



## Razzano v. Remsenburg-Speonk Union Free School District et al

2020 | Cited 0 times | E.D. New York | September 30, 2020

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK  
-----X JANICE RAZZANO,

Plaintiff, -against-

REMSENBURG-SPEONK UNION FREE SCHOOL DISTRICT, KATHERINE SALOMONE,  
THOMAS KERR, LISA FOX, KEVIN FEDERICO, CECELIA SPELLMAN-FREY, JOEL  
PETERSON, RONALD M. MASERA, and JOHN KERN in their official and individual capacities,

Defendants. -----X

### MEMORANDUM AND ORDER 11-CV-2920 (KAM)

KIYO A. MATSUMOTO, United States District Judge: On June 17, 2011, plaintiff Janice Razzano commenced this action, bringing claims of disability discrimination and retaliation pursuant to the Americans with Disabilities Act of 1990 and the New York State Human Rights Law, N.Y. Exec. Law §§ 290 et seq. , and alleging an Equal Protection violation pursuant to 42 U.S.C. § 1983. Plaintiff alleges discrimination and retaliation by the Remensburg-Speonk Union Free School District ( School District, , 1

School District superintendent and principal

1 The school district is comprised of one elementary school. through 2010, Dr. Katherine Salomone, School District Board of Thomas Kerr, Board vice president Lisa Fox, and Board members Kevin Federico, Cecelia Spellman- Frey, and Joel Peterson. ( ) at 1-2, ECF No. 1.) On October 7, 2011, plaintiff filed an amended complaint, raising the same claims but adding the current School District superintendent and principal, Ronald M. Masera, and Board member John Kern, as defendants. Amended Am. Comp at 1-2, ECF No. 2.) On February 14, 2017, Judge Wexler dismissed sua sponte,

(Minute Entry of Judge Leonard Wexler, dated February 14, 2017.) Judge Wexler later clarified that the Appellate decision precluded complaint the doctrines of res judicata and collateral (Minute Entry of Judge Leonard Wexler, dated November 13, 2017.) Plaintiff appealed Judge Notice of Appeal by Janice Razzano, ECF No. 27.) On appeal, the Second Circuit held that the sanction of dismissal for failure to prosecute was unsupported by the record, that dismissal on claim preclusion grounds was unsupported by the underlying claims raised at the state and administrative levels, and that dismissal



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on issue preclusion grounds was not supported by an administrative transcript demonstrating that the issues raised at the federal level were fully litigated in the administrative action. *Razzano v. Remsenburg-Speonk Union Free Sch. Dist.*, 751 F. App'x 24 (2d Cir. 2018). Accordingly, the Second Circuit vacated the judgment and remanded for reconsideration of the issues on a more fully developed record. *Id.* at 28. Presently before summary judgment. ( Memorandum of Law in Support of Mem ), ECF No. 58-3.) For the reasons provided below, the court for summary judgment.

**BACKGROUND** The following timeline of events is taken from the

56.1. 2

The court has considered whether the parties have proffered admissible evidence in support of their positions and

2 Local Civil Rule 56.1 provides that a party moving for summary judgment shall annex[] to the notice of motion a separate, short and concise a correspondingly numbered paragraph responding to each numbered paragraph in paragraphs must cite to admissible evidence. Local Civ. R. 56.1(a)-(c). Plaintiff relies upon incorrect hearsay objections for the majority of her 56.1 statement. In addition, facts that were not contradicted by citations to admissible evidence are deemed admitted. See *Ferraro v. New York City Dep't of Educ.*, 404 F. Supp. 3d 691, 698 (E.D.N.Y. 2017), *aff'd*, 752 F. App'x 70 (2d Cir. 2018)(citing *Giannullo v. City of New York*, 322 F.3d 139, 140 (2d forth in the moving party's Rule 56.1 statement, that fact will be deemed ). has viewed the facts in a light most favorable to the plaintiff, the nonmoving party.

### I. Factual Background

The Board of Education of the Remsenburg-Speonk Union Free School District is a municipal corporation of the State of New York. (N.Y. Ed. Law § 1701); see *C.K. v. Bd. of Educ. of the Westhampton Beach Sch. Dist.*, 185 F. Supp. 3d 317, 321 (E.D.N.Y. 2016). The School District consists of a single elementary school. (Def. Mem. at 2.)

In 2009, plaintiff complained of persistent coughing while at school, the cause of which was undetermined. (Def. , ECF No. 58-2.) It is undisputed that the school conducted multiple environmental tests and found no evidence of

3 (Id. ¶ 6.)

