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United States District Court,
S.D. New York.

Mandy EHRLICH, [1] Plaintiff,
v.
NEW YORK CITY LEADERSHIP ACADEMY; and New York City Board of Education, Defendants.

No. 12 Civ. 2565(AKH). | Signed May 29, 2014.

Opinion

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

ALVIN K. HELLERSTEIN, District Judge.

***1** Plaintiff Mandy Ehrlich brings this action against the New York City Leadership Academy ("NYCLA") and the New York City Board of Education ("BOE") [2] pursuant to the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12131 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. § 794. Ehrlich is both a New York City school teacher and the mother of a disabled child in New York City's public education system. She alleges that she was unlawfully dismissed from the NYCLA in retaliation for advocating for her disabled daughter's right to accommodations from New York City's public schools.

The NYCLA and the BOE have filed motions for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the following reasons, their motions are denied.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where the evidentiary record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also* Fed.R.Civ.P. 56(e). A genuine issue of material fact exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must "view the evidence in the light most favorable to the party opposing summary judgment, ... draw all reasonable inferences in favor of that party, and ... eschew credibility assessments." *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 122 (2d Cir.2004). However, the non-moving party may not rely on conclusory allegations or unsubstantiated speculation to defeat the summary judgment motion. *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998).

BACKGROUND

The pertinent facts of record, either undisputed or, where disputed, taken in Ehrlich's favor, are as follows.

A. Ehrlich's Career as a School Teacher

Ehrlich became a New York City school teacher and employee of the BOE in 1996.56.1 Statement ¶ 17.

B. Ehrlich as a Parent

In addition to being a school teacher, Ehrlich is the mother of a disabled child. Her daughter, H.E., is disabled due to a congenital orthopedic impairment. *Id.* at ¶ 31. As a result of her disability, H.E. uses prosthetics. *Id.* In the 2011–12 school year, H.E. was a second grade student at the Muscota New School, a New York City public school. *Id.* at ¶¶ 29, 40. Pursuant to the ADA, the BOE has adopted an Individualized Education Plan ("IEP") for H.E., which required the BOE to provide H.E. with occupational and physical therapy services. *Id.* at ¶ 31.

C. The NYCLA

The NYCLA is a nonprofit educational organization that teaches educators. *Id.* at ¶ 1. The NYCLA was founded on the initiative of the BOE. *See* Ex. 39.

Pursuant to a contract with the BOE, the NYCLA runs a year-long Aspiring Principal Program, which prepares selected New York City public school teachers to become public school principals. 56.1 Statement at ¶¶ 2–3; Exs. 40, 43. The program is performed at a physical location leased by the BOE for NYCLA's use. Nadurak 17–18, 24–25, 31. All participants in the Aspiring Principal Program must sign a written agreement setting forth their commitment to work for the BOE for five years in the future, or to repay the cost of the program. *Id.* at 29–30; Ex. 41.

***2** Participants in the program do not teach. Instead they (1) participate in a six-week summer intensive course, between

July and August, (2) participate in a ten-month school-based residency program, during which time they are mentored by a principal, and (3) work towards transitioning successfully into school leadership positions. 56.1 Statement at ¶ 3. The mentor principals are supervised by the BOE, who can terminate the mentorships. *See* Ex. 40 at 11; 56.1 Statement at ¶¶ 4–5.

During the residency program, participants spend four days a week at the school and also attend workshop classes. 56.1 Statement at ¶¶ 4–6. At the end of the program, participants are evaluated on a pass-fail basis, pursuant to standards set by the NYCLA in the Aspiring Principal Program's Leadership Matrix. *Id.* at ¶ 7.

Teachers who participate in the Aspiring Principal Program remain BOE employees during their year in the program. *Id.* at ¶ 9. They are paid as administrators rather than teachers, receive a higher salary than they would have as teachers, and are subject to a different collective bargaining agreement. *Id.* at ¶¶ 9–11.

D. Ehrlich is Accepted into and attends the NYCLA Aspiring Principal Program

In 2011, Ehrlich applied for, and was accepted into the NYCLA's Aspiring Principal Program for 2011/2012. *Id.* at ¶¶ 23–24. As a participant in the program, Ehrlich remained an employee of the Board of Education and received increased pay. *Id.* at ¶¶ 25–27. The NYCLA coordinated Ehrlich's payroll. *See* Ehrlich 616; Ex. C.

