

Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL/IAS TERM, PART 51 NASSAU COUNTY**

PRESENT:

*Honorable James P. McCormack*  
Acting Justice of the Supreme Court

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EAST MEADOW UNION FREE SCHOOL DISTRICT,

Plaintiff(s),

Index No. 6475/07

-against-

THE NEW YORK STATE DIVISION OF HUMAN  
RIGHTS and LEAH M. JEFFERSON,

Motion Seq. No.: 001  
Motion Submitted: 6/18/07

Defendant(s).

\_\_\_\_\_x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X

This Petition by the East Meadow Union Free School District ("School District") for a judgment pursuant to Article 78 of the CPLR in the nature of prohibition permanently enjoining and restraining the respondents the New York State Division of Human Rights ("SDHR") and its Regional Director, Leah M. Jefferson, from holding a public hearing pursuant to its Determination After Investigation dated February 12, 2007, is denied and this proceeding is dismissed.

On January 8, 2007, pursuant to Executive Law § 295(6), the New York State Division of Human Rights ("SDHR") issued a Verified Complaint against the petitioner

School District in which it alleged that one of the School District's students, John Cave, is disabled in that he is hearing impaired; that Cave uses a service dog trained by the National Education for Assistance Dog Services; and, that the School District refused to allow Cave's service dog to accompany him to school. Based on these allegations, the SDHR alleged in its complaint that the School District has engaged in an unlawful discriminatory practice in violation of Human Rights Law § 296(14) "by preventing the use of guide dogs, hearing dogs or service dogs by hearing impaired or other persons with disabilities in educational facilities covered by the Human Rights Law § 296.4."

Human Rights Law § 296(14) provides:

It shall be an unlawful discriminatory practice for any person engaged in any activity covered by this section to discriminate against a blind person, a hearing impaired person who has a hearing impairment manifested by a speech discrimination score of forty percent or less in the better ear with appropriate correction as certified by a licensed audiologist or otolaryngologist as defined in section seven hundred eighty-nine of the general business law or a physician who has examined such person pursuant to the provisions of article thirty-seven-A of such law or a person with a disability on the basis of his or her use of a guide dog, hearing dog or service dog.

An investigation was undertaken by the SDHR. In the interim, on February 8, 2007, the Caves commenced an action on behalf of their son John in the United States District Court against, *inter alia*, the School District. In that action, the plaintiffs seek an injunction barring the School District from interfering with John bringing his service dog to school. Plaintiffs allege the School District's refusal to permit John to bring his service dog to school constitutes violations of the Americans With Disabilities Act

(ADA), Section 504 of the Rehabilitation Act of 1973 and several New York State statutes: New York Civil Rights Law; New York Education Law; and, the New York State Human Rights Law. The SDHR was not a party to that action.

On February 12, 2007, the Executive Department of the SDHR issued a "Final Investigation Report and Basis of Determination" ("Report"). In its Report, the SDHR stated that its investigation revealed that the School District has no written policies on service dogs. It found that the School District addresses requests regarding service animals on a case-by-case basis: The School District determines whether and how the use of a service animal would impact the student's access to educational programming and it engages in a balancing test, weighing the potential benefits to the student in attending school with a service animal against the risks inherent in having a service animal in the school. The SDHR noted that the School District believed that this balancing test was akin to the one required under the Americans with Disabilities Act ("ADA"). The SDHR also stated that the School District believed that the Human Rights Law was not without limitation and that it was never intended to create a situation allowing a service dog to pose an unacceptable danger to others. The School District relied on Perino v St. Vincent's Medical Center of Staten Island (132 Misc.2d 20 [Supreme Court Richmond County 1986]) where a guide dog was excluded from a delivery room in a hospital.

The SDHR concluded in its Report that the School District's policy which first determines whether the use of a service animal would impact on the student's access to

the school's educational programming did not comply with Section 296(14) of the Human Rights Law as that statute does not tie the right to use a service animal to any such consideration. The SDHR further noted that the "reasonable accommodation" test like the one found in the ADA which the School District employed does not comport with Section 296(14) of the New York State Human Rights Law, either: New York Human Rights Law § 296(14) simply and clearly provides that a qualifying disabled person may not be discriminated against because of the use of a guide dog. The SDHR rejected the School District's argument that Human Rights Law § 296(14) was preempted where a dog represents a threat to public health or safety: The SDHR found that there was no evidence that a trained service dog represents a threat to the health or safety of students in a school setting.

Simply stated, the SDHR stated in its Report that its investigation revealed that a disabled student had been denied use of his service dog in the School District's educational facility. The SDHR concluded that "[t]he evidence gathered supports the complainant's allegations that the [School District's] policy discriminates against persons with disabilities in the use of their service dogs." The SDHR accordingly declared that there was **PROBABLE CAUSE** to believe that the School District has engaged in or is engaging in an unlawful discriminatory practice violative of Human Rights Law § 296(14) by preventing the use of guide dogs, hearing dogs or service dogs by disabled persons in an educational facility and that the resolution of that issue at a public hearing before an Administrative Judge was warranted. A hearing was

scheduled for April 18, 2007.