3 Plaintiff argues that the lack of an environmental cause for environmental expert J.C. Broderick & Associates

sampling are limited in that it only reports the presence and conditions of the parameters analyzed at



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the time the inspection and sampling was performed. Although every attempt was made to collect the samples at a time which is most representative of the typical conditions of the subject spaces, these results cannot guarantee the conditions prior to, and subsequent to, when the samples further investigation, including more expansive air monitoring and -1.) disputed First, the statements plaintiff cites indicate only the common sense understanding that a one-day test cannot account for environments that change from day to day. Second, the expert samples at a time which [was] most representative of the typical conditions of the subject

On November 14, 2009, plaintiff filed a complaint with the New York State Department of Labor alleging the presence of mold and asbestos at the school that plaintiff alleged led to her suffering a persistent cough while at work in the Remsenburg-Speonk School District. (Exh. P, NYS Dept. of Labor, ECF No. 58-19.) On January 7, 2010, plaintiff filed a separate complaint against the School District with the Equal Employment Opportunity Commission

which found complaints: 2009 (Exh. J at 4, ECF No. 58-13); Enviroscience Consultants did not detect fungi or bacteria in the air ducts of the special education office on April 10, 2009 (Exh. K at 4, ECF No. 58-14); Enviroscience Consultants determined on July 29, 2009 that the District should not undertake a building-wide survey of the staff for respiratory problems, should not conduct further program (Exh. L at 4, ECF No. 58-15.); Enviroscience Consultants detected odor, and elevated relative humidity, when school was not in session, during its August 27, 2009 indoor air quality test, (Exh. M at 5, ECF No. 58-16), but found on October 19, 2009 that cleaning had been successful when testing indicated normal concentrations of common environmental organisms and no visible mold growth within the music room, (Exh. N at 5, ECF No. 58-17); Enviroscience Consultants detected only low microbial levels and no presence of microbial growth from its indoor air quality sampling and inspection of the new speech room on December 28, 2009 (Exh. O at 5, ECF No. 58-18); the complaint of mold and asbestos at the school was not sustained, (Exh. P, ECF No. 58-19; Exh. Q, ECF No. 58-20; Exh. R, ECF No. 58-21 (affirming the same on review)), and; at the recommendation of the New York State United Teachers, Olmsted Environmental Services inspected the special education office, the music room, and two classrooms, and found, among other things, that humidity and air contaminant levels were within acceptable limits, and that there were no significant risk factors for mold colonization (Exh. S at 5, ECF No. 58-22). multiple environmental expert opinions which deny an environmental cause for material fact that environmental conditions did not illness. , ECF No. 58-26.)

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obstructive ventilatory defect with improvement after

plaintiff to move offices and wear a respirator, providing plaintiff with additional recess periods, repainting office, and re- Id. ¶ 8.)

Between November 16, 2009 and February 9, 2010, an industrial hygienist inspected the school for the presence of



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NYS Department of Labor could not be sustained. (Exh. Q, NYS Dept. of Labor Investigat , ECF No. 58-20.) The industrial hygienist found several unrelated

violations. (Id.) On May 21, 2010, the NYS Department of Labor uld not be sustained. (See Exh. P.) Plaintiff requested reconsideration, and on July 15, 2010, the Department of Labor affirmed its original

4 Though it was not submitted as evidence, plaintiff alleges in her complaint that the EEOC issued her a right-to-sue letter on March 24, 2011. (Am. Compl. ¶ 340.) As defendant offers no contradictory evidence, and drawing all reasonable inferences in favor of plaintiff, the nonmovant, the court accepts this as true for purposes of this motion. determination. (Exh. R, NYS Dept. of Labor Informal Conf. , ECF No. 58-21.) During the 2010-2011 school year, the School

193 students for the 2009-2010 school year. ( ¶ 1.) This decrease in students coincided with a decrease in state funding to the School District, which required the School District to implement budget reductions. (Id. ¶ 2.) Pursuant to the decrease in student population and budget reductions, on June 14, 2010, the Board eliminated three school positions and reclassified two school positions from full to half-time. (Id.

those reclassified from full to half-time. (Id.) Plaintiff would be responsible for counseling eight students for the 2010- 11 school year: three of those students would participate in regular mandated counseling sessions as part of their , while the other five would attend non-mandatory counseling. (Id. ¶ 4.) Plaintiff would prepare annual reports only for the three students with an IEP. (Id.) On March 9, 2012, psychiatrist Dr. Randall Solomon made a preliminary finding that plaintiff was not mentally fit to continue working in the School District. (Id. ¶ 13; Exh. Y, P , ECF No. 58-28.) On May 29, 2012, after reviewing the records of

his initial conclusion that plaintiff was not mentally fit to continue working in the School District. 5