On August 12, 2011, Ehrlich was informed that she would be assigned to PS 321 for her school-based residency program. 56.1 Statement at ¶ 28. At the same time, she learned that two other participants in the program, Sean Licata and Josette Claudio, were assigned to Muscota New School, where her daughter would be a student. *Id.* at ¶ 29.

E. Ehrlich's Advocates for her Daughter

Ehrlich was not entirely satisfied with the services that her daughter received at Muscota New School. Because of this dissatisfaction, Ehrlich applied for a Related Service Arrangement ("RSA") on H.E.'s behalf. An RSA is an arrangement under which the BOE uses vouchers to pay a specialist, from outside of the school's regular service provider network, to provide services to a disabled child. In this case, Ehrlich believed that her daughter's IEP provided that her therapist must have prosthetic training. *See, e.g.,* Ex. 13. Because Ehrlich was not confident that the therapist assigned to work with H.E. at Muscota had experience with prosthetics, she wanted the BOE to use vouchers to pay for a specialized physical therapist with such experience.

At an NYCLA event, Ehrlich met Camille Wallin, the principal of Muscota. 56.1 Statement at ¶¶ 49–50. Ehrlich informed Wallin that she intended to apply for a Related Service Arrangement ("RSA") on behalf of H.E. *Id.* at ¶ 51. Ehrlich asked Wallin to whom she should speak about applying for an RSA, and Wallin referred her to Licata, who Ehrlich knew through the NYCLA. *Id.* at ¶¶ 51–52.

***3** On August 30, 2011, Ehrlich emailed Licata and told him that she had been told to speak to him regarding H.E.'s physical therapy. *Id.* at ¶¶ 54–58. The next day, Licata phoned Ehrlich after work. *Id.* at ¶ 56. Ehrlich told him that she wanted to request an RSA. *Id.* During their conversation it became apparent that Licata did not know how to make an RSA request, and Ehrlich and Licata talked about Licata's qualifications to handle the RSA process. *Id.* at ¶¶ 58–59; Ehrlich at 247–48. Ehrlich then spoke with, and emailed, Licata several times between August 31 and September 20, 2011, sometimes at her instigation, sometimes at his, regarding Ehrlich's application for an RSA. 56.1 Statement at ¶¶ 58, 64, 69, 76–81, 89–90, 94–97.

Licata directed Ehrlich to talk to Valerie Valentine, an Administrator of Special Education, about the RSA request. *See id* . at ¶¶ 60–61; Ehrlich 269. After Licata told Ehrlich to contact Valentine directly, Ehrlich voiced her concern that as a parent it might be improper for her to speak to Valentine, but Licata told her that it would not be a problem. Ehrlich 269–73.

Ehrlich spoke to Valentine on September 12, 2011, in connection with Ehrlich's position as an administrator at PS 321. *Id.* at 277–81. At the end of that conversation, Ehrlich asked Valentine's permission to discuss the RSA as an issue separate from the work-related issues and offered to make an appointment if Valentine preferred to discuss the RSA separately. *Id.* Valentine told Ehrlich that it was a fine time to discuss Ehrlich's application for an RSA. *Id.* at 280.

On September 15, Ehrlich was informed that her RSA request had been denied. 56.1 Statement at ¶ 93.

At some time in September 2011, the BOE stopped providing H.E. with physical therapy. There is a factual dispute about who gave the physical therapist the order to stop working

with H.E. The therapist assigned to H.E. testified that Ehrlich told her not to work with H.E. or to contact her family. *Id.* at ¶ 102; Goldfarb at 33. However, the therapist also testified that Licata told her to stop working with H.E. Goldfarb at 21. It is possible that the therapist believed that Licata was communicating Ehrlich's wishes. Ehrlich denies instructing the physical therapist to stop working with her daughter. Ehrlich at 327. Ehrlich maintains that she explicitly told the therapist that she was not refusing the physical therapy services. *Id.* Ehrlich rather maintains that Licata told the therapist not to contact Ehrlich or her daughter unless he told her to do so. 56.1 Statement at ¶ 103. Since this is a disputed issue of fact, I am required to credit Ehrlich's account.[3] Therefore, for purposes of this motion I assume that Licata told the therapist to stop working with H.E., despite Ehrlich's wishes that the therapy continue.

