Grosz v New York City Dept. of Educ.
2023 NY Slip Op 31636(U)
May 15, 2023
Supreme Court, New York County
Docket Number: Index No. 102035/2011
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. J. MACHELLE SWEETING **PART** **62**

Justice

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INDEX NO. 102035/2011

MOTION DATE 07/11/2022

MOTION SEQ. NO. 005

CINDY B. GROSZ,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION, NOREEN LITTLE, SHEILA JACKSON, EDNA LOCKE, and KATHLEEN D. COLE,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for DISMISS LACK OF PROSECUTION .

Plaintiff Cindy B. Grosz brings this action against defendants New York City Department of Education ("DOE"), Noreen Little ("Little"), Sheila Jackson ("Jackson"), Edna Loncke[1] ("Loncke") and Kathleen D. Cole ("Cole") (collectively, "the Individual Defendants") (together with DOE, defendants), for alleged employment discrimination, disparate treatment, and hostile work environment based on race and religion and retaliation in violation of New York State Human Rights Law (Executive Law § 290 *et seq.*) (NYSHRL) and New York City Hu man Rights Law (Administrative Code of City of NY § 8-101 *et seq.*) (NYCHRL) and for alleged retaliation in violation of Civil Service Law § 75-b, Labor Law § 740 and Administrative Code of the City of New York § 12-113 (3). Defendants now move, pursuant to CPLR 3211(a)(5) and (a)(7), 3126 and 3216, to dismiss the third amended verified complaint.

[1] "Loncke" has also been spelled as "Locke" in this action.

Background Information

The following facts are taken from the third amended verified complaint ("the complaint") unless otherwise noted and are assumed to be true for purposes of this decision.

Plaintiff identifies as a "Caucasian, observant Jew" (NY St Cts Elec Filing [NYSCEF] Doc No. 7, Elisheva Rosen [Rosen] affirmation, exhibit A, complaint ¶ 134). She was employed by DOE as a fully tenured teacher at P.S. 156 (the School) from September 2001 until July 30, 2013, when she was terminated after a disciplinary hearing held under Education Law § 3020-a (*id.*, ¶¶ 8-9 and 129). Plaintiff reported to Little, the principal, and Jackson, Loncke and Cole, the assistant principals, all of whom are "non-Jewish, African-Americans" (*id.*, ¶¶ 5-6 and 134).

A. The Whistleblowing Activity

It is alleged that beginning in March 2007, the Individual Defendants engaged in actions plaintiff believed constituted improper governmental action or conduct which constituted a violation of law and presented a substantial danger to the health, safety and educational welfare of children (*id.*, ¶ 13). Plaintiff alleges that Little and Loncke falsified documents and testimony before the DOE and to representatives of the United Federation of Teachers ("UFT") in the spring and fall of 2007, improperly promoted students and mishandled an incident involving a student with a weapon (*id.*, ¶¶ 14-16).

In the fall of 2009, plaintiff contacted DOE's Special Commissioner for Investigation ("SCI") and sought whistleblower protection (*id.*, ¶ 17). Plaintiff complained that Little had failed to report weapons found in the school and cases of suspected child abuse, among other complaints (*id.*, ¶ 18 and 24). Plaintiff made similar complaints about Jackson (*id.*, ¶¶ 21-23).

B. The Alleged Retaliatory Actions

After Little learned of the disclosures, she and the other Individual Defendants allegedly embarked on a campaign of unjustified retaliation against plaintiff during the 2009-2010 school year (*id.*, ¶¶ 26-27). Plaintiff complains they wrote "letters to file" and memoranda about plaintiff's behavior management system; insubordination in failing to follow protocols for reporting suspected child abuse or neglect to the Administration for Children's Services ("ACS"), and other issues (*id.*, ¶¶ 29-44). They refused to assist with unruly students (*id.*, ¶¶ 54-55); made unspecified false statements to parents about plaintiff (*id.*, ¶ 57); reprimanded plaintiff (*id.*, ¶ 58); and issued two "unsatisfactory" observations or performance reviews (*id.*, ¶¶ 46-49). During the 2010-2011 school year, defendants wrote letters to file about plaintiff's "unsubstantiated" reports of suspected child abuse or neglect to ACS and other issues (*id.*, ¶¶ 62-64 and 68-72, 84-86, 88, 90-91, 101); reprimanded plaintiff (*id.*, ¶¶ 60, 61, 87, 103); refused to provide equipment and tools for the classroom (*id.*, ¶¶ 66, 73, 120); refused to assist with unruly students (*id.*, ¶¶ 75-77 and 93); issued unsatisfactory observations or performance reviews (*id.*, ¶¶ 67 and 82-83, 122); refused to consider plaintiff's application for an afterschool position (*id.*, ¶ 81); and talked about plaintiff with others (*id.*, ¶ 104). By letter dated September 10, 2010, SCI informed plaintiff that her "claim does not constitute a violation of whistleblowing statutes or regulation" (*id.*, ¶ 127).

C. Allegations of Race and Religious Discrimination

Plaintiff alleges that she was subjected to discrimination based on race and religion, disparate treatment, a hostile work environment and retaliation. Plaintiff claims that Little has not hired a Jewish teacher in years, terminated a disproportionate number of Caucasian teachers and chose to discipline only Caucasian and Jewish staff for misconduct (*id.*, ¶¶ 149 and 155). In

October 2010, Little asked staff if they were Jewish, telling them she had to "equalize the staff" (*id.*, ¶ 151). Plaintiff alleges that Little made numerous public remarks about Jews (*id.*, ¶¶ 139, 145 and 148); commented on plaintiff's religious-based attire (*id.*, ¶ 141); wrote unjustified letters to file (*id.*, ¶ 144); rolled her eyes when discussing the Jewish holidays (*id.*, ¶ 146); asked teachers to make an effort to work during the Jewish holidays (*id.*, ¶ 147); scheduled a "Meet the Teacher" night during two Jewish holidays (*id.*, ¶¶ 148 and 150); failed to observe Hanukkah but observed Christmas and Kwanza (*id.*, ¶ 152); announced that Women's History Month for March 2011 should focus on the study of black women (*id.*, ¶ 153); and caused anti-Semitic misinformation about Jewish history to be taught to an African studies extracurricular study group (*id.*, ¶ 155). Plaintiff also claims that race and religion were motivating factors in the decision Little and Jackson made to terminate her from an afterschool program on the day she told them she would be visiting Israel for her son's Bar Mitzvah[2] (*id.*, ¶¶ 142-143).