5, ECF No. 58-29.) On June 14, 2012, the School District filed disciplinary charges against plaintiff for, among other things, failing to supervise students as the assigned lunch monitor on June 22, 2010, leaving confidential student records exposed in public printers on at least seven occasions during 2011, criticizing another teacher to students, and failing to cooperate with a psychiatric fitness evaluation. (Def. 56.1 ¶ 14.) The School District further charged that plaintiff was not mentally fit to continue working for the School District. (Id. ¶ 15; Exh. AA, Matter of Razzano vs. Remsenburg-Speonk Union Free Sch. Dist., Index No. 13-16057, Order in at 3, ECF No. 58-30.) The arbitration decision of May 31, 2013 finding that plaintiff was

5 Plaintiff seems to object by quoting a portion of statement: (Pl. 56.1 Dr. Solomon reported that a diagnosis could not be substantially interfere with [her] ability to function appropriately and (Exh. Y.) Moreover, after Dr. Solomon reviewed . (Exh. Z.) not mentally fit was confirmed by the state supreme



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court in an Article 75 proceeding. ( ¶ 15; Exh. AA at 4.)

II. ing

Her Reduction to Half-Time By administrative petitions dated May 19, 2010, July 13, 2010, and September 28, 2010, plaintiff petitioned the Commissioner of the New York State Department of Education pursuant to New York State Education Law § 310, challenging the her position from full to half- hazards [at the school], as well as discrimination, retaliation,

, ECF No. 56-27; Exh. V, Pl. Pet. to , ECF No. 58-25.) On April

proving that [the District] reduced her pos (Exh. X at 4-5.) The Commissioner of Education found that

assertion that the school reduced her position from full to half-time in bad faith. (Id. ¶ 12.) On October 8, 2010, plaintiff appealed the decision of the Commissioner of Education to the New York State Supreme Court of Suffolk County, pursuant to CPLR §§ 7801- her position from full to half-time was undertaken in

hazardous health conditions. Matter of Razzano v. Remsenburg- Speonk UFSD, 95 A.D.3d 1335, 945 N.Y.S.2d 713 (2012). The state supreme petition and dismissed the proceeding, finding that the Commissioner of Education had primary jurisdiction over plaintiffs challenge to the reclassification of her position and the related claim of whether the school board hired an independent contractor to assume her responsibilities in alleged violation of tenure laws. Id. at 1337. On appeal, the Second Department remanded and ordered the state supreme court to determine whether the School District reclassified plaintiffs position in bad faith in violation of Civil Service Law § 75-b, and, if the state supreme court found that plaintiffs position was not reclassified in bad faith, to leave the remaining factual issue of whether an independent contractor assumed some of the responsibilities of the tenured petitioner, over which the Commissioner had primary jurisdiction, to the Commissioner. Id.

On remand, the state supreme court determined on June 27, 2018 that the School District reclassified plaintiff in good faith and was motivated by valid budgetary concerns. Razzano v.

Remsenburg-Speonk UFSD, 162 A.D.3d 1043, 1045, 80 N.Y.S.3d 347 (2018). The state supreme court also

disciplinary charges. (Id. at 1046.) The state supreme court

time again . . . in good faith and without any remarkable further found

Id. ¶ 10; Exh. H, Post- , ECF No. 58-11.)

In affirming the trial c on June 27, 2018, the Second Department found that the - time] was based on



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valid budget concerns and was not made in bad

unfounded, but [] the [School District] still made consistent good-faith efforts to address her complaints and provide

(Def. 56.1 Stmt ¶¶ 16-19.) The Second Department affirmed on appeal, and agreed that the disciplinary proceedings resulting

(Id. ¶ 20.) The Second Department further held that there was e,

Id. ¶ 21.)

### III. §

#### 3020-a Termination

Plaintiff was terminated on June 10, 2013, following a twelve day arbitration. (Def. Mem. 9.) On June 19, 2013,

vacate a May 31, 2013 arbitration decision pursuant to NYS Education Law § 3020-a - that recommended her termination after the School District filed disciplinary charges against her. (Exh. AA at 1-2.) On January 31, 2014, the New York State Supreme Court in Suffolk County affirmed the arbitration decision. (Id. 5.) On appeal, the Second Department affirmed the judgment of the trial court. *Razzano v. Remsenburg-Speonk Union Free Sch. Dist.*, 144 A.D.3d 810, 41 N.Y.S.3d 72 (2016).

### IV. Federal Action Alleging Violations of

the ADA, 42 U.S.C. § 1983, and the NYSHRL

On June 17, 2011, plaintiff commenced the instant federal action against the School District, alleging discrimination and retaliation in violation of the ADA, NYSHRL, and an Equal Protection violation under § 1983. (See Am. Compl.) This court reviews this federal action, and related motion for summary judgment, on remand, with instruction from the Second Circuit to develop a more robust record. *Razzano v. Remsenburg-Speonk Union Free Sch. Dist.*, 751 F. App'x 24, 28 (2d Cir. 2018).