F. Ehrlich is Dismissed from the NYCLA

Around this time, some BOE employees started complaining to the NYCLA about Ehrlich's efforts to apply for an RSA.

***4** Someone in the BOE's special education department told Cynthia Pond, one of the supervisors at the NYCLA, that Ehrlich had spoken to the special education department about Licata's qualifications to handle RSAs. Pond at 79–84. The complaint about Ehrlich may have been made by Carolyn Hahn, *id.* at 80, a special education department employee who, in a previous conversation with Ehrlich, had previously exhibited intolerance towards the disabled, made jokes about H.E.'s disability, described H.E.'s parents as "craz[y]" for seeking accommodations for her daughter, and suggested that having parents who sought accommodations would "psychologically damage[ ]" H.E.[4]

On September 20, 2011, Pond visited the Muscota school to investigate. There Pond met with Wallin and Licata. There is some dispute about whether Wallin complained about Ehrlich's behavior. Pond testified that Wallin complained that Ehrlich's behavior made her feel uncomfortable. Pond at 84, 96–97. While Wallin denied making any such complaints, and testified that she believed that Ehrlich acted properly. Wallin at 13–16, 29–30. Taking the disputed facts in the light most favorable to Ehrlich, I assume that Wallin did not make any complaints about Ehrlich's behavior.

Licata—who was a BOE employee as well as a participant in the NYCLA's Aspiring Principal Program—told Pond that he was having issues with Ehrlich. 56.1 Statement at ¶ 117–18. The issues he identified can be separated into three separate areas: (1) he felt that Ehrlich had crossed a line between the professional and the personal, by contacting him out of work and at the NYCLA office; (2) he complained that Ehrlich had sent him an email mentioning that he did not say hello to her daughter at school; and (3) he complained that Ehrlich had questioned his qualifications. *Id.* at ¶ 118.

Taking all disputed facts in Ehrlich's favor, the record suggests that Licata's complaints were unreasonable. First, it was appropriate for Ehrlich to have contacted Licata, because Wallin had instructed her to do so. And his complaint that she contacted him outside of his school hours is unfounded, since he affirmatively contacted her during his personal time.

Second, the email in question could be read as a professional and friendly email between colleagues. The email, which was sent the day after H.E., a seven or eight year old, had started at a new school, read as follows:

Thanks Sean,

> So last night I asked [H.E.] if everyone was nice to her and if all of her old teacher friends said "hello" she went through everyone's name and at the end of it all she said, "And Sean didn't say hello, he must have been busy"—ahhh the perceptions of a Staff Kid—Have a great day and we'll talk later.

Ex. S. Since nothing in the email is overtly malicious, aggressive, or unprofessional, a reasonable juror could conclude that this email was simply a friendly message between colleagues. Indeed, Pond conceded that she did not view this email as unprofessional. Pond 166.

***5** Third, there is no record evidence suggesting that Ehrlich questioned Licata's qualifications to handle a request for an RSA in an aggressive or otherwise unprofessional manner. The record, taken in the light most favorable to Ehrlich, indicates that she raised the subject of his ability to handle a request for an RSA when they first spoke and it became clear that he did not know the procedure for making an RSA request. Nothing indicates that she publicly undermined or belittled Licata or otherwise acted inappropriately.

After her visit to Muscota, Pond and other supervisors at the NYCLA conducted an investigation into Ehrlich's behavior. Ehrlich and Licata were interviewed on September 27, 2011. 56.1 Statement at ¶¶ 125, 136. Ehrlich also met with some NYCLA personnel on October 6, 2011. *Id.* at ¶

139. During the September 27 and October 6, 2011 meetings, Ehrlich was asked about her application for the RSA and her communications with Licata. *Id.* at ¶¶ 1026–28, 133–35, 140–43. Following the October 6, 2011 meeting, Ehrlich informed the NYCLA supervisors that her daughter was not receiving the physical therapy mandated by her IEP, and that Licata had told the therapist not to work with H.E. or to talk to her. *Id.* at 145; Ehrlich at 392–93.