D. Allegations of Disparate Treatment

Plaintiff alleges that she was treated differently from other, similarly situated teachers. For instance, other teachers were not inundated with letters to file or memoranda (*id.*, ¶ 45) and given letters to file after the 2009-2010 school year ended (*id.*, ¶¶ 50-52), or because of classroom behavior issues (*id.*, ¶ 92). Plaintiff also complains that she was the only teacher who was required to make copies of a summer reading log (*id.*, ¶ 74); not provided with certain education tools and materials (*id.*, ¶ 78); directed to provide conferring notes (*id.*, ¶ 80); not allowed to attend a class trip (*id.*, ¶102); told that she would never receive a satisfactory rating (*id.*, ¶ 141); and required to reschedule a voluntary "Meet the Teacher" night (*id.*, ¶ 150).

[2] A number of these incidents took place in 2005 (NYSCEF Doc No. 26, plaintiff aff, ¶¶ 7-11). Loncke left the School in 2007 (NYSCEF Doc No. 30, plaintiff aff, exhibit D, plaintiff tr at 26).

E. Plaintiff's Termination

By letter dated May 10, 2011, SCI's First Deputy Commissioner notified DOE's Chancellor of the results of an investigation into a complaint SCI had received from the Queens County District Attorney (NYSCEF Doc No. 9, Rosen affirmation, exhibit C at 1). The Queens County District Attorney had earlier received a complaint from a guidance counselor at the school that plaintiff had made false reports of suspected child abuse to ACS (*id.*). The letter indicated that ACS determined 11 of the reports made between February 3 and November 23, 2010 were unfounded, and that one parent had filed a complaint with SCI about plaintiff (*id.* at 4). SCI recommended terminating plaintiff's employment and referred its findings to the Queens County District Attorney "for whatever action he deems appropriate" (*id.* at 5).

Shortly thereafter, Little wrote two letters to file concluding that plaintiff had engaged in professional misconduct by filing false reports with ACS between February 3 and November 23, 2010 and advising plaintiff that she was in danger of receiving an unsatisfactory rating (complaint, ¶¶ 100-101). Plaintiff alleges that Little and her allies at the school gave SCI false information to initiate SCI's report and caused others to give false statements to ACS and the Queens County District Attorney (*id.*, ¶¶ 96-99).

In a separate memorandum dated May 11, 2011, DOE's Office of Special Investigation ("OSI") concluded that plaintiff had tampered with an ongoing investigation by, among other actions, failing to report an incident of corporal punishment involving Jackson (*id.*, ¶ 94).

On June 3, 2011, plaintiff was served with a Notice of Charges pursuant to Education Law § 3020-a; the New York State Commissioner of Education was also served (*id.*, ¶¶ 105-106). At Little's request, plaintiff was suspended with pay on June 8, 2011 pending a hearing and determination on the charges (*id.*, ¶¶ 110-111), and plaintiff was listed as "pending" in an

organization sheet for the 2011-2012 school year (*id.*, ¶ 121). In March 2012, plaintiff was reassigned to the Children's First Network where, plaintiff claims, Charles Geier, Director of Human Resources, annoyed and harassed her for no justifiable reason (*id.*, ¶¶ 124-126).

Hearing Officer Earl R. Pfeffer, Esq. ("Hearing Officer Pfeffer") held a hearing over 37 days, took testimony from numerous witnesses, including plaintiff, and received numerous exhibits (NYSCEF Doc No. 8, Rosen affirmation, exhibit B at 2). The 24 specifications, some with subparts, related to incidents that occurred during the 2009-2010 and 2010-2011 school years, and alleged that plaintiff was insubordinate, neglected her duty, and engaged in conduct unbecoming her profession (*id.* at 3). Eight specifications – 1, 2, 8, 9, 10, 11, 20 and 22 – charged plaintiff with making false complaints (*id.* at 3-7). Plaintiff, who was represented by counsel, claimed in defense that "[s]he was promised protection if she made complaints against her supervisors, and when she acted on that guarantee, she was served with disciplinary charges" (*id.* at 17). Plaintiff claimed that a former Deputy Chancellor never sent notice that her whistleblower protection had been withdrawn and claimed that she retained whistleblower protection for specifications 1, 2, 8, 9, 10, 11, 20 and 22 (*id.* at 17-18).

In an 85-page opinion dated July 30, 2013, (NYSCEF Doc. No. 8), Hearing Officer Pfeffer determined that plaintiff was culpable on specification 2 (false complaints about an assistant principal and a school aide); specifications 4(2) (failing to give Little student statements) and 4(3) (failing to give OSI student statements); specification 5 (failing to comply with Jackson's directives); specification 8 (false complaints about a teacher); specification 9 (false complaint that School administration failed to report two fires; specification 10 (false complaints that a school aide hit or beat students); specifications 11 (A) (false complaint that Jackson violated DOE Regulations on safety) and 11 (B) (false complaint that Jackson violated

DOE Regulations on discipline); specification 16 (failing to follow Little's directives to comply with reporting procedures to the New York State Central Register); specification 17 (failing to follow Little's directives to comply with the reporting procedures in Chancellor's Regulation A-750 on Child Abuse Prevention); specification 18 (failing to notify Little or the Suicide Prevention Designee that a student had suicidal ideation); specification 19 (failing to notify Little or the Suicide Prevention Designee that a student attempted to commit suicide); specifications 20 (A) (false complaint that Little and Jackson had tampered with evidence) and 20 (B) (false complaint that Little and Jackson had tampered or hid evidence from ACS); and specification 22 (false complaint that Little attacked a student). Specifications 23 (D) and (E) were withdrawn, and specifications 21 (A) to (C), 23 (A) to (C), and 24 (A) and (B) were previously dismissed (*id.* at 8 and 84). The remaining specifications were dismissed. For the violations listed in paragraph 1, Hearing Officer Pfeffer recommended "termination."