**LEGAL STANDARD I. Summary Judgment** Summary judgment shall be granted to a movant who puts at issue any material fact and the movant is entitled to judgment as a matter of law.

*Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 104 (2d Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)), cert denied, 565 U.S. 1260 (2012). No genuine issue of material fact exists.



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party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, Anderson, 477 U.S. at 249-50 (internal citations omitted). Summary judgment allows the court to dispose of meritless claims before becoming entrenched in a frivolous and costly trial. Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986).

When bringing a motion for summary judgment, the movant carries the burden of demonstrating the absence of any disputed issues of material fact. Rojas, 660 F.3d at 104. In deciding a summary judgment motion, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. Flanigan v. Gen. Elec. Co., 242 F.3d 78, 83 (2d Cir. 2001) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)), cert. denied, 534 U.S. 1065 (2001). A moving party may indicate the absence of a factual dispute by, inter alia . . . that an adverse party

taken as a whole could not lead a rational trier of fact to find for the non- for Matsushita Elec. Ind. Co., 475 U.S. at 587.

nonmoving party may not rest upon mere conclusory allegations or Castro v. Cty. of Nassau, 739 F. Supp. 2d 153, 165 (E.D.N.Y. 2010) (citing R.G. Grp., Inc. v. Horn & Hardart Co.,

must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary Jaramillo v. Weyerhaeuser Co., 536 F.3d 140, 145 (2d Cir. 2008) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322- 23 (1986)). In deciding a motion for summary judgment, the court is dutybound not to weigh evidence or assess the credibility of witnesses. United States v. Rem, 38 F.3d 634, 644 (2d Cir. 1994).

., No. 06 Civ. 5770, 2007 U.S. Dist. LEXIS 77926, at \*7 (S.D.N.Y. Oct. 22, 2007). Specifically, employment discrimination cases

Id.; see also Holcomb v. Iona Coll., 521 F.3d 130, 137 (2d Cir. 2008). The Second Circuit has noted, way to remind district courts that the impression that summary judgment is unavailable to defendants in discrimination cases is Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (internal quotation and citation omitted); see also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133,

, 509 U.S. 502, 524 (1993)); Holcomb however, a plaintiff must provide more than conclusory

### II. The ADA and the NYSHRL

The ADA makes it unlawful for an employer to

disability in regard to job application procedures, the hiring . . . of employees, . . . and other terms, conditions, and 2 U.S.C. § 12112(a). To establish a prima facie discrimination case under the ADA, a plaintiff must



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plaintiff suffers from or is regarded as suffering from a disability within the meaning of the ADA; (3) plaintiff was qualified to perform the essential functions of the job, with or without reasonable accommodation; and (4) plaintiff suffered an adverse employment action because of his disability or perceived Kinnery v. City of New York, 601 F.3d 151, 155-56 (2d Cir. 2010) (citations omitted); see also Brady v. Wal Mart Stores, Inc., 531 F.3d 127, 134 (2d Cir. 2008). A plaintiff

that he suffered an adverse employment action under circumstances giving rise to an inference of discriminatory Dooley v. JetBlue Airways Corp. (2d Cir. 2015) (citing Cortes v. MTA N.Y.C. Transit, 802, F.3d 226, 231 (2d Cir. 2015)).

The ADA prohibits discrimination against any inter alia compensation, job training, and other terms, conditions, and

similarly prohibits employers from discriminating against any

§ 296(1)(a). The analysis for disability discrimination under the ADA coincides with the analysis for disability discrimination under the NYSHRL. Berger v. New York City Police Dep't, 304 F. Supp. 3d 360, 367 (S.D.N.Y. 2018); see Parker v. Columbia Pictures Indus., 204 F.3d 326, 332 n.1 (2d Cir. 2000).

### III. 42 U.S.C. § 1983

To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and that the deprivation was committed by a person acting under color of law. Feingold v. New York, 366 F.3d 138, 159 (2d Cir. 2004). The Second Circuit considers Section 1983 employment discrimination claims under the burden-shifting evidentiary framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Littlejohn v. City of New York, 795 F.3d 297, 312 (2d Cir. 2015). Courts typically apply the same standard to discrimination claims brought under NYSHRL. , 192 F.3d 310, 317 n.2 (2d Cir. 1999). The Second Circuit has applied the McDonnell Douglas burden shifting test to require a plaintiff

she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 83 (2d Cir. 2015).