On October 11, 2011, the NYCLA gave Ehrlich the option to resign from the Aspiring Principal Program or to be dismissed. 56.1 Statement at ¶¶ 157–58. She did not resign. Effective October 17, 2011, Ehrlich was dismissed from the Aspiring Principal Program. *Id.* at ¶ 159. The letter dismissing her stated that she failed to meet the requisite standards of "Personal Behavior" and "Situational Problem Solving," as discussed at her September 27 and October 6, 2011 meetings with NYCLA staff. Ex. SS.

In this litigation, the NYCLA has changed its explanation for why Ehrlich was dismissed. It now contends that she was dismissed because of the comments she made after the October 6, 2011 meeting, which the NYCLA contends were a false accusation against Licata.

Following her dismissal, Ehrlich reported to the BOE, where she was placed in the absent teacher reserve pool for reassignment. Ehrlich at 403–06. Her salary was decreased, and she lost job stability. *Id.*

DISCUSSION

Ehrlich argues that she was dismissed from the NYCLA in retaliation for advocating on behalf of her daughter, in violation of the ADA and the Rehabilitation Act and that the NYCLA's purported reasons for dismissing her were pretext. The NYCLA argues that Ehrlich's case should be dismissed because the NYCLA was not Ehrlich's employer within the meaning of the ADA and because she cannot show that she was dismissed as a result of retaliation. The BOE argues that Ehrlich's claims against it should be dismissed because it cannot be held liable for the NYCLA's actions.

The ADA provides that "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C.A. § 12203(a). The regulations implementing the Rehabilitation Act similarly provides that "No person shall be subject to retaliation for opposing any practice made unlawful by ... the Rehabilitation Act ..." *See* 29 C.F.R. § 1614.101(b) ("No person shall be subject to retaliation for opposing any practice made unlawful by ... the Rehabilitation Act ..."); *see also Sands v. Runyon,* 28 F.3d 1323, 1331 (2d Cir.1994) (citing that regulation). Ehrlich contends that the NYCLA retaliated against her because of her advocacy on behalf of her daughter, by applying for an RSA.

I. The NYCLA's Liability Under the ADA and Rehabilitation Act

***6** The NYCLA, relying on an analogy between Title VII and the ADA, argues that it cannot be held liable under the ADA, because it was not Ehrlich's employer was the BOE, not the NYCLA. This argument fails because the statutory schemes are different. While Title VII is an employment statute, the ADA is not limited to employer-employee relations.[5] Rather the anti-retaliation provision codified in 42 U.S.C. § 12203 prohibits retaliation by any "person" against "any individual." Similarly, the regulations implementing the Rehabilitation Act protect any "person." *See* 29 C.F.R. § 1614.101(b). Accordingly, because the ADA and the Rehabilitation Act's anti-retaliation provisions are not specifically limited to the regulation of employer-employee relationships, Ehrlich can rely on them in her suit against the NYCLA.[6]

II. Ehrlich's Retaliation Claim

The NYCLA also argues that Ehrlich cannot establish that she was retaliated against. I must evaluate Ehrlich's retaliation claims under the three-part burden shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802–04 (1973), to see whether summary judgment is appropriate. *See Miller v. McHugh,* 814 F.Supp.2d 299, 313 (S.D.N.Y.2011); *Treglia v. Town of Manlius,* 313 F.3d 713, 719 (2d Cir.2002). Under that framework, Ehrlich must first establish a *prima facie* case of discrimination by presenting *de minimis* evidence that:

> (1) [s]he engaged in an activity protected by the ADA; (2) the employer was aware of this activity; (3) the employer took adverse employment action against h[er]; and (4) a causal connection exists between

> the alleged adverse action and the protected activity.

Treglia, 313 F.3d at 719. If she meets that burden, it creates a presumption that the employer unlawfully discriminated, and "the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the challenged employment decision." *Id.* at 721. "If a defendant meets this burden, the plaintiff must point to evidence that would be sufficient to permit a rational factfinder to conclude that the employer's explanation is merely a pretext for impermissible retaliation." *Id.* (internal citations and quotations omitted).