Hearing Officer Pfeffer concluded that there was just cause for disciplinary action under Education Law § 3020-a; conduct unbecoming plaintiff's position and/or conduct prejudicial to the good order, efficiency and/or discipline of the service; substantial cause rendering plaintiff unfit to perform properly her obligations; neglect of duty; insubordination; a violation of Chancellor's Regulations; and just cause for termination (*id.* at 8). As for the penalty, Hearing Officer Pfeffer wrote:

> I find the weight of the record evidence demonstrates that Respondent lacks the honesty, integrity and good judgment necessary to serve as teacher in the New York City Schools. She attempted, through filing false, misleading and baseless complaints about Little and Jackson, whom she did not like, to settle a score with a school administration with which she was constantly in conflict, especially with regard to the role of ACS in addressing the behavioral issues of difficult children. She misused a personal connection to then-Deputy Chancellor Nadelstern, and took advantage of a grant of whistleblower status, to attack the professional competence and character of Little and Jackson. She intentionally sought to create alarm about school administration's ability to run a safe school with exaggerated

> and sometimes outright false claims about weapons, physical attacks on children, and unreported fires.[3]
>
> I obviously cannot get inside Respondent's head, and I must avoid speculation on what motivated her to abandon decency and honesty in her year long battle with Little and Jackson. What is clear, however, is that Respondent has great difficulty functioning in a pedagogical community, which must be governed by collegiality rather than by the mistrust and suspicion which grew to dominate Respondent's relationships with her administrators and some of her co-workers.
>
> Respondent, moreover, offers me no reliable basis to mitigate the gravity of the discipline. She betrays no self-awareness of her role in creating the atmosphere of mistrust which engulfed her relationships with supervisors and other staff. She admits to no wrongdoing, even when her errors of judgment and miscalculations should be self-evident. Respondent has anointed herself the protector of abused children, although she claims not to have read or digested the Regulations which govern child abuse prevention. She ignored and defied the repeated requests by her superiors that she not rely on ACS as a substitute for developing effective classroom management techniques. The efforts by her administrators to help her become a more effective teacher and use school resources to meet the challenges presented by her difficult children, were met with suspicion. Respondent closed herself off from constructive counseling by painting those who would not accept her world view as enemies to be removed from the school at any cost, even it if meant twisting and grossly distorting the truth.
>
> I have searched this record for some basis to give Respondent another chance, but she, through her own actions, has closed off that opportunity. Indeed, even as she obtained whistleblower assurances from the Chancellor's office, she mistakenly thought that protection would be armor against the consequences for baseless and unscrupulous attacks upon the professional integrity of Little and Jackson.
>
> In sum, and based upon the entire record of this proceeding, I find there is just cause for Respondent's termination.

(*id.* at 81-83).

Plaintiff commenced a CPLR article 75 proceeding to vacate the arbitration award on the grounds that the award was arbitrary, capricious, not based on fact and excessive in penalty (NYSCEF Doc No. 10, Rosen affirmation, exhibit D). The court (Kerrigan, J.) denied the petition, granted DOE's cross-motion to dismiss the petition, and dismissed the proceeding in a decision dated December 17, 2013 (*id.*). Plaintiff did not file an appeal.

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[3] Hearing Officer Pfeffer noted that SCI had twice explained to plaintiff that she was not entitled to whistleblower protection (*id.* at 18 n 4).

Procedural History

In May 2005, plaintiff filed a Charge of Discrimination based on religion with the Equal Employment Opportunity Commission ("EEOC"), and in November and December 2010, plaintiff amended and supplemented the charge based upon religion to include race discrimination and retaliation[4] (complaint ¶ 176; NYSCEF Doc No. 16, Rosen affirmation, exhibit J, answer ¶ 178). Plaintiff also filed complaints with DOE's Office of Equal Opportunity against the Individual Defendants on unspecified dates (complaint ¶¶ 158 and 177).

Plaintiff filed notices of claim on October 6 and December 9, 2010 (*id.*, ¶ 131) and commenced this action on February 17, 2011 (*id.*, ¶ 178). The complaint dated August 29, 2014 pleads four causes of action for: (1) violations of Civil Service Law § 75-b, Labor Law § 740 and Administrative Code of the City of New York § 12-113 based on plaintiff's whistleblowing activities; (2) discrimination, disparate treatment and hostile work environment on the basis of religion in violation of the NYSHRL and NYCHRL; (3) discrimination, disparate treatment and hostile work environment on the basis of race in violation of the NYSHRL and NYCHRL; and (4) retaliation in violation of the NYSHRL and NYCHRL. Defendant interposed an answer asserting eight affirmative defenses, including the statute of limitations (second defense).

A discovery conference, (the fortieth in this action), was held on January 16, 2020. In a so-ordered stipulation (the "January 2020 Stipulation"), the parties agreed plaintiff would be deposed before March 6, 2020, and defendants would be deposed before April 17, 2020 (NYSCEF Doc No. 11, Rosen affirmation, exhibit E). Plaintiff also acknowledged receipt of defendants' email production (*id.*). The court (Ramseur, J.) ordered that the discovery deadlines would not be extended absent good cause shown at the next conference scheduled for February 13, 2020 (*id.*).

[4] Plaintiff has not disclosed whether her EEOC complaints have been resolved.

By separate order dated February 10, 2020 (the "February 2020 Order"), the court (Love, J.) directed the parties to comply with the January 2020 Stipulation or face penalties or sanctions, absent good cause shown at the next conference (NYSCEF Doc No. 12, Rosen affirmation, exhibit F).

On July 19, 2021, defendants served plaintiff with a 90-day notice to resume prosecution (NYSCEF Doc No. 13, Rosen affirmation, exhibit G).

Defendants now move for dismissal on the grounds that: (1) plaintiff failed to resume prosecution under CPLR 3216; (2) plaintiff failed to comply with prior discovery orders under CPLR 3126; (3) Hearing Officer Pfeffer's factual findings are entitled to preclusive effect; (4) the retaliation claim is barred by res judicata and collateral estoppel; (5) the Civil Service Law § 75-b claim must be dismissed; (6) the complaint fails to state a claim under Labor Law § 740; and (7) the NYSHRL and NYCHRL claims brought against the Individual Defendants must be dismissed for lack of their personal involvement. Plaintiff opposes and proffers an affidavit of merit, her deposition transcript, and other exhibits.[5]

[5] Contrary to defendants' contention, plaintiff's affidavit of merit is signed (NYSCEF Doc No. 26 at 19).