### DISCUSSION I. 42 U.S.C. § 1983

claim fails legally and procedurally. Class-of-one equal protection claims are not recognized in the public employment context. See , 553 U.S. 591 loyee does not state a claim under the Equal Protection Clause by alleging that he or she was arbitrarily treated differently from other similarly situated employees unless the different treatment was based on the employee's membership in any particular cl Porr v. Daman, 299 F. App'x 84, 86 (2d Cir. 2008)(citing Engquist, 128 S.Ct. at 2155-56). Plaintiff fails to plead or introduce any admissible evidence in her responsive submission pursuant to Local



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Rule 56.1 to demonstrate that she was treated differently than any similarly situated employee, nor does she offer any argument in her responsive memorandum of law. [I]n the case of a counseled partial opposition [to summary judgment] that relevant claims or Jackson v. Fed. Express., 766 F.3d 189, 198 (2d Cir. 2014); accord Kovaco v. Rockbestos-Surprenant Cable Corp., 834 F.3d 128, 143 (2d Cir. 2016) (hostile work environment claims deemed abandoned where

the motion as to his other claims); City of N.Y., No. 12 CV 1016, 2015 WL 5657343, at \*9 (E.D.N.Y.

Taylor v. City of New York, 269 F. Supp. 2d 68 claim abandoned when a party moves for summary judgment on one ground and the party opposing summary judgment fails to address

Section 1983 claim only once, in a citation to her original complaint, with no attendant facts or legal argument in opposition to defendants motion , ECF No. 59.) The

pursuant to 42 U.S.C. § 1983 summary judgment motion on this claim.

### II. Preclusion

discrimination, retaliation, and hostile work environment under the ADA and NYSHRL. D raises the doctrines of res judicata, collateral estoppel, and on the substantive basis that plaintiff does not state a claim under the ADA or NYSHRL. Both preclusion doctrines are affirmative defenses and may be properly considered in a summary judgment motion when raised by defendant. Leather v. Eyck, 180 F.3d 420, 424 (2d Cir. 1999); of Corr., 214 F.3d 275, 283 (2d Cir. 2000). The Second Circuit ious starting point in a preclusion analysis is a determination of the issues that were litigated in Flaherty v. Lang, 199 F.3d 607, 613 (2d Cir. 1999).

A. Claim Preclusion Res judicata, or claim preclusion, bars a party or its privies from relitigating issues that were or could have been raised in a prior action decided by a final judgment on the merits. St. Pierre v. Dyer, 208 F.3d 394, 399 (2d Cir. 2000).

full faith and credit . . . as they

1738; see also Burka v. N.Y.C. Transit Auth., 32 F.3d 654, 657 preclusive effect in federal court as the judgment would have

must be given the same preclusive effect in this court as it See Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 375 (1985); see also Brown v. N.Y.S. Supreme Court for Second Judicial Dist., 680 F. Supp. 2d 424, 428 (E.D.N.Y. 2010); Marvel Characters, Inc. v. Simon,

difference between New York and federal claim prec



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Under New York law, there are four elements to the doctrine of res judicata: (1) there must be a final judgment in

between the same parties in both actions; and (4) concerning the same claims in both actions. In re Hunter, 4 N.Y.3d 260, 269 (N.Y. 2005).

conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon Sosa v. JP Morgan Chase Bank, 822 N.Y.S.2d 122, 124 (N.Y. App. Div. 2006) (quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, (N.Y. 1981)). that is, to bring the action to a final conclusion against the Yonkers Contracting Co., Inc. v. Port Auth. Trans- Hudson Corp., 93 N.Y.2d 375, 380 (N.Y. 1999). The party asserting the defense of res judicata bears the burden of

Miller Mfg. Co., Inc. v. Zeiler, 45 N.Y.2d 956, 958, (N.Y. 1978). dismiss the action on the merits is not a basis for the Espinoza v. , 32 A.D.3d 326, 328 (N.Y. App. Div. 2006).

Defendants fails on claim preclusion grounds, as plaintiff raises claims of discrimination, retaliation, and hostile work environment under the ADA and NYSHRL. As a result, the fourth prong of claim preclusion analysis is not satisfied. The new claims plai Hunter, 4 N.Y.3d 269. As the Second Circuit § 3020-a decision in the Article 75 state court administrative hearing officer nor the Appellate Division had the power to rule on the discrimination claims, as Razzano had not raised them in the disciplinary proceeding or in her Razzano, 751 F. App'x 104.