A. *Prima Facie* Evidence of Retaliation

The NYCLA argues that Ehrlich did not engage in any activity protected by the ADA. In order to take this position, the NYCLA has twisted Ehrlich's claims out of recognition. According to the NYCLA, Ehrlich is claiming that she was dismissed from the Aspiring Principal's Program based on comments she made on October 6, 2011, when Ehrlich told the NYCLA that Licata had instructed the physical therapist not to treat H.E. Further, the NYCLA argues that Ehrlich's comments were not protected by the ADA, because Ehrlich had no basis for thinking that Licata was motivated by animus against the disabled. However, the NYCLA misinterprets Ehrlich's claims.

Ehrlich, in fact, claims that she was dismissed from the program because of her continued advocacy on behalf of her disabled daughter. It is well-established that advocacy on behalf of the rights of the disabled is protected activity under the Rehabilitation Act and the ADA. *See, e.g., Weixel v. Bd. of Educ. of City of New York*, 287 F.3d 138, 149 (2d Cir.2002) (holding that parent's application for an accommodation for her disabled school-aged daughter was protected advocacy). Ehrlich requested an RSA because she believed that the physical therapist assigned to H.E. was not properly trained to help children with prosthetics, and that the services the BOE was providing to H.E. were in violation of H.E.'s IEP and therefore in violation of federal law. *See, e.g.*, Ex. 15. Thus, by applying for an RSA, Ehrlich was claiming that the BOE had violated federal law by providing inadequate services to H.E. Such advocacy is protected. It is illegal to retaliate against parents for making these requests.

***7** The NYCLA argues that Ehrlich's application for an RSA was not protected because she should have known that an RSA was unlikely to be awarded. This argument is misplaced. Even if the BOE's denial of the RSA was not unlawful, it was certainly reasonable for Ehrlich, as the mother of a disabled child, to apply for the services that she believed were best for her daughter.

The NYCLA also argues that the manner in which Ehrlich advocated for her daughter was inappropriate, and therefore strips her of protection from retaliation. The Second Circuit has noted that " '[i]nsubordination and conduct that disrupts the workplace are legitimate reasons for firing an employee,' and an employer may discharge an employee for inappropriate forms of complaint even if the complaint itself has substance." *Harrison v. Admin. Review Bd. of U.S. Dep't of Labor*, 390 F.3d 752, 759 (2d Cir.2004) (quoting *Matima v. Celli*, 228 F.3d 68, 79 (2d Cir.2000); alterations omitted). But, since this case is at the summary judgment standard, I must "view the evidence in the light most favorable to the party opposing summary judgment." *Amnesty Am.*, 361 F.3d at 122. Seen in that light, Ehrlich's behavior was not inappropriate: she contacted Licata and Valentine only when referred to them; she acted professionally at all times; and she was careful to distinguish between her advocacy as a parent and her professional role within the BOE.

Accordingly, Ehrlich has established that "[s]he engaged in an activity protected by the ADA." *Treglia*, 313 F.3d at 719. The NYCLA does not challenge the other elements of her *prima facie* case: that the NYCLA was aware of this activity, that it took an adverse employment action against her, and that she has made a *prima facie* showing of a causal connection between her activity and the adverse action. *Id.*

B. Pretext

Since Ehrlich established a *prima facie* retaliation case, the burden shifts to the NYCLA to articulate a legitimate, non-retaliatory reason for dismissing her. The NYCLA now argues that it dismissed Ehrlich because she had, after the October 6, 2011 meeting, falsely accused Licata of terminating her daughter's disabled services. "A plaintiff may prove that retaliation was a but-for cause of an adverse employment action by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, non-retaliatory reasons for its action." *Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir.2013). Ehrlich easily shows facts from which a reasonable factfinder could infer that this is a mere pretext.

Glaringly, Ehrlich's supposed false accusation of Licata was not the reason the NYCLA gave in its termination letter, which referenced subjects discussed *during* the September

27 and October 6, 2011 meetings with NYCLA staff, not statements made after the October 6, 2011 meeting. Ex. SS.[7] When people change their stories, juries can infer that they are lying. Moreover, as Ehrlich argues, there are many reasons why a jury might reject the NYCLA's account:

***8** First, a reasonable juror might infer that the NYCLA witnesses are lying because there are no contemporaneous documents to support their claimed reasons for dismissing Ehrlich and because, when deposed about these events, the NYCLA and BOE witnesses testified that they could not recall certain events and gave conflicting testimony. For example, Pond claims that her investigation of Ehrlich was based on a complaint made by Wallin, while Wallin denied making any such complaint.