A hearing was held in United States District Court regarding the Caves' application for a preliminary injunction. It spanned four and one-half days, February 14, 15, 16, 20 and 22<sup>nd</sup>. On February 28, 2007, the Caves' application for a preliminary injunction was denied by the United States District Court, Eastern District (Spatt, J.). The District Court found that the Caves had not established a likelihood of success with respect to their discrimination claims under the ADA, the Rehabilitation Act or the Executive Law. The District Court found that the Caves had not exhausted their administrative remedies under the Individuals With Disabilities Education Act ("IDEA"). See 20 U.S.C. § 1400, et seq. IDEA requires every public school to develop a personalized education curricula for students with disabilities in order to qualify for federal funding. The District Court found that John's desire and alleged need to bring his service dog to school necessitated a modification of his Individual Education Program ("IEP") under IDEA. The District Court noted that IDEA, as does the New York State Education Law, provides parents of disabled students the right to seek review of any decision concerning their children's education. 20 U.S.C. § 1451(b)(6)(A); New York Education Law § 4404; see also, Hope v Cortines, 872 F.Supp. 14, 16 (E.D.N.Y. 1995), aff'd, 69 F.3d 687 (2d Cir. 1995). Judicial review is not available unless these procedures have been exhausted. 20 U.S.C. § 1415 (i)(2)(a); Hope v Cortines, supra. The District Court further noted that claims under the ADA and Section 504 of the Rehabilitation Act are also barred if relief is available under the IDEA and that

avenue has not been exhausted. Hopes v Cortines, 872 F.Supp. at p. 21.

The District Court further found that the Caves had failed to establish a likelihood of success with respect to their ADA and Rehabilitation claims as the evidence established that the School District had made extraordinary accommodations for John. It noted:

1. John, Jr. was provided with a sign language interpreter for all his classes except for the resource room;
2. He was provided with an FM transmitter, when necessary;
3. He was provided with a student note taker;
4. He was given extra time, one-and-a-half the usual time, to take his tests—and was permitted to take certain tests in the resource room; and
5. He was provided with a one-on-one specialist teacher for the deaf and hearing impaired, with a session with her every day.

As for the Caves' claims under New York statutes, the District Court found that the claim pursuant to the New York Civil Rights Law failed for want of notice to the State Attorney General. See New York Civil Rights Law § 40-d. While the District Court also found that the School District's position that John Caves was not protected by Human Rights Law § 296(14) because he had not " 'manifested . . . a speech discrimination score of forty percent or less with appropriate correction' . . . [was] supported by the testimony and evidence adduced at the hearing," the District Court further found that "the proof was [in fact] unclear as to whether John, Jr. ha[d] 'a

**speech discrimination score of forty percent or less' with appropriate correction."**

Thus, the District Court held that the plaintiffs were not entitled to a preliminary injunction as they failed to prove, by a preponderance of the evidence, that John, Jr.'s hearing fell within the forty percent or less set forth in N.Y. Executive Law § 296(14).

In light of the District Court's decision denying the Caves a preliminary injunction, on March 30, 2007, the School District sought reconsideration by the SDHR concerning its **PROBABLE CAUSE** determination dated February 12, 2007. SDHR denied that request on April 6, 2007. The SDHR found that the record revealed that there were material issues of fact involved which are best resolved at a public hearing before an Administrative Law Judge. The Accompanying Memorandum noted that the SDHR was not a party to the federal action. In addition, the SDHR further noted:

The Federal Court did not address whether the respondent's policies and practices have a discriminatory impact on other disabled students at the school who need to use a guide dog, hearing dog or other service dog. Even if the Administrative Law Judge were to find after public hearing that John Cave, Jr. was not a covered person under Executive Law § 296.14, this would not preclude her from also finding at the same time that the respondent's policies discriminate against students other than John Cave, Jr. who may be blind, hearing impaired or have a disability. This complaint was brought as a Division Initiated Complaint, pursuant to Executive Law §§ 295.6(b) and 297.1, to determine whether respondent's blanket policy of refusing the use of all guide dogs, hearing dogs, or service dogs on school ground violates the Human Rights Law. The complaint was not brought solely with respect to the circumstances involving John Cave, Jr.

This Article 78 proceeding ensued. In its Petition, the School District alleges that

it was conclusively established and found by the District Court in Caves v East Meadow Union Free School District that John Caves is not an individual covered under Executive Law § 296(14). As such, the School District maintains that the SDHR lacks **PROBABLE CAUSE** to believe that the School District has engaged in any practices or policies violative of Human Rights Law § 296(14). The School District accordingly alleges that the SDHR's refusal to grant it reconsideration of its determination of **PROBABLE CAUSE** and to withdraw it is arbitrary and capricious, an abuse of discretion and affected by an error of law.