i. Article 78 Proceeding Furthermore, in her Article 78 petition, plaintiff sought reinstatement to her full-time position and compensation for economic benefits and consequential damages lost. In her complaint to this court, she sought monetary damages under the ADA and the NYSHRL. As the trial court in an Article 78 proceeding did not have the power to award the full extent of damages now sought, see Razzano, 751 F.3d at 104, this court

her Article 78 proceeding. An Article 78 proceeding generally does not preclude a subsequent § 1983 proceeding. See Davidson v. Capuano, 792 F.2d 275, 278 80 (2d Cir. 1986. This is because the type of damages sought pursuant to § 1983 are typically not available in Article 78 proceedings, which allow only recovery of incidental damages. Corbett v. City of New York, 816 F. App'x 551, 553 54 (2d Cir. 2020) (citing Davidson, 792 F.2d at 278 80). A

on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in Burgos v. Hopkins, 14 F.3d 787, 791 (2d Cir. 1994); Monclova v. City of New York, No. 13-CV-7261(KAM)(ST), 2017 WL 5495804, at \*15 (E.D.N.Y. Mar. 31, 2017), aff'd, 726 F. App'x 83 (2d Cir. 2018). Damages for

recoverable in an Article 78 proceeding. Davidson, 792 F.2d at 278; see also Vargas v. City of New York, 377 F.3d 200, 205 (2d Cir. 2004) (reclusion rule does not apply because a state court entertaining



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an Article 78 proceeding does not have the power to award the full measure of relief available ; Antonsen v. Ward, 943 F.2d 198, 204 (2d Cir. 1991) (Article 78 proceeding did not preclude later claims for damages under the NYSHRL); Best Payphones, Inc. v. Dobrin, 410 F. Supp. 3d 457, 473 (E.D.N.Y. 2019) (Article 78 proceeding did not preclude later claims for damages under § 1983); Frierson-Harris v. Hough, No. 05-CV-3077, 2006 WL 3511881, at \*1 (S.D.N.Y. Dec. 6, 2006), aff'd, 328 F. App'x 753 (2d Cir. 2009) (Article 78 proceeding did not preclude later claims for damages under § 1981); but see Powell v. Ward, 643 F.2d 924, 934 (2 including an Article 78 proceeding, will preclude relitigation of a civil rights claim in a federal court if the state proceeding reached the federal constitutional issues

It follows that an Article 78 proceeding generally will not have claim preclusive effect if the relief sought in the later action is damages for a civil rights violation. In

present claims even though they are based on substantially the same events, as she did not seek the same remedy. The damages that plaintiff now seeks under the ADA, § 1983, and the NYSHRL

Article 78 action.

motion for summary judgment based on claim

under the defense of issue preclusion.

B. Issue Preclusion In remanding this action, the Second Circuit held that -a proceeding resulting in Razzano's termination was an administrative adjudication that must be given [issue] preclusive effect...only if (1) the identical issue necessarily was decided in the prior action and is decisive of the present action, and (2) the party to be precluded from relitigating the issue had a full and fair Razzano, 751 F. App'x 26 (internal citations and quotations omitted). The court find disability discrimination and retaliation pursuant to the ADA and the NYSHRL are issue precluded, and as a result, summary judgment is granted to defendants on previously decided issues.

The doctrine of collateral estoppel, or issue p identical issue necessarily was decided in the prior action and is decisive of the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to litig Evans v. Ottimo, 469 F.3d 278, 281 (2d Cir. 2006) (citing Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455-56 (N.Y.1985)); see also Leather, 180 F.3d at 425- Act, 28 U.S.C. § 1738, federal courts must give state-court judgments the same preclusive effect as they would receive in Burkybile v. Bd. of Educ. of Hastings-On-Hudson Union Free Sch. Dist., 411 F.3d 306, 310 (2d Cir. 2005) (citing Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984)).

i. The Issues Raised in the § 3020-a Hearing Are



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Identical to Those in the Instant Case § 3020-a hearing concerning the bases for her termination are identical to those raised in this case. The Second Circuit found that defendants had not met their evidentiary burden in arguing that the § 3020-a administrative termination proceeding had an issue preclusive effect. Razzano -a decision or transcript, we cannot determine the nature and/or scope of [plaintiff's] arguments in her defense, and cannot conclude with certainty the extent of the identity of the issues which would Id. Thus, the Second Circuit held that issue preclusion dismissal was premature, insofar as defendants proffered only the Second Department decision in Razzano, 144

Id. In support of their instant motion for summary judgment, defendants now in the Article 75 proceeding challenging the § 3020-a decision, see Exh. B(2), the trial court decision affirming the arbitration finding, see Exh. AA, and plaintiff. (See Exhs. Y and Z; see also Def. Mem. at 14-16; Def. Reply at 8.)

The § 3020-a hearing and Article 75 appeal concerned whether there was just cause for termination. Plaintiff states in her petition accompanying her Article 75 challenge to the § 3020-a proceeding that, at her § 3020-a hearing and in her challenge to the proceeding, plaintiff raised as discriminatory and retaliatory animus. (See Exh. BB, P In Re Razzano v. Remsenburg-Speonk Union Free School District, 2013 WL 12186140 ( Exh. BB ), ECF No. 60-2 at ¶ 1 [t]he dismissed specifications also confirm the motive of Respondent to retaliate against me and to deprive me of fundamental ¶ [t]

the in , ¶ 123 ( my position was being reduced due to retaliation because of my protected activity and I am being discriminated against due to my disability. ).)