Second, a jury could conclude that Ehrlich was telling the truth when she told the NYCLA administrators that Licata had unilaterally terminated H.E.'s physical therapy. After all, Ehrlich's account is supported by the physical therapist's testimony that Licata had told the therapist to stop treating H.E. If the jury concludes that it was Licata who terminated H.E.'s physical therapy, then the NYCLA's justification for dismissing Ehrlich unravels. The NYCLA maintains that Ehrlich was dismissed because she falsely accused Licata of terminating the physical therapy. But, if Ehrlich was telling the truth, a jury could conclude that the NYCLA's supposed investigation of this event was inadequate and was manufactured in order to provide a pretext for dismissing Ehrlich.

And third, a reasonable jury could infer that the NYCLA officers who decided to dismiss Ehrlich were motivated by their view that Ehrlich's advocacy for H.E. was a problem that needed to be managed. A jury could also go further, and conclude that the NYCLA reached this conclusion because of its close working relationship with the BOE. A jury could take Hahn's comments—in which she exhibited intolerance towards the disabled, made jokes about Ehrlich's daughter's disability, described Ehrlich as "craz[y]" for seeking accommodations for her daughter, and suggested that seeking accommodations would "psychologically damage[e]" H.E.—as symptomatic of a BOE culture that was hostile towards the parents of disabled children who asked for accommodation. And a jury could conclude that the NYCLA's decision making was affected by the BOE's prejudices.

In sum, a reasonable jury could conclude that the NYCLA's proffered reasons for dismissing Ehrlich were pretextual and that the NYCLA really dismissed her for advocating for her daughter. *See Kwan*, 737 F.3d at 846.

III. The BOE's Liability for the NYCLA's Actions

The BOE argues that it cannot be held liable for the NYCLA's decision to dismiss Ehrlich since the BOE is a separate entity from the NYCLA. Ehrlich argues that the BOE can be held liable under the theory that the NYCLA was acting as the BOE's agent when it dismissed her.

In this case, there is some dispute about the extent to which the BOE is independent of the NYCLA. The NYCLA's Aspiring Principals Program is funded by the BOE and participants in the program sign a contract with the BOE, are paid by the BOE and placed at BOE schools .[8] The NYCLA states that it is an independent organization and that the contract between it and the BOE provides that the NYCLA has discretion over the selection of applicants for the Aspiring Principals Program and the termination of applicants. *See* Traverse Decl., Ex. B. However, practices are not always reflective of provisions. "When several entities have an integrated economic relationship and exercise common control over employment practices that affect an employee, each may be held liable for the other's discriminatory acts and policies as an integrated enterprise." *Dortz v. City of New York*, 904 F.Supp. 127, 145 (S.D.N.Y.1995) (quotation omitted). Ehrlich thus has the right to prove that the BOE is liable for her dismissal on a theory of common employment in this case. *See also Ansoumana*, 255 F.Supp.2d at 199 (noting that courts must consider the "economic reality").

***9** Additionally, the BOE might be held liable under an agency theory. "General common law agency principles apply to the ADA." *Bowen v. Rubin*, 385 F.Supp.2d 168, 180 (E.D.N.Y.2005). Under those principles, an employer can be held liable for actions taken by its agents. *See, e.g., DeVito v. Chicago Park Dist.*, 83 F.3d 878, 881 (7th Cir.1996) ("the ADA imposes *respondeat superior* liability on an employer for the acts of its agents"); *see also Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir.1996) (holding that the ADA's definition of the term "employer" was written to incorporate *respondeat superior* liability of an employer for the acts of its agents). In determining whether a party is acting as an agent, Courts should look to the common law of agency. *See Community for Creative Non–Violence v. Reid*, 490 U.S. 730, 109 (1989) (identifying a list of factors to consider); *Salomon v. Our Lady of Victory Hosp.*, 514 F.3d 217, 226–27 (2d Cir.2008)

(considering the *Reid* factors in the context of a Title VII employment litigation).