Discussion

On a motion brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff [ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal is warranted where "the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc*., 29 NY3d 137, 142 [2017]).

The party moving to dismiss an action as time-barred, under CPLR 3211(a)(5), bears the burden of demonstrating that the time in which to sue has expired (*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011]). In response, the plaintiff bears the burden of raising a question of fact that the limitations period has been tolled; that an exception to the limitations period applies or that plaintiff timely commenced the action within the applicable period (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020]).

A. Dismissal under CPLR 3216

Defendant argues that dismissal is appropriate under CPLR 3216, as plaintiff failed to comply with the 90-day notice or move for an extension of time to comply.

Plaintiff counters that defendants should not be allowed to blame her for failing to move this action forward as they repeatedly failed to provide discovery. Plaintiff was deposed on March 3, 2020, and Jackson was deposed on March 12, 2020 (NYSCEF Doc No. 25, Jonathan Clarke [Clarke] affirmation, ¶ 37). On April 3, 2020defendants' counsel advised that the three remaining Individual Defendants would not appear for remote depositions due to the COVID-19 pandemic

(*id.*, ¶ 40; NYSCEF Doc No. 28, plaintiff's mem of law, exhibit B). Attempts to schedule the depositions were unsuccessful (NYSCEF Doc No. 25, Clarke affirmation, ¶ 41).

Defendants contend in reply that plaintiff has misrepresented the email correspondence between counsel and has not prosecuted this action after service of the 90-day notice.

CPLR 3216(a) allows the court to dismiss an action where a party unreasonably neglects to proceed or delays prosecution of an action or unreasonably fails to serve and file a note of issue. An action cannot be dismissed for want of prosecution unless the following conditions described in CPLR 3216(b) have been met: (1) joinder of issue; (2) either one year has elapsed since issue was joined or six months has passed from the date of the preliminary conference order; and (3) the court or a party has served a written demand by registered or certified mail upon the plaintiff to resume prosecution or file a note of issue within 90 days after receipt of the demand. A party served with a demand to resume prosecution under CPLR 3216(b)(3) must comply by filing a note of issue within 90 days or moving to either vacate the notice or extend the statutory period before it expires (*Austin v Gould*, 159 AD3d 422, 422 [1st Dept 2018]; *see also* CPLR 3216 [c] and [d]).

Defendants have established that more than one year has elapsed since issue was joined and that it served plaintiff with a CPLR 3216(b)(3) demand by certified mail, return receipt requested, on July 19, 2021[6] (NYSCEF Doc No. 13, Rosen affirmation, exhibit G at 4). The signed return receipt establishes that plaintiff received the demand on July 21, 2021 (*id.*). Thus, plaintiff had 90 days from that date to serve and file a note of issue (*see Public Serv. Mut. Ins. Co. v Zucker*, 225 AD2d 308, 310 [1st Dept 1996] [Rubin, J., concurring] [90-day period begins to run from the date a demand is received]). Plaintiff does not dispute that she did not file a note of issue, move

[6] The affidavit of service does not state whether the mailing was made by registered or certified mail. However, the return receipt includes the specific "article number," even though a copy of the certified mail receipt was not submitted on the motion.

to vacate the demand, or move for an extension of time to comply within the 90-day period. CPLR 3216, however, "is extremely forgiving of litigation delay" (*Di Simone v Good Samaritan Hosp.*, 100 NY2d 632, 633 [2003] [internal quotation marks and citation omitted]). To avoid dismissal for want of prosecution, a plaintiff must demonstrate both a justifiable excuse for failing to file the note of issue and a meritorious cause of action (*Umeze v Fidelis Care N.Y.*, 17 NY3d 751, 751 [2011]; CPLR 3216 [e]). "The nature and degree of the penalty to be imposed on a motion to dismiss for want of prosecution is a matter of discretion with the court" (*Espinoza v 373-381 Park Ave. S., LLC*, 68 AD3d 532, 533 [1st Dept 2009]).

Applying these precepts, plaintiff has proffered a justifiable excuse for the delay (*Amato v Commack Union Free School Dist.*, 32 AD3d 807, 807 [2d Dept 2006] [counsel's illness a justifiable excuse]; *Penn v American Airlines*, 192 AD2d 385, 386 [1st Dept 1993] [same]). Plaintiff's counsel affirms that in July 2021, he was stricken with COVID-19, hospitalized and diagnosed with atrial fibrillation for which surgery was recommended (NYSCEF Doc No 25, ¶¶ 6 and 42). Plaintiff has also set forth an arguably meritorious cause of action. The allegations in the complaint and the averments in plaintiff's affidavit detail, at a minimum, viable causes of action under the NYSHRL and NYCHRL (*see Espinoza*, 68 AD3d at 533). Accordingly, the court is constrained to deny defendants' motion insofar as it seeks dismissal under CPLR 3216.

B. Dismissal under CPLR 3126

Defendants contend that the complaint should be dismissed for plaintiff's failure to complete court-ordered discovery. They argue that plaintiff did not complete defendants' depositions by April 17, 2020, and waited until June 17, 2021 to discuss scheduling them (NYSCEF Doc No. 37, Rosen reply affirmation, exhibit 1). When defendants asked plaintiff to

re-send the list of witnesses and to serve deposition notices (NYSCEF Doc No. 38, Rosen reply affirmation, exhibit 2), plaintiff failed to do so, prompting them to serve the 90-day notice.

Plaintiff maintains that depositions could not have been held before the court-ordered deadline due to the COVID-19 pandemic and the state-wide lockdown. Plaintiff also contends that defendants have been delinquent in complying with court-ordered discovery.

CPLR 3126(3) allows the court to dismiss an action if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article." A party moving for the sanction of dismissal under CPLR 3126 must make "a clear showing that the failure to comply is willful, contumacious or in bad faith" (*Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [1st Dept 2010] [internal quotation marks and citation omitted]).