In the instant action, plaintiff contends that her alleged disability led to her termination and that the school did not accommodate her condition, whereas defendants argue that position was reduced due to budget cuts, and ultimately terminated due to issues with her performance. The identity of issues that are the bases for termination of employment has been held sufficient to satisfy the first prong of the collateral estoppel inquiry. Ferraro, 404 F. Supp. 708, aff'd, 752 F. App'x 70 (2d Cir. 2018) (citing Mohammed v. New York City Dep't of Educ., 932 F. Supp. 2d 420, 428 (E.D.N.Y. 2013) (finding identity of issues where issue of whether Plaintiff's termination was based on impermissible considerations or performance concerns was raised in 3020-a hearing).) Plaintiff raised the issues of discrimination and retaliation in the underlying proceeding. As a result, the court finds that the first prong is satisfied here.

ii. Whether the Issues Were Actually Litigated and Actually Decided here a federal claim was previously raised as a central defense, a hearing officer necessarily decided the claim for purposes of collateral estoppel. Ferraro, 404 F. Supp. 708, aff'd, 752 F. App'x 70 (2d Cir. 2018)(citing Mazur v. N.Y. City Dep't of Educ., 53 F. Supp. 3d 618, 631 (S.D.N.Y. 2014) [p]laintiff's claims of age and disability discrimination were necessarily decided in the 3020 a hearing in order to support a aff'd, 621 Fed.Appx. 88 (2d Cir. 2015).) Here, the remaining claims at issue in the instant action are disability discrimination, retaliation, and hostile work environment. Though the transcripts of the 3020-a



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proceeding itself are not before the court -a proceeding reveals the issues that were submitted for the hearing officer determinations. (See Exh. BB.)

As described by plaintiff, in the underlying 3020-a

Id. at ¶ 89. Hearing Officer Robert Simmelkjaer found that construed portions of condition solely to the so- - made by defendants an underlying Id. at ¶¶ 89, 90. On the issue of whether the School District retaliated against plaintiff, the

bona fide -

Id. at ¶ 117.

On appeal to New York State Supreme Court pursuant to Article 75, the court affirmed determinations in the § 3020-a proceeding. First, the court noted that the school district terminated plaintiff based on her

seven specifications under charge III,

charges. (Id. at 2-3.) Finally, in concluding that the hearing

its entirety [persuaded the hearing officer] that [plaintiff] has exhibited a pattern of behavior which proves that she is mentally unfit to continue her duties as a School Psychologist, in the [school district] . . . [and that] the pattern of [her] aberrant behavior, as distinguished from isolated incidents, her for a Section 913 Id. at 4.) The state supreme court, Suffolk County, affirmed that the 3020- a hearing officers finding that the arbitrators decision was rational and had a plausible basis. Id.

On appeal, the Second Department affirmed that, as in plaintiffs case, where the arbitrator found that there is evidence of specific incidents of inappropriate, unprofessional, or insubordinate conduct which are found to demonstrate a separate and independent basis for the action taken, a defense under Civil Service Law § 75 b cannot be sustained. Razzano, 144 A.D.3d at 811. Furthermore, the record demonstrates that the arbitrator properly rejected the petitioner's defense that the disciplinary proceedings were retaliatory in nature. Id. at 810 (internal citations omitted). Thus both the state supreme court and the Appellate Division affirmed that the arbitrators finding in the 3020-a proceeding rejecting plaintiffs defense that the charges against plaintiff were not discriminatory or retaliatory had a rational basis, was supported by ample evidence, and was not arbitrary or capricious. Id. at 810-11.

On this record, the court is satisfied that

raised and decided at the § 3020-a hearing. The record, however, further environment claim was not



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actually litigated in the § 3020-a hearing.

iii. Full and Fair Opportunity to Litigate and Necessary to Support Judgment on the Merits The state supreme court decision notes that plaintiff was represented by counsel at the 3020-a hearing and given the opportunity to testify; 6

that witnesses and medical experts testified; and that parties presented 100 exhibits. (Exh. AA at 2, 4.) Plaintiff does not dispute or proffer any contrary evidence. The hearing occupied a total of twelve days over a six-month period, and the evidence and the arguments was 69 pages long. Id. at 1-2. The court finds that such procedure satisfies the full and fair opportunity element. See Ferraro, 404 F. Supp. 708, *aff'd*, 752