The BOE relies on *Howell v. The New York City Leadership Academy, Inc.*, 05 Civ. 8233(JGK) (Mar. 25, 2008 S.D.N.Y.), in which this Court considered similar facts. Like Ehrlich, the plaintiff in *Howell* had sued both the BOE and the NYCLA based on her dismissal from the Aspiring Principals Program. The plaintiff claimed that she was dismissed because the school principal who was supervising her discriminated and retaliated against her, and participated in the NYCLA's dismissal decision. The Court in *Howell* concluded that the BOE was not responsible for the NYCLA's decision to dismiss the plaintiff because it was the NYCLA that made the employment decisions and because the principal had participated in the decision to terminate plaintiff in the principal's capacity as an NYCLA employee, not as a BOE employee. *See* 05 Civ. 8233(JGK), Dkt. No. 35 at 25:5–27:16 (Transcript of March 25, 2008 Oral Argument regarding Motion for Summary Judgment, during which the Court dismissed plaintiff's claims against the BOE).

However, *Howell* is not binding on me. Ehrlich claims that the decision to dismiss her from the Aspiring Principals Program originated with complaints from individuals from the BOE's Special Education Department, who were not NYCLA employees. Although there is no direct evidence in the record that these BOE employees participated in the NYCLA's decision to dismiss Ehrlich and directed the NYCLA to dismiss her, inferences reasonably can be drawn so to suggest. As Justice White noted in *Price Waterhouse v. Hopkins*, the absence of direct evidence of discrimination should not be an absolute obstacle to a plaintiff's claims: "the entire purpose of the *McDonnell Douglas* [framework for summary judgment] is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." 490 U.S. 228, 271 (1989) (White, J., concurring). [9] Here, a reasonable jury could infer the BOE employees' participation in the decision to dismiss Ehrlich from: (1) the evidence that the Special Education Department's complaints triggered the NYCLA's investigation into Ehrlich; and (2) the evidence, discussed above, suggesting that the NYCLA's purported reasons for dismissing Ehrlich were a pretext, used to cover the NYCLA's real motive.

***10** If BOE employees directed, or even suggested, that the NYCLA terminate Ehrlich, and the NYCLA followed that instruction or suggestion, then the NYCLA would be liable as well as the NYCLA. *See* RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006) ("An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."); *accord Fierro v. City of New York*, 12 CIV. 3182 AKH, 2013 WL 4535465 (S.D .N.Y, Apr. 22, 2013) (concluding that even though the NYCLA "is a separate entity from [the B]OE," plaintiff was entitled to discovery about the BOE's role in the NYCLA's decision not to admit him, implicitly because the DOE might be held liable if it played a role in the NYCLA's decision).

Accordingly, the BOE is not entitled to summary judgment on the question of whether it is liable, under an agency theory, for the NYCLA's decision to dismiss Ehrlich.

CONCLUSION

For the foregoing reasons, the motions for summary judgment are denied. The Clerk is directed to mark the motions (Dkt. Nos. 41 and 54) terminated.

Additionally, I note that in my July 11, 2013 Order Regulating Discovery, I sustained the Defendants' objection to the taking of Carolyn Hahn's deposition as "cumulative and irrelevant." [10] In light of my review of the record now before me, it is apparent that Hahn's testimony may be relevant to ascertain what role, if any, the BOE played in Ehrlich's dismissal. Accordingly, I *sua sponte* reconsider the July 11, 2013 order. If she wishes to, Ehrlich may take Hahn's deposition as promptly as mutually convenient.

Counsel are directed to attend a status conference at 10am on June 27, 2014 at Courtroom 14D, 500 Pearl Street, New York, N.Y. 10007. Hahn's deposition should be taken well before that date.

SO ORDERED.

Footnotes

1 The Clerk of Court is directed to correct the caption to conform to this spelling.

2 Because the parties treat the BOE and the New York City Department of Education ("DOE") as interchangeable, I refer to the BOE throughout this order and assume that the BOE and the DOE are the same entity. *See* Dkt. No. 37.

3 Additionally, I note that an administrative hearing officer credited Ehrlich's account when he ruled that the Department of Education was responsible for H.E.'s missed physical therapy. *See* Ex. 21.