As an initial matter, defendants have not tendered an affirmation of good faith as required by 22 NYCRR § 202.7 (*Manipal Educ. Ams., LLC v Taufiq*, 203 AD3d 662, 665 [1st Dept 2022]), and counsel's affirmation does not contain sufficient detail of the efforts to resolve the discovery issue (*compare Loeb v Assara N.Y. I L.P.*, 118 AD3d 457, 457-458 [1st Dept 2014]). Nor have defendants established that plaintiff's conduct was willful, contumacious or in bad faith (*see Brigham v Jaffe*, 189 AD3d 475, 476 [1st Dept 2020]). It appears that the parties were unable to schedule the remaining depositions due to the COVID-19 pandemic, and in attempting to resume depositions, a dispute arose whether those depositions would take place virtually (NYSCEF Doc No. 14, Rosen affirmation, exhibit H; NYSCEF Doc No. 15, Rosen affirmation, exhibit I). This failure to proceed does not constitute willful or contumacious behavior or bad faith. The motion insofar as it seeks dismissal under CPLR 3126 is denied.

C. Preclusive Effect of the Education Law § 3020-a Hearing

Defendants argue that the retaliation claim is barred by res judicata or collateral estoppel because Hearing Officer Pfeffer specifically addressed the allegations of retaliation at the Education Law § 3020-a hearing. Defendants also assert that plaintiff cannot establish a *prima facie* case of discrimination or retaliation relating to her termination because she had a full and fair opportunity to litigate the retaliation claims, and her article 75 proceeding challenging her termination was upheld.

Plaintiff contends that defendants failed to show that the issues raised in this action were previously litigated at the Education Law § 3020-a hearing and failed to identify which specific claims they seek to preclude. In any event, plaintiff contends that the hearing did not address her discrimination, retaliation, or hostile work environment claims.

Defendants maintain in reply that plaintiff's retaliation claims and claims relating to her termination should be dismissed.

At the outset, CPLR 3018(b) states that res judicata must be pled as an affirmative defense. The defense is waived unless it is raised in a pre-answer motion or in a responsive pleading (CPLR 3211[e]; *Santana v Fernandez*, 184 AD3d 724, 725 [2d Dept 2020]; *Country-Wide Ins. Co. v Gotham Med., P.C.*, 154 AD3d 608, 610 [1st Dept 2017]). Although defendants did not raise res judicata as a defense in their answer, the court will consider their arguments as there is no alleged prejudice or surprise to plaintiff. Defendants' answer contains several references to the Education Law § 3020-a hearing, at which plaintiff had the full and fair opportunity to call and cross-examine witnesses and present documentary evidence (answer ¶¶ 8, 107, 114, 115 and 131). Plaintiff also addressed the merits of the unpled defense in her opposition (*see e.g. Rogoff v San Juan Racing Assn.*, 77 AD2d 831, 832 [1st Dept 1980], *affd* 54 NY2d 883 [1981]).

It is well settled that res judicata, or claim preclusion, "broadly bars the parties or their privies from relitigating issues that were *or could have* been raised in that action" (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018]). On the other hand, "[t]he doctrine of collateral estoppel … [is] a narrower species of *res judicata*" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Collateral estoppel, or issue preclusion, "'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party …, whether or not the tribunals or causes of action are the same'" (*Parker v Blauvelt Volunteer Fire Co.,* 93 NY2d 343, 349 [1999] [citation omitted]). Collateral estoppel applies to the quasi-judicial determinations made by an administrative agency when "(1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal" (*Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]). Because an Education Law § 3020-a hearing is a quasi-judicial proceeding (*see Burkybile v Board of Educ. of Hastings-On-Hudson Union Free Sch. Dist*., 411 F3d 306, 312 [2d Cir 2005], *cert denied* 546 US 1062 [2005]), the factual findings made by a hearing officer at that hearing are entitled to preclusive effect based on collateral estoppel (*id.*; *accord Johnson v Department of Educ. of City of N.Y.*, 158 AD3d 744, 745 [2d Dept 2018]). Likewise, findings made in a CPLR article 75 proceeding are entitled to preclusive effect (*see Matter of Benjamin v New York City Dept. of Educ.*, 119 AD3d 440, 441 [1st Dept 2014], *lv denied* 24 NY3d 907 [2014]). The burden rests with the party invoking the doctrine of collateral estoppel to show that the issues are identical, whereas the party opposing its application must show that it lacked a full and fair opportunity to litigate the issue (*Matter of Dunn*, 24 NY3d 699, 704 [2015]).

The fourth cause of action alleges that defendants retaliated against plaintiff for filing an EEOC complaint alleging discrimination based on religion in May 2005, and for amending or supplementing that complaint in November and December 2010 to allege race discrimination and retaliation. To state a cause of action for retaliation under the NYSHRL and NYCHRL, the plaintiff must show: (1) plaintiff was engaged in a protected activity; (2) the employer was aware of the plaintiff's participation in that activity; (3) the employer took an adverse employment action or action that disadvantaged the plaintiff; and (3) and a causal connection exists between the protected activity and the adverse action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]).

In reviewing Hearing Officer Pfeffer's decision, plaintiff raised retaliation in defense to only one charge, specification 7, relating to her classroom management skills, but Hearing Officer Pfeffer dismissed the specification without commenting on the retaliation defense (NYSCEF Doc No. 8 at 20 and 43-44). Retaliation was also discussed on specification 11, which charged plaintiff with making false complaints that Jackson had violated DOE policies on safety (11 [A]) and discipline (11 [B]), and that Jackson had retaliated against her by ridiculing her, denying her supplies and working equipment, and criticizing her teaching (11 [C]) (*id.* at 22 and 56). Hearing Officer Pfeffer dismissed specification 11 (C), writing:

> Although the hearing record does not contain evidence proving retaliation by Jackson (or any other administrator) against Respondent, I am persuaded Respondent genuinely believed she was being subjected unfairly to different treatment. Ordinarily, an employee is entitled to make a complaint of retaliation without fear of discipline if she cannot prove her allegations. Indeed, in my experience, employees who have engaged in misconduct often hold strong to their view they have done nothing wrong, and they therefore perceive the consequences of their misconduct as improperly motivated retaliation. That misplaced belief, at least under the circumstances here, should not properly become a basis for additional discipline.