"It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." Watergate II Apartments v Buffalo Sewer Authority, 46 NY2d 52, 57 (1978) citing Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375. "[This] rule, however, . . . need not be followed when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power (*cf.* Matter of First Nat. City Bank v City of New York Finance Administration, 36 NY2d 87, 92-93 [1975]; see Jaffe, *Judicial Control of Administrative Action*, p. 438) or when resort to an administrative remedy would be futile (Usen v Sipprell, 41 AD2d 251 [4<sup>th</sup> Dept. 1973]; 1 NY Jur, *Administrative Law* § 171, p. 575) or when its pursuit would cause irreparable injury (Pierne v Valentine, 291 NY 333 [1943]; Utah Fuel Co. v National Bituminous Coal Comm., 306 US 56 [1939])." Watergate II Apartments v Buffalo Sewer Authority, supra.

Under Section 298 of the Human Rights Law, “an order after public hearing, a cease and desist order, an order awarding damages, an order dismissing a complaint, or . . . an order of the division which makes a final disposition of a complaint . . .” is subject to judicial review and enforcement. In Matter of Tessy Plastics Corporation v State Division of Human Rights, 47 NY2d 789, 791 (1979), the Court of Appeals affirmed the denial of a writ of prohibition enjoining proceedings before the SDHR on account of the SDHR’s failure to adhere to the statutorily prescribed timetable. The Court of Appeals held that “[t]he [SDHR] is given jurisdiction by statute to investigate complaints of discrimination. Remedy for asserted error of law in the exercise of that jurisdiction or authority lies first in administrative review and following exhaustion of that remedy in subsequent judicial review pursuant to section 298 of the Executive Law.” Matter of Tessy Plastics Corporation v State Division of Human Rights, *supra*, at p. 791.

The **PROBABLE CAUSE** determination sought to be reviewed is clearly not beyond the SDHR’s power nor is it unconstitutional. Moreover, there is no basis to conclude that continued administrative review of the charges against the School District would be futile or that the pursuit thereof would cause irreparable injury.

In fact, a **PROBABLE CAUSE** determination is not subject to review pursuant to Article 78 of the CPLR. Matter of City of Albany v New York State Division of Human Rights, 157 AD2d 1008, 1009 (3d Dept. 1990); New York State Transit Authority v New York State Div. of Human Rights, 33 AD3d 617 (2d Dept. 2006); Association of National Westminster Bank v Rosa, 201 AD2d 314 (1<sup>st</sup> Dept. 1994). Furthermore, the April 6, 2007

determination denying reconsideration of the February 12, 2007 PROBABLE CAUSE determination did not become an order “after public hearing” subject to review under Executive Law § 298 merely because it was rendered after a hearing: That hearing was on a related matter in another forum in which the SDHR was not even a party.

Moreover, the School District’s transparent attempt to superimpose the alleged findings made by the District Court in Caves v East Meadow Union Free School District fails for several other reasons:

Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter.” In re Hunter, 4 NY3d 260, 274 (2005). “This rule applies . . . to claims that could have been raised in the prior action,” too. In re Hunter, *supra*, at p. 274. The parties to the District Court action and the SDHR proceeding are different; a judgment on the merits has not been entered; and, the subject matters while related, differ: The School District’s overall policy regarding service animals was not and could not be made an issue in the District Court proceeding. *Res judicata* does not apply.

“The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party.” Buechel v Bain, 97 NY2d 295, 304 (2001), cert den. 535 U.S. 1096 (2002). Again, the SDHR was not a party to or in privity with a party in the District Court action; whether John qualifies under Human Rights Law § 296(14) has not been definitively decided; and, the issues raised in the District Court and before the SDHR

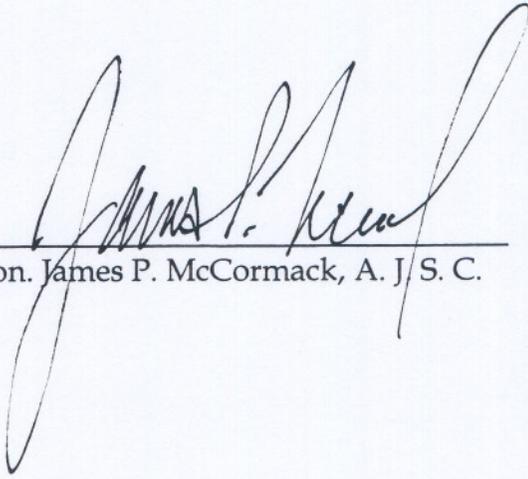
are not identical. Collateral estoppel does not apply here, either.

In sum, the SDHR was not a party to the District Court action. And, contrary to the School District's characterization of the District Court's decision, the District Court did not clearly find that John was not covered by Section 296(14) of the Human Rights Law. Rather, it found that the School District's position that John was not covered by the statute was supported by the testimony and evidence adduced and that the plaintiffs failed to prove by a preponderance of the evidence that John was covered under Human Rights Law § 296(14). Furthermore, different issues are posed in the District Court action and before the SDHR: Only John's individual claims are involved in the District Court action whereas the School District's policy relating to service animals in general is subject to review before the SDHR.

The Petition is denied. The proceeding is dismissed.

This constitutes the Decision and Order of the Court.

Dated: August 7, 2007  
Mineola, N.Y.



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Hon. James P. McCormack, A. J. S. C.