4 Hahn made these comments in a conversation with Ehrlich, in which Hahn knew that Ehrlich was a teacher and did not know that she was H.E.'s mother. Ehrlich described the conversation as follows:

> [I mentioned that my school] had a student whose IEP mandated that her therapist have prosthetic training (in reference to [H.E.]). Hahn immediately asked, "Do you have that crazy family from District 6 who wanted a flute?" I was taken aback, not knowing how to react. "Flute?" I answered. "Do you mean a recorder?" Hahn told me that yeah "flute, recorderwhatever." I told her that yes-we have a student who requested a recorder so that she can participate in our music program. Hahn replied that the student should just play the triangle, and told me how the parents of this student were insane and that they always have been, and that they had walked into an IEP meeting with an army of people demanding services for their child that would only end up hurting the child, and that the mother of the child was damaging her child psychologically and selectively handicapping her, because she couldn't be "fixed." I then attempted to change the subject to get Hahn off the phone, but to no avail. Hahn continued, "It's not like the kid is left handed or anything; then she might have an issue. She doesn't have a left hand so she is now right handed she learned how to write with her right hand." I told Hahn that [H.E.] is indeed left-handed and that her handwriting shows letter reversals. Hahn replied that handedness cannot be proven and if the mother told me that, then she's even crazier than Hahn thought, and said the student's parents needed to just come to terms with the fact that their kid is disabled and get over it, and that no amount of therapy was going to fix the fact that she has one hand. She also stated that the child would probably be better off with different parents.

Ehrlich Decl. ¶ 9.

5 The ADA's anti-employment discrimination provision in 42 U.S.C. § 12112 may be limited to claims brought by employees against their employers. *Compare Brennan v. Mercedes Benz USA*, 388 F.3d 133, 135–36 (5th Cir.2004) (holding that § 12112 is so limited) *with Medvey v. Oxford Health Plans, Inc.*, 3:01CV1977 (EBB), 2005 WL 2300379 (D.Conn. Sept. 20, 2005) (holding that under § 12112 "[a] defendant that does not have a direct employment relationship with a plaintiff may nonetheless be liable under ... the ADA for its discriminatory acts if it interferes with the plaintiff's employment opportunities with a third party and the defendant controls access to those opportunities.") (quoting *United States v. New York State Dep't of Motor Vehicles*, 82 F.Supp.2d 42, 46 (E.D.N.Y.2000)). But Ehrlich does not rely on that provision.

6 In any event, even if the ADA tracked Title VII, then Ehrlich could still state a claim against the NYCLA. In *Butterfield v. New York State*, 96 CIV. 5144(BDP) LMS, 1998 WL 401533, at *14 (S.D.N.Y. My 15, 1998), a Title VII case on which the NYCLA relies, this Court observed that if "any defendant who was not [plaintiff's] employer nevertheless interfered with her employment opportunities with her direct employer then an action against that defendant would come within the ambit of Title VII." Under *Butterfield*, Ehrlich would have a claim against the NYCLA because the NYCLA's decision to dismiss her from the Aspiring Principals Program affected her relationship with the BOE, her direct employer. As a result of the dismissal, Ehrlich was placed in the absent teacher reserve pool for reassignment and suffered a pay cut.

Moreover, as discussed below, there is a question of fact as to whether the NYCLA and the BOE could be held liable for each others' employment practices as joint employers. *See Ansoumana v. Gristede's Operating Corp.*, 255 F.Supp.2d 197, 199 (S.D.N.Y.2003) (noting that, in determining whether there is joint employment, the Court is "guided by the central, controlling question: What is the 'economic reality' of an employment relationship?").

7 While the NYCLA was under no obligation to articulate in its termination letter its reasons for dismissing Ehrlich, it chose to do so. A jury could find that the reasons articulated in the letter were supposed to be relied on.

8 Ehrlich also relies on the fact that, when she was dismissed from the Aspiring Principals Program, her BOE salary was reduced, and instead of giving her a career as an administrator, the BOE sent her to the absent teacher reserve pool for reassignment. Although these consequences may have resulted from her being dismissed from the program, there is a question of fact as to whether this tends to show that the BOE had some control over Ehrlich's dismissal.

9 *Price Waterhouse* was superceded on other grounds by the Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075. *See Burrage v. United States*, 134 S.Ct. 881, 889 n. 4 (2014).

10 Ehrlich reserved the right to use Hahn as a witness at trial, even if she did not take Hahn's deposition.