(*id.* at 57-58). Contrary to defendants' assertion, the retaliatory acts in specification 11 (C) relate to plaintiff's false reports that Jackson had violated DOE policies, as opposed to plaintiff's

complaints of perceived discrimination. Indeed, plaintiff's race, religion, and EEOC complaint were not mentioned anywhere in Hearing Officer Pfeffer's decision, and plaintiff did not raise them in defense at the hearing (*see Mazur v New York City Dept. of Educ.*, 53 F Supp 3d 618, 631 [SD NY 2014], *affd* 621 Fed Appx 88 [2d Cir 2015] [age and disability discrimination raised as defenses and necessarily decided at an Education Law § 3020-a hearing]). Nor have defendants established that lodging complaints about how administrators ran the school constitutes a protected activity (*see Washington v New York City Dept. of Educ.*, 740 Fed Appx 730, 734 [2d Cir 2018] [complaint about a principal's actions related to a student not considered a protected activity for purposes of the NYSHRL and NYCHRL]). Thus, the issue of retaliation under the NYSHRL and NYCHRL was not actually litigated (*compare Garcia v Yonkers Bd. of Educ.*, 803 Fed Appx 441, 443 [2d Cir 2020] [legal merits of retaliation claim not precluded because the hearing officer's findings did not address it] and *Denicolo v Board of Educ. of City of N.Y.*, 328 F Supp 3d 204, 212 [SD NY 2018] [no specific decision by the hearing officer on retaliation], with *Johnson*, 158 AD3d at 746 [hearing officer conclusively found that plaintiff not discriminated against] and *Ferraro v New York City Dept. of Educ*., 752 Fed Appx 70, 74 [2d Cir 2018] [disability- and retaliation-based defenses raised at proceeding]). As such, defendants failed to carry their burden of establishing that retaliation in violation of the NYSHRL and NYCHRL was identical to a material issue decided in the Education Law § 3020-a hearing.

On the issue of termination, "[a] termination of employment for cause does not necessarily preclude the possibility of termination motivated by unlawful animus, since a jury could find that the plaintiff's employment was terminated for discriminatory reasons, even if there were legitimate reasons for terminating employment" (*Johnson*, 158 AD3d at 746, citing *Leon v New York City Dept. of Educ*., 612 Fed Appx 632, 635 [2d Cir 2015]). Here, neither the arbitration award nor the

article 75 decision addressed or conclusively decided the charges were driven, in part, by discriminatory or retaliatory intent (*see Ford v New York City Bd. of Educ*., 2022 WL 1063036, *14, 2022 US Dist LEXIS 65733, *16 [SD NY, Apr. 8, 2022, No. 19 Civ. 6327 (JPC) (KHP)]; *Ramsaroop v Department of Educ. of City of N.Y*., 2022 WL 376029, *6, 2022 US Dist LEXIS 23647, *16 [SD NY, Feb. 8, 2022, No. 20 Civ. 4947 (ER)]). Therefore, defendants failed to show that plaintiff cannot establish a *prima face* case of discrimination or retaliation under the NYSHRL or NYCHRL. Plaintiff, though, is precluded from arguing any contrary facts regarding her misconduct, discussed in the hearing officer's decision, which resulted in her termination (*see Matusick v Erie County Water Auth.*, 757 F3d 31, 49 [2d Cir 2014] [factual findings made by the hearing officer entitled to preclusive effect]). Defendants' reliance on *Garcia* (803 Fed Appx at 443-443) for the proposition that the preclusive effect of an Education Law § 3020-a hearing prevents a plaintiff from establishing that retaliation was the "but-for" cause of the plaintiff's termination is misplaced (*see Lively v Wafra Inv. Advisory Group, Inc*., 211 AD3d 432, 432 [1st Dept 2022]). Accordingly, that part of the motion to dismiss the retaliation claim and claims pertaining to her termination on the grounds of res judicata or collateral estoppel is granted to the extent plaintiff is precluded from arguing any contrary facts regarding her misconduct, discussed at the Education Law § 3020-a hearing, which resulted in her termination.

D. Civil Service Law § 75-b

Defendants contend that the Civil Service Law § 75-b claim should be dismissed because (1) plaintiff failed to exhaust her administrative remedies; (2) actions occurring before February 10, 2010 are time-barred; and (3) the Individual Defendants are not proper defendants.

Plaintiff asserts that defendants failed to point to a specific provision in the collective bargaining agreement that sets forth the remedies available to her. Plaintiff also argues the claim is not time-barred based on a continuous course of conduct.

Civil Service Law § 75-b(2)(a) prohibits a public employer, like DOE (*White v City of N.Y.*, 2014 WL 4357466, *1, 2014 US Dist LEXIS 123255, *4 n 3 [SD NY, Sept. 3, 2014, No. 13 Civ. 7156 (ER)]), from dismissing or taking,

> adverse personnel action against a public employee … [who] discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. 'Improper governmental action' shall mean any action by a public employer or employee … which is in violation of any federal, state or local law, rule or regulation.[7]

"Personnel action" means "an action affecting compensation, appointment, promotion, transfer, assignment, reassignment, reinstatement or evaluation of performance" (Civil Service Law § 75-b [1] [d]). Therefore, to state a claim under Civil Service Law § 75-b, a plaintiff must plead:

> (1) an adverse personnel action; (2) disclosure of information to a governmental body (a) regarding a violation of a law, rule, or regulation that endangers public health or safety, or (b) which [the plaintiff] reasonably believes to be true and which [he or] she reasonably believes constitutes an improper governmental action; and (3) a causal connection between the disclosure and the adverse personnel action.

(*Lilley v Green Cent. Sch. Dist.*, 168 AD3d 1180, 1182 [3d Dept 2019] [internal quotation marks and citation omitted]). The plaintiff must show "that 'but for' the protected activity, the adverse personnel action by the public employer would not have occurred" (*id.* [internal quotation marks and citation omitted]).

[7] The excerpt from Civil Service Law § 75-b cited above is the version in effect when plaintiff commenced this action in 2011. The statute has since been amended (*see* L 2015, ch 585 § 2).