6 The 3020- questions posed by either attorney 4) (emphasis added). regarding plaintiffs opportunity to litigate. In reference to the proceeding, claims in her opposing know if she was actually represented by counsel or she proceed [sic] pro (Pl. Opp. at 11.) This statement is insufficient to dispute evidence that plaintiff had a full opportunity to litigate in the 3020-a hearing prior to the decision on the merits. F. App'x 70 (2d Cir. 2018); Mohammed, 932 F. Supp. 2d at 428 (fair opportunity to litigate satisfied where parties were

evidence); Smith v. N.Y. City Dep't of Educ., 808 F. Supp. 2d 569, 580-81 (S.D.N.Y. 2011) (full and fair opportunity to litigate found where plaintiff was represented by counsel over multiple-day hearing involving examination and cross-examination of witnesses and introduction of evidence).

Accordingly, this court finds that plaintiff had a full and fair opportunity to litigate the issues of whether the disciplinary charges against her and resulting termination of her employment were discriminatory or retaliatory and whether she was otherwise qualified for her position as school psychologist.

In sum, the issues regarding allegation of retaliation and discrimination satisfy all four prongs of the collateral estoppel analysis, and are therefore precluded.

### C. Hostile Work Environment

this stage of the analysis as it is not otherwise precluded by res judicata or collateral estoppel. However, because plaintiff offers no evidence in support of her hostile work environment claim in her 56.1 statement or legal argument opposition brief, summary judgment is granted and her claim must be dismissed. the NYSHRL are governed Tolbert v. Smith, *prima facie* case of hostile work environment, the plaintiff must show that

pervasive to alter the conditions of the victim's employment and create

Id. (citing Perry v. Ethan Allen, Inc., 115 F.3d 143,



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must show that the hostile conduct occurred because of a Id. (citing Alfano v. Costello, 294 F.3d 365, 374 (2d Cir. 2002)).

To determine whether a work environment is

circumstances, in the discriminatory conduct; (2) its severity; (3) whether the conduct was physically threatening or humiliating, or a mere offensive utterance; (4) whether the conduct unreasonably interfered with plaintiff's work; and (5) what psychological Lumhoo v. Home Depot USA, Inc., 229 F. Supp. 2d 121, 152 (E.D.N.Y. 2002) (citing Richardson v. New York State Dep't of Correctional Serv., 180 F.3d 426, 437 (2d episodic; they must be sufficiently continuous and concerted in Bacchus v. New York City Dep't of Educ., 137 F. Supp. 3d 214, 240 (E.D.N.Y. 2015) (citing Das v. Consolidated School Dist. of New Britain, 369 F. Appx 186, 190 (2d Cir. 2010)).

would even arguabl[y] (Def. Mem. 19.) As plaintiff offers no counterargument or evidence to support her hostile work environment claim, she has failed to establish a prima facie case, and furthermore has abandoned her claim. When a counseled party moves for summary judgment, a partial response [by the non-movant] arguing that summary judgment should be denied as to some claims while not mentioning others may be deemed an abandonment of the unmentioned claims. Kovaco v. Rockbestos-Surprenant Cable Corp., 834 F.3d 128, 143 (2d Cir. 2016)(quoting Jackson v. Fed. Exp., 766 F.3d 189, 194 (2d Cir. 2014)). The court recognizes that an extra measure of caution is merited in affirming summary judgment in a discrimination action because direct evidence of discriminatory intent is rare and such intent often must be inferred from circumstantial evidence found in affidavits and depositions Holtz v. Rockefeller & Co., 258 F.3d 62, 69 (2d Cir. 2001). Plaintiff, however, offers nothing from which a jury could find a hostile work environment. order to survive summary judgment on a claim of hostile work environment harassment, a[n employee] must produce evidence that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir.2000), superseded by statute on other grounds, Local Civil Rights Restoration Act of 2005, N.Y.C. Local L. No. 85 (internal quotation marks omitted) (analyzing claims brought inter alia under Title VII and § 1981). Despite plaintiff demonstrating a hostile work environment in her 56.1 filing, the before the court failed to produce evidence, direct or circumstantial, that would prove Monahan v. New York City Dep't of Corrections, 214 F.3d 275, 292 (2d Cir.2000) (internal citations and quotation marks omitted). As a result, defendants motion for summary judgment is granted on plaintiffs hostile work environment claim.

CONCLUSION For the reasons stated above, defendants motion for summary judgment is granted in its entirety. The Clerk of Court is respectfully requested to enter judgment for defendants and close this case. SO ORDERED Dated: September 30, 2020 Brooklyn, New York

\_\_\_\_\_/s/\_\_\_\_\_



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KIYO A. MATSUMOTO United States District Judge Eastern District of New York

