down his
11 sick leave is a bookkeeping entry with no pecuniary effect.” *Id.* at 200. Such an
12 employee has only been deprived of a property interest triggering due process
13 when “he suffers a financial loss because of that leave’s unavailability,” *e.g.*, when
14 the employee runs out of leave accruals while still on leave. *Id.* at 199.

15 On the facts before us, Schwaller did not deprive Tooly of a protected
16 property interest when he placed Tooly on involuntary leave on May 17.
17 Schwaller’s letter to Tooly expressly stated: “While you are on this leave, you may
18 charge any of your accruals. When these are exhausted, you will be eligible for sick

1 leave at half-pay.” J.A. 55. Tooly has not argued that his accruals were insufficient
2 to cover his full salary during his period of involuntary leave.³ Thus, Tooly was
3 not deprived of a protected interest. It follows that Schwaller did not violate a
4 clearly established due process right by placing Tooly on involuntary leave, and
5 that doing so did not deprive Schwaller of qualified immunity.

³ Accordingly, we express no opinion as to whether sick leave at half pay would be a deprivation triggering due process requirements.

We also note that Tooly’s Counterstatement of Material Facts contains an inconsistency regarding the date on which Tooly stopped being paid. In one place, Tooly states that he stopped being paid in April 2011 while, elsewhere, he states that he stopped being paid in August 2011. *Compare* J.A. 159, *with, e.g.*, J.A. 147. Schwaller states that the reference to April 2011 is a typographical error, as Tooly’s own deposition testimony confirms that he stopped being paid after his termination in August 2011. *See* J.A. 137-38. Schwaller also argues that, in context, April 2011 would make no sense because it predates Tooly’s involuntary leave, which began on May 18, 2011.

Tooly does not contest Schwaller’s characterization of the April 2011 date as a typographical error. To the contrary, Tooly’s brief on appeal makes no reference to *any* due process violation occurring before his May 18 placement on involuntary leave. *See, e.g.*, Appellee’s Br. at 2 (“Beginning in May 2011, Tooly was subjected to a series of [c]onstitutional deprivations.”). Accordingly, while we accept “the facts that plaintiff alleges are true” on interlocutory appeals from a denial of qualified immunity, *see Bolmer*, 594 F.3d at 141, we construe Tooly to be alleging that he stopped being paid in August 2011.

1 **E. Tooly’s Termination**

2 **1. *The Loudermill Requirements***

3 The district court, however, did correctly determine that Tooly’s
4 termination was a deprivation of a protected property interest requiring due
5 process. *See O’Connor*, 426 F.3d at 196. The remaining issue, then, is whether
6 Schwaller provided Tooly with adequate process prior to firing him.

7 The Supreme Court in *Cleveland Board of Education v. Loudermill* held that
8 pre-deprivation process requires: (1) “oral or written notice of the charges against
9 [the employee]”; (2) “an explanation of the employer’s evidence”; and (3) “an
10 opportunity to present [the employee’s] side of the story” and “to present reasons,
11 either in person or in writing, why [the] proposed action should not be taken.” 470
12 U.S. 532, 546 (1985). In the case before us, the question presented is whether there
13 is clearly established federal law holding that the Due Process Clause is violated
14 when the employer has provided the plaintiff with an opportunity to receive the
15 process required by *Loudermill*, but the plaintiff, for possibly proper reasons, has
16 not made use of that process by appearing or responding.

1 2. *The Relevant Facts in Tooly's Case*

2 When Tooly was instructed to appear for his two scheduled medical
3 examinations, he was advised both times that “failure to attend this medical
4 examination may subject you to disciplinary action.” J.A. 55; *see also* J.A. 59.
5 Admittedly, however, Dolan’s June 30, 2011 letter, which informed Tooly about
6 his disciplinary interrogation meeting, did not mention either of the missed
7 medical examinations as the reason for the disciplinary hearing. The letter stated
8 only that Tooly “may have committed acts for which formal disciplinary action
9 may be initiated” and that the purpose of the interrogation meeting would be to
10 question him concerning this matter. J.A. 60. The letter did clearly advise him that
11 “failure or refusal to report as directed may, in itself, be grounds for disciplinary
12 action.” *Id.*

13 While Dolan’s June 30, 2011 letter did not specify the charges against Tooly,
14 his attorney, Hartt, requested that information from Dolan, and Dolan called Hartt
15 twice in an effort to respond to his request. Dolan left messages with Hartt’s office,
16 but she never received a return call or any other communication from Hartt. J.A.
17 48.

1 Additionally, Schwaller argues that, at the proposed disciplinary meeting,
2 Tooly would have received all of the procedural protections required by
3 *Loudermill*. Moreover, Tooly was advised that failure to attend the meeting would
4 “waiv[e] [his] right to provide information about potential disciplinary action that
5 could be issued against [him],” and that “[a]ny disciplinary action taken against
6 [him would] proceed without the interrogation.” J.A. 68. As we have held, a
7 “failure to submit to the [disciplinary] procedures precludes consideration of the
8 fairness of those proceedings in practice.” *Narumanchi v. Bd. of Trustees of Conn.*
9 *State Univ.*, 850 F.2d 70, 72 (2d Cir. 1988). Because Tooly never appeared for the
10 interrogation meeting, we cannot say with certainty what would have occurred at
11 the meeting, or whether the meeting would or would not have been fair. However,
12 as discussed below, we do not need to decide whether the procedures afforded
13 Tooly were constitutionally adequate because we can resolve the issue on “clearly
14 established law” grounds. *See Cerrone*, 246 F.3d at 199.

15 ***3. The Lack of Clearly Established Law***

16 For qualified immunity to apply, it is sufficient that no clearly established
17 law has held that “an officer acting under similar circumstances” violated an
18 employee’s due process rights. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017). Clearly