(1) Whether Plaintiff Exhausted Her Administrative Remedies

A plaintiff who is "'subject to a collectively negotiated agreement which contains provisions preventing an employer from taking adverse personnel actions and which contains a final and binding arbitration provision,' … [is] required to bring [his or] her claim in arbitration instead of in court" (*DiGregorio v MTA Metro-N. R.R.*, 140 AD3d 530, 530-531 [1st Dept 2016], quoting Civil Service Law § 75-b [3] [b] and [c]; *accord Specht v City of New York*, 15 F4th 594, 605 [2d Cir 2021]).

Defendants proffer the collective bargaining agreement between DOE and UFT, Local 2, American Federation of Teachers, AFL-CIO, dated May 1, 2014 (NYSCEF Doc No. 18, Rosen affirmation, exhibit K at 2), but the actions plaintiff complains of took place before that date. Defendants have not established whether the collective bargaining agreement submitted on the motion applies retroactively to cover incidents that occurred before May 1, 2014, or whether the collective bargaining agreement in effect at the time the incidents took place is identical to the May 2014 version. The motion insofar as it seeks dismissal of the Civil Service Law § 75-b claim based upon plaintiff's failure to exhaust her administrative remedies is denied.

(2) Whether All or Part of the Civil Service Law § 75-b Claim is Time-Barred

A whistleblower claim under Civil Service Law § 75-b is subject to a one-year statute of limitations (*Donas v City of New York*, 62 AD3d 504, 505 [1st Dept 2009], citing Civil Service Law § 75-b [3] [c]).

Defendants have established that any Civil Service Law § 75-b claim for retaliatory acts occurring before February 17, 2010 is time-barred (*see Watro v Nassau Boces Bd. of Coop. Educ. Servs.*, 194 AD3d 773, 774 [2d Dept 2021]; *Donas*, 62 AD3d at 505). Plaintiff reported the

improper conduct sometime during fall 2009 (complaint ¶¶ 13). The first retaliatory act took place on October 23, 2009, when plaintiff received a letter about her behavior management system (*id.*, ¶ 30). Plaintiff, though, waited until February 17, 2011 to bring this action.

Plaintiff's argument that the October 6, 2010 filing date for the notice of claim salvages the timeliness of part of her claim is without merit. This filing date does not bear on the date from which a cause of action accrues, since the filing of a notice of claim is a statutory prerequisite to suit (*see* Education Law § 3813; *Miller v City of New York*, 89 AD3d 612, 612 [1st Dept 2011]).

Plaintiff's argument that "the statute of limitations is expanded to cover actions that in themselves could not serve as separate causes of action" (NYSCEF Doc No. 24, plaintiff's mem of law at 21) is unpersuasive. Plaintiff alludes to the continuing violation doctrine by citing *Pesce v Mendes & Mount, LLP* (2020 WL 7028641, 2020 US Dist LEXIS 222879 [SD NY, Nov. 30, 2020, No. 19-CV-4922 (JPO)]). "[T]he 'continuing violation' doctrine … is usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act" (*Selkirk v State of New York*, 249 AD2d 818, 819 [3d Dept 1998]). However, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges" (*National R.R. Passenger Corp. v Morgan*, 536 US 101, 113 [2002]). The continuing violation doctrine applies to Civil Service Law § 75-b claims (*see Donas*, 62 AD3d at 505).

The complaint cites eight allegedly retaliatory acts that took place before February 10, 2010. Specifically, Little or Jackson wrote eight letters to file, some of which threatened disciplinary action, for, among other issues, plaintiff's failure to follow a supervisor's instructions and her behavior management and classroom skills[8] (complaint, ¶¶ 30-37). Assuming, *arguendo*,

[8] Many of the allegations in the complaint, and in plaintiff's affidavit of merit and deposition, lack dates specifying when many of the actions complained of took place.

that these acts constitute adverse personnel action (*compare Verdi v City of New York*, 306 F Supp 3d 532, 551 [SD NY 2018] [counseling memoranda considered a performance review), each of these eight acts constitutes a single, discrete act (*see Siddiqi v New York City Health & Hosp. Corp.*, 572 F Supp 2d 353, 366 [SD NY 2008] ["(e)ach negative performance evaluation is a discrete act"]), which is insufficient to trigger the continuing violation doctrine. Thus, plaintiff has not raised a question of fact that the limitations period has been tolled (*see Watro*, 194 AD3d at 774). The motion, insofar as it seeks to dismiss so much of the Civil Service Law § 75-b claim predicated upon acts that occurred before February 17, 2010, is granted.

(3) Whether a Civil Service Law § 75-b Claim is Proper Against the Individual Defendants

It is well settled that Civil Service Law § 75-b "does not apply separately to individual public employees where the pertinent governmental entity is also sued" (*Frank v State of New York, Off. of Mental Retardation & Dev. Disabilities*, 86 AD3d 183, 188 [3d Dept 2011]).

Defendants have established that the complaint fails to state a cause of action under Civil Service Law § 75-b against the Individual Defendants. The Individual Defendants are DOE employees, and plaintiff has sued DOE, as well. By failing to address this part of the motion, plaintiff has abandoned this claim against the Individual Defendants (*see R.K. v City of New York*, 200 AD3d 584, 585 [1st Dept 2021]; *Eyshinskiy v New York City Dept. of Educ.*, 2016 WL 7017414, *2, 2016 US Dist LEXIS 165991, *6 [SD NY, Dec. 1, 2016, No. 15 Civ. 10027 (DLC)], *affd sub nom. Eyshinskiy v Kendall*, 692 Fed Appx 677 [2d Cir 2017]). The motion seeking to dismiss so much of the first cause of action alleging a violation of Civil Service Law § 75-b against the Individual Defendants is granted.

E. Labor Law § 740

Labor Law § 740 (2)(a) and (b)[9] prohibit an employer from taking retaliatory personnel action against an employee who "discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety" or "provides information to … any public body conducting an investigation, hearing or inquiry into any such violation of a law, rule or regulation by such employer." An employee subjected to retaliatory personnel action may pursue a civil action for compensation or other specified remedies (Labor Law §§ 740 [4][a] and [5]).

Defendants have established that the complaint fails to state a cause of action under Labor Law § 740. Plaintiff admitted that DOE is a public employer (complaint ¶ 4), and Labor Law § 740 does not apply to public employers (*see Frank v State of N.Y., Off. of Mental Retardation & Dev. Disabilities*, 86 AD3d 183, 185 [3d Dept 2011] ["Labor Law § 740 applies to retaliatory personnel actions by private employers"]; *Hanley v New York State Exec. Dept., Div. for Youth*, 182 AD2d 317, 321 [3d Dept 1992] [Civil Service Law § 75-b, not Labor Law § 740, governed the probationary employee's claim]; *see also Pincus v New York City Dept of Educ.*, 2017 WL 10187671, *8, 2017 US Dist LEXIS 228834, *21 [ED NY, Nov. 30, 2017, No. 16-cv-5253 (AMD) (JO)] [collecting cases]). Plaintiff has abandoned this claim by failing to address it (*see R.K.*, 200 AD3d at 585). The motion seeking to dismiss so much of the first cause of action alleging a violation of Labor Law § 740 is granted.

[9] The version of the Labor Law § 740 cited above is the version in effect when plaintiff commenced the action in 2011. The statute has been amended twice since then (*see* L 2021, ch 522 § 1 and L 2006, ch 442 §§ 12 and 13).

F. The NYSHRL and NYCHRL Claims against the Individual Defendants

Defendants argue that the race and religious discrimination claims against Jackson and Cole and the race and religious discrimination and retaliation claims against Loncke should be dismissed for failing to allege their personal involvement. Defendants also contend that the NYSHRL and NYCHRL claims should be dismissed against the Individual Defendants because none of them had the authority to carry out personnel decisions without prior approval.

Plaintiff argues that there has been no discovery with respect to determining her employer's identity, and that the Individual Defendants may be liable if they actually participated in the discriminatory or retaliatory conduct.

First, "[t]he State HRL prohibits discriminatory conduct by 'employer[s]] only, not individual employees" (*Kwong v City of New York*, 204 AD3d 442, 445 [1st Dept 2022], *lv dismissed* 38 NY3d 1174 [2022[, quoting Executive Law § 296 [1]). That said, an employee who has an ownership interest or has the "power to do more than carry out personnel decisions made by others" may be individually liable under the NYSHRL (*Patrowich v Chemical Bank*, 63 NY2d 541, 542 [1984]). Here, plaintiff does not allege in her complaint, affidavit or deposition testimony that the Individual Defendants had an ownership interest in DOE or had the power to hire and fire her (*Peplar v Coyne*, 33 AD3d 434, 435 [1st Dept 2006]). Accordingly, so much of the second, third and fourth causes of action predicated on the NYSHRL are dismissed against the Individual Defendants.

While none of the Individual Defendants are employers for purposes of the NYCHRL, they may be held individually liable for their own discriminatory conduct (*see Doe v Bloomberg L.P.*, 36 NY3d 450, 459 [2021], citing Administrative Code § 8-107 [1] [a]). Fellow employees may be liable "only where they act with or on behalf of the employer in hiring, firing, paying, or

in administering the 'terms, conditions or privileges of employment' – in other words, in some agency or supervisory capacity" (*Priore v New York Yankees*, 307 AD2d 67, 74 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]). Here, the complaint alleges that plaintiff worked under the supervision of the Individual Defendants (complaint ¶ 137), and the complaint, as supplemented by plaintiff's affidavit and testimony, alleges that Little, Jackson and Cole, and Loncke, to a certain extent, directly supervised plaintiff. Giving the complaint every favorable inference, as this court must, the court is constrained to deny dismissal of the NYCHRL claims against the Individual Defendants.

Conclusion

In accordance with all of the above reasons, it is hereby

ORDERED that the branch of the motion of defendants New York City Department of Education, Noreen Little, Sheila Jackson, Edna Loncke and Kathleen D. Cole seeking to dismiss that part of the first cause of action alleging a violation of Civil Service Law § 75-b accruing before February 17, 2010 is **GRANTED**, and that part of the first cause of action is dismissed against all defendants; and it is further

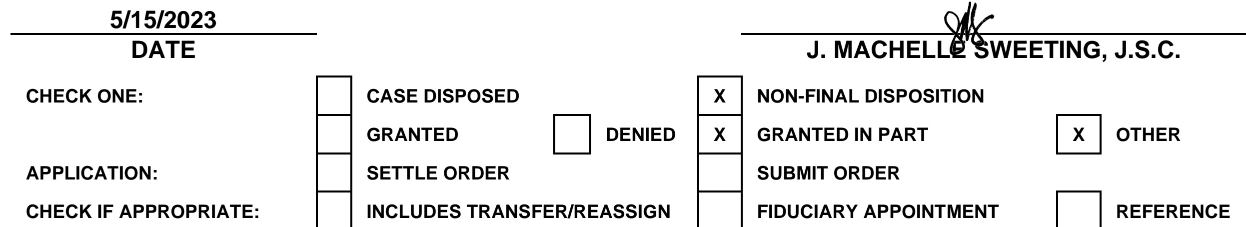
ORDERED that the branch of defendants' motion to dismiss that part of the first cause of action alleging a violation of Civil Service Law § 75-b against defendants Noreen Little, Sheila Jackson, Edna Loncke and Kathleen D. Cole is **GRANTED**, and that part of the first cause of action is dismissed against them; and it is further

ORDERED that the branch of defendants' motion to dismiss that part of the first cause of action alleging a violation of Labor Law § 740 is **GRANTED**, and that part of the first cause of action is dismissed against all defendants; and it is further

ORDERED that the branch of defendants' motion to dismiss that part of the second, third and fourth causes of action alleging a violation of New York State Human Rights Law (Executive Law § 290 *et seq.*) against defendants Noreen Little, Sheila Jackson, Edna Loncke and Kathleen D. Cole is **GRANTED**, and that part of the second, third and fourth causes of action is dismissed against them; and it is further

ORDERED that plaintiff is precluded from arguing any contrary facts regarding her misconduct, discussed at the Education Law § 3020-a hearing, which resulted in her termination; and it is further

ORDERED that the balance of defendants' motion is **DENIED**.



5/15/2023
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[X] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE