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Court of Appeals of New York.  
Vincenzo MILIONE, Appellant,

v.

CITY UNIVERSITY OF NEW YORK, et al.,  
Respondents.

Motion No: 2017–1051

Decided on December 14, 2017

**Order**

Motion for leave to appeal denied with one hundred  
dollars costs and necessary reproduction  
disbursements.

Supreme Court, Appellate Division, Second  
Department, New York.

Vincenzo MILIONE, appellant,  
v.  
CITY UNIVERSITY OF NEW YORK, et al.,  
respondents.

Aug. 23, 2017.

**Attorneys and Law Firms**

Walsh Markus McDougal & DeBellis, LLP, Garden  
City, NY (John R. Yetman and Claudio DeBellis of  
counsel), for appellant.

Schoeman Updike & Kaufman, LLP, New York, NY  
(Beth L. Kaufman of counsel), for respondents.

MARK C. DILLON, J.P., LEONARD B. AUSTIN,  
SHERI S. ROMAN, and JEFFREY A. COHEN, JJ.

**Opinion**

In an action, inter alia, to recover damages for discrimination, retaliation, and a hostile work environment in violation of Executive Law § 296 and Administrative Code of the City of New York § 8–107, the plaintiff appeals from so much of an order of the Supreme Court, Nassau County (McCormack, J.), entered December 3, 2014, as granted that branch of the defendants' motion which was for summary judgment dismissing the causes of action alleging violations of Administrative Code of the City of New York § 8–107 as barred by the doctrine of collateral estoppel, and denied, as academic, his cross motion for discovery pursuant to CPLR 3212(f).

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff is an Italian American employed by the City University of New York (hereinafter CUNY). In 2010, the plaintiff commenced an action in federal court under titles VI and VII of the Civil Rights Act of 1964, the New York State Human Rights Law (*see* Executive Law § 296) (hereinafter NYSHRL), and the New York City Human Rights Law (*see* Administrative Code of City of NY § 8–107) (hereinafter NYCHRL) against CUNY, Matthew Goldstein, as Chancellor of CUNY, Queens College, James Muyskens, as President of Queens College, the John D. Calandra Italian American Institute of the City University of New York (hereinafter Calandra), and Anthony Tamburri, as the Dean of Calandra (hereinafter collectively the defendants), alleging that the defendants discriminated and retaliated against him based on his national origin and his advocacy for Italian Americans. The \*808 defendants moved for summary judgment dismissing the complaint. The District Court for the Southern District of New York \*\*798 granted the defendants' motion, dismissed the federal claims, and declined to exercise supplemental jurisdiction over the state and local claims. The United States Court of Appeals for the Second Circuit affirmed the District Court's order.

The plaintiff then commenced this action against the defendants, *inter alia*, to recover damages for discrimination based upon his national origin and his advocacy on behalf of Italian Americans, for retaliation against him for his advocacy on behalf of Italian Americans and opposition to the defendants' alleged continued discrimination of Italian Americans, and for creating, causing, or contributing to a hostile and

abusive work environment, in violation of NYSHRL and NYCHRL. The defendants moved, among other things, for summary judgment dismissing the complaint. The plaintiff cross-moved for discovery pursuant to CPLR 3212(f). The Supreme Court granted the defendants' motion, determining, *inter alia*, that the plaintiff's claims under NYSHRL and NYCHRL were barred by the doctrine of collateral estoppel, and denied, as academic, the plaintiff's cross motion. The plaintiff appeals, contending that the court erred in granting dismissal of his claims brought under NYCHRL, and in denying his cross motion.

“The doctrine of collateral estoppel, a narrower species of *res judicata*, 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 or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 467 N.E.2d 487). “Collateral estoppel comes into play when four conditions are fulfilled: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits” (*Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 17, 6 N.Y.S.3d 206, 29 N.E.3d 215; *see Clifford v. County of Rockland*, 140 A.D.3d 1108, 1109, 35 N.Y.S.3d 211). “The party seeking to invoke collateral estoppel has the burden to show the identity of the issues, while the party trying to avoid application of the doctrine must establish the lack of a full and fair opportunity to litigate” (*Matter of Dunn*, 24 N.Y.3d 699, 704, 3 N.Y.S.3d 751, 27 N.E.3d 465, *citing Kaufman v.*

*Eli Lilly & Co.*, 65 N.Y.2d 449, 456, 492 N.Y.S.2d 584, 482 N.E.2d 63).

Where a federal court declines to exercise jurisdiction over a \*809 plaintiff's state law claims, collateral estoppel may still bar those claims provided that the federal court decided issues identical to those raised by the plaintiff's state claims (*see Clifford v. County of Rockland*, 140 A.D.3d at 1110, 35 N.Y.S.3d 211; *Ji Sun Jennifer Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d 18, 23, 987 N.Y.S.2d 338).

In the federal action, the District Court determined that the defendants had legitimate, nondiscriminatory reasons for their employment actions, they were not motivated by retaliatory animus, their reasons were not a pretext for discrimination, and the plaintiff was not treated differently than other employees (*see Milione v. City University of New York*, 950 F.Supp.2d 704 [S.D.N.Y.] ). The Second Circuit affirmed the order of the District Court (*see Milione v. City University of New York*, 567 Fed.Appx. 38 [2d Cir.] ). As such, the determinations rendered by the federal courts are dispositive of the plaintiff's claims under NYSHRL and NYCHRL, even under the broader standard \*\*799 of NYCHRL (*see Simmons–Grant v. Quinn Emanuel Urquhart & Sullivan, LLP*, 116 A.D.3d 134, 139, 981 N.Y.S.2d 89; *cf. Ji Sun Jennifer Kim v. Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d at 23, 987 N.Y.S.2d 338).

Under the circumstances, the defendants met their burden of demonstrating that the issues raised in this action are identical to those decided against the plaintiff in the federal action. In opposition, the plaintiff failed to demonstrate that he did not have a full and fair

opportunity to litigate those issues. Accordingly, the Supreme Court properly determined that the plaintiff's claims under NYSHRL and NYCHRL were barred by the doctrine of collateral estoppel (*see Simmons–Grant v. Quinn Emanuel Urquhart & Sullivan, LLP*, 116 A.D.3d at 139, 981 N.Y.S.2d 89; *see also Hudson v. Merrill Lynch & Co., Inc.*, 138 A.D.3d 511, 517, 31 N.Y.S.3d 3).

In light of our determination, we need not reach the defendants' remaining contention.

Accordingly, the Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the causes of action at issue on this appeal, and denied, as academic, the plaintiff's cross motion for discovery pursuant to CPLR 3212(f).

7a  
SUPREME COURT – STATE OF NEW YORK

PRESENT:  
Honorable James P. McCormack  
Acting Justice of the Supreme Court

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VINCENZO MILIONE,

Plaintiff(s),

-against-

TRIAL/IAS,  
PART40  
NASSAU  
COUNTY

CITY UNIVERSITY OF NEW  
YORK, MATTHEW  
GOLDSTEIN as  
CHANCELLOR of CITY  
UNIVERSITY OF NEW YORK  
and INDIVIDUALLY,  
QUEENS COLLEGE, JAMES  
MUYSKENS as PRESIDENT  
OF QUEENS COLLEGE and  
INDIVIDUALLY, THE JOHN  
D. CALANDRA ITALIAN  
AMERICAN INSTITUTE, and  
ANTHONY TAMBURRI as  
DEAN OF THE JOHN D.  
CALANDRA ITALIAN

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Index No. 14743-  
2013

Motion Seq. No.:  
001 & 002

Motion Submitted:

Defendant(s).

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The following papers read on this motion:

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

Motion by defendants for judgment pursuant to CPLR 3211(a)(7) and 3212, dismissing the complaint in its entirety is granted.

Cross-motion by plaintiff for an order pursuant to CPLR(f) granting plaintiff the opportunity to conduct discovery and directing a Preliminary Conference for the purpose of scheduling discovery is denied as moot.

Application by the Italian-American Legal Defense and Higher Education Fund, Inc. (“the Fund”), for leave to serve and file a brief as *amicus curiae* is denied.

Background

Plaintiff’s national origin is Italian American. He began working at The John D. Calandra Italian American Institute of the City University of New York (“Calandra”) in 1987. Calandra was created in 1979 to foster higher education among Italian Americans at the City University of New York (“CUNY”). Defendant

Matthew Goldstein is the Chancellor of CUNY, and defendant James Muyskens is the President of Queens College. Calandra “is a University Institute at Queens College” (complaint, par. 8). Plaintiff was responsible for the technical aspects of starting an affirmative action program for Italian Americans at CUNY. In 1990 plaintiff filed a complaint with the Department of Labor after CUNY denied him a promotion. The matter was settled in 1990.

In 1995 plaintiff was promoted to the position of Director of Research and Education at Calandra. According to plaintiff, he enjoyed a good relationship with the affirmative action officers at CUNY campuses from 1995 through 2000, after which his relationships deteriorated. He claims that over the years CUNY failed to honor its promise to end discrimination against Italian Americans, and so he publicly criticized CUNY for this failure.

In March, 2006, CUNY hired defendant Anthony Tamburri as the Dean of Calandra. Tamburri’s national origin is Italian American. Tamburri promptly suggested personnel changes and changes in job titles.

In 2006 plaintiff publicly criticized CUNY on a number of occasions for continued discrimination against Italian Americans. After the presentation of a critical report to the CUNY chancellor’s office in October, 2006, Tamburri instructed plaintiff not to publicly present his research findings without Tamburri’s prior approval.

In 2007 plaintiff’s title was changed to Director of Demographic Studies. Plaintiff’s salary and benefits were unchanged. Plaintiff complains that he was stripped of his staff, and thereby prevented from pursuing his research on Italian American affirmative action.

Plaintiff filed a charge of discrimination with the

Equal Employment Opportunity Commission (“EEOC”) in January, 2008. A Notice of Right to Sue was issued on April 15, 2010, and in July, 2010, plaintiff commenced an action in the federal district court for the Southern District of New York. The defendants in the federal action are the same defendants sued herein. In the federal action plaintiff alleged claims for national origin discrimination, disability discrimination, and retaliation under Title VI and Title VII of the Civil Rights Act of 1964, as well as violations of the New York State Human Rights Law, Executive Law 296 et. seq. (“NYSHRL”), and the New York City Human Rights Law (“NYCHRL”), New York City Administrative Code 8-107 et seq.

By decision dated June 21, 2013 (*Milione v. City Univ. of N.Y.*, 950 F. Supp. 2d 704 [S.D.N.Y.2013]), the federal district court granted summary judgment dismissing all of plaintiff’s federal claims and declining supplemental jurisdiction over plaintiff’s state law claims. This dismissal was affirmed by the Second Circuit (*Milione v. City Univ. of New York*, 567 Fed. Appx. 38 [2d Cir. 2014]).

On December 23, 2013, plaintiff commenced this action wherein he alleges twelve causes of action. In their answer dated April 4, 2014, defendants deny the allegations of the complaint and allege twenty affirmative defenses.

Plaintiff continues to be employed at Calandra. At this time defendants move for summary judgment dismissing the complaint on various grounds. Plaintiff opposes the motion, and argues that summary judgment is premature.

#### Summary Judgment Standard

Summary judgment is the procedural equivalent

of a trial (*S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk County Dept. of Social Servs. v. James M.*, 83 N.Y.2d 178, 182 [1994]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (*Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 82 [2003]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations (*Id.*).

#### Discussion

Defendants contend that plaintiff has already had his day in court in the federal action. They argue that plaintiff's claims are precluded by the affirmative defense of collateral estoppel (Defendants' fourth affirmative defense).

The doctrine of collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent action an issue raised in a prior action, and necessarily decided against that party in the prior action (*Buechel v. Bain*, 97 N.Y.2d 295, 303 [2001], cert. den. 535 U.S. 1096 [2002], citing *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 [1984]). Collateral estoppel applies only where "the issue in the second action is identical to an issue raised, necessarily decided, and material in the prior action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier

action” (*City of New York v. Welsbach Elec. Corp.*, 9 N.Y.3d 124, 128 [2007]). Where issues are actually litigated in a prior federal action, squarely addressed, and specifically decided against the plaintiff therein, the plaintiff is collaterally estopped from relitigating those identical issues under the guise of state law claims (*Sanders v. Grenadier Realty Inc.*, 102 A.D.3d 460 [1<sup>st</sup> Dept. 2013]; *Peterkin v. Episcopal Social Servs. of N.Y., Inc.*, 24 A.D.3d 306 [1<sup>st</sup> Dept. 2005]).

Here defendants allege that the state law claims herein stem from the exact same conduct that was the subject of the prior federal action. Discovery took place in the federal action over the course of eleven months, and depositions were taken of plaintiff, defendant Musykens, and Dean Tamburri. The federal court granted summary judgment dismissing the federal claims, and that dismissal was affirmed. Defendants insist that the findings in the federal action preclude relitigation in this action.

The standards for recovery under Executive Law 296 are the same as those governing cases under Title VII (*Mittl v N.Y. State Div. of Human Rights*, 100 N.Y.2d 326, 330 [2003]). To establish a *prima facie* case of discrimination, the plaintiff must show that he(1) is a member of a protected class; (2) was qualified to hold the position; (3) suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination (*Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 [2004]). The burden then shifts to the employer to provide a legitimate, nondiscriminatory reason for its employment decision. Plaintiff must then raise a triable issue of fact as to whether the proffered reasons are merely a pretext for discrimination (*Id.*).

Turning to the federal action, in its decision upholding summary judgment the Second Circuit found

that plaintiff “cannot show that CUNY’s proffered reasons for the adverse employment actions are mere pretext” (*Milione*, 567 Fed. Appx. at 41). The Second Circuit based its determination on the following facts in the record:

Tamburri explained that Milione’s title change accurately reflects his research activities and position below Dean Tamburri. Milione cannot dispute that Tamburri, as the new Dean, was entitled to delineate the responsibilities and duties of his employees and set his own agenda for the Calandra Institute. When appointed Dean in March 2006, Tamburri stated that he would make personnel changes, which included changing Milione’s title. Between May 2007 and March 2008, Tamburri modified the titles of six Institute employees. Tamburri also told all Calandra staff members (not only Milione) that he would approve all official, public communications regarding the Institute. In addition, Tamburri had concerns regarding Milione’s inability to take direction and work regular hours. Defendants therefore have sustained their burden of articulating a legitimate reason for their actions, shifting the burden to Milione to show that those reasons are mere pretext for unlawful retaliation.

(*Milione*, 567 Fed. Appx. at 41-42). As to plaintiff’s claims of pretext, the Second Circuit stated, “We detect no genuine issue of fact as to Defendants’ reasons for

taking the alleged adverse employment actions or Defendants' motivation" (*Id.* at 42). Plaintiff simply failed to provide evidence that Tamburri's actions were "motivated by discriminatory animus" (*Id.*).

These same issues of pretext and lack of discriminatory animus are raised in the state law claims for national origin discrimination. As these issues were raised, addressed and decided in the federal court action, plaintiff is collaterally estopped from pursuing his state law claim of national origin discrimination. Accordingly defendants are entitled to summary judgment dismissing plaintiff's claims for national origin discrimination pursuant to NYSHRL, namely the first and third causes of action.

To establish a *prime facie* claim of retaliation pursuant to Executive Law 296, the plaintiff must show (1) that he was engaged in an activity protected by Executive Law 296; (2) the employer was aware that he participated in the protected activity, (3) he suffered from an adverse employment action based upon his activity; and (4) there is a causal connection between the protected activity and the adverse action taken by the employer (see *Adeniran v. State of New York*, 106 A.D.3d 844 [2<sup>nd</sup> Dept. 2013]). As in the case of discrimination, once the plaintiff makes out this *prima facie* showing, the burden shifts to the employer to present legitimate, independent and nondiscriminatory reasons to support its actions (*Id.* at 845). Once the defendant meets this burden, the plaintiff would be required to show that the reasons given were merely a pretext (*Id.*).

Turning again to the federal appellate decision, the Second Circuit's finding that "the record does not show that Tamburri intended to retaliate against Milione because he advocated against discrimination, or that Tamburri was discriminating against Italian

Americans in disciplining Milione” (*Milione*, 567 Fed. Appx. at 42). No issue of fact was raised as to defendants’ articulated reasons for their conduct (*Id.*).

These same issues of legitimate reasons for defendants’ alleged acts of retaliation, and pretext are raised in the state law claims for retaliation. Consequently, plaintiff is collaterally estopped from pursuing his claims of retaliation herein. Defendants are entitled to summary judgment dismissing plaintiff’s claims for retaliation pursuant to NYSHRL, namely the second and fourth causes of action.

Plaintiff made no claim of a hostile work environment in the federal action. Nevertheless defendants seek summary judgment dismissing the claims of hostile work environment herein based upon findings made in the federal action that are determinative of the hostile work environment claims. They point to plaintiff’s admission that his hostile work environment claim is based on the exact same conduct as his national origin and retaliation claims, namely: “his national origin, his advocacy on behalf of Italian Americans,” and his participation in “protected activity” (complaint, par. 168).

“A hostile work environment exists where the workplace is ‘permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment’” (*Nettles v. LSG Sky Chefs*, 94 A.D.3d 726, 730 [2<sup>nd</sup> Dept. 2012], quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 [1993]). “The allegedly abusive conduct must not only have altered the conditions of employment of the employee, who subjectively viewed the actions as abusive, but the actions must have created an “objectively hostile or abusive environment - one that a reasonable person

would find to be so” (*Forrest, supra* at 311; *Nettles, supra* at 730). Mere personality conflicts do not suffice (*Nettles, supra* at 730).

As noted above, the Second Circuit’s findings of no discriminatory animus, no showing of pretext, and no issue of fact as to defendants’ reasons for taking the alleged adverse employment actions or defendants’ motivations, weigh against plaintiff. In addition, under the unusual circumstances of this case, plaintiff’s reliance upon the identical conduct already ruled upon warrants a finding of collateral estoppel (cf. *Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 A.D.3d 18 [1<sup>st</sup> Dept. 2014])(no collateral estoppel where state court claims based upon different instances of protected activity)). Therefore, the Court finds that plaintiff is collaterally estopped from bringing a hostile work environment claim pursuant to NYSHRL.

Furthermore, on the merits plaintiff could not prevail on his hostile work environment claim. The Court has reviewed the record, especially plaintiff’s affidavit dated August 26, 2014 (Exhibit 1 to the cross-moving papers), wherein he attempts to set forth 21 different instances of severe and pervasive discrimination against him (*Id.* at par. 6). What this evidence shows is “no love lost” between plaintiff and his superiors (*Forrest, supra* at 308). The evidence falls short of establishing that the workplace was permeated with discriminatory intimidation, ridicule and insult on the basis of the alleged discriminatory conduct that was sufficiently severe to alter the conditions of plaintiff’s employment and create an objectively abusive working environment (see *Torres v. Louzoun Enters., Inc.*, 105 A.D.3d 945 [2<sup>nd</sup> Dept. 2013],lv. app. dsmd. in part and den. in part 22 N.Y.3d 1054 [2014] and *Kamen v. Berkeley Co-Op. Towers Section II Corp.*, 98 A.D.3d 1086 [2<sup>nd</sup> Dept. 2012]).

Based on the foregoing, this Court is compelled to find that plaintiff is collaterally estopped from pursuing his hostile work environment claim, or alternatively, that he has no cause of action for hostile work environment pursuant to NYSHRL. Accordingly defendants' motion for summary judgment dismissing the fifth and sixth causes of action must be granted.

The remaining six causes of action allege the claims for national origin discrimination, retaliation and hostile work environment pursuant to NYCHRL. The standard for recovery under NYCHRL is broader than under NYSHRL (*Simmons-Grant v. Quinn Emmanuel Urquhart & Sullivan, LLP.*, 116 A.D.3d 134, 141 [1st Dept. 2014]), because of the Local Civil Rights Restoration Act, generally referred to as the Restoration Act, which was passed in 2005 in New York City. The purpose of the Restoration Act was the "accomplishment of the uniquely broad and remedial purposes of the NYCHRL, "regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed" (*Nelson v HSBC Bank USA*, 87 A.D.3d 995, 997 [2<sup>nd</sup> Dept. 2011] quoting New York City Administrative Code 8-130).

For a national origin discrimination claim pursuant to NYCHRL, where defendants moving for summary judgment put forward evidence of one or more nondiscriminatory reasons for their actions, a court should ordinarily avoid the question of whether a *prima facie* case has been made, and turn to the question of whether, based upon all of the evidence before the court, and drawing all reasonable inferences in plaintiff's favor, no jury could find defendants liable under any evidentiary route (*Furfero v. St. John's Univ.*, 94 A.D.3d 695 [2<sup>nd</sup> Dept. 2012] citing *Bennett v.*

*Health Mgt. Sys. Inc.*, 92 A.D.3d 29 [1<sup>st</sup> Dept. 2011], lv. app. den. 18 N.Y.3d 811 [2012]). If the plaintiff produces some evidence that unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factors for the employer's action, such evidence of pretext should be sufficient to deny summary judgment under NYCHRL (*Melman v. Montefiore Med Ctr.*, 98 A.D.3d 107, 127 [1<sup>st</sup> Dept. 2012]).

Here, the federal court has already found that CUNY's reasons for its actions were legitimate, and that plaintiff failed to raise a genuine issue of fact as to the offered reasons or discriminatory motive (*Milione*, 567 Fed. Appx. at 38-39). Review of the record herein demonstrates that plaintiff has failed to produce any evidence that unlawful discrimination on the basis of national origin was a motivating factor, even if not the sole motivating factor, for defendants' conduct. Under these circumstances no jury could find against defendants on any evidentiary route, and therefore, defendants are entitled to summary judgment dismissing the national origin discrimination claims under NYCHRL, namely the seventh and ninth causes of action.

While actionable retaliatory conduct is expanded under NYCHRL, a plaintiff must still show that (1) he is engaged in a protected activity, (2) his employer was aware he participated in such activity; (3) his employer engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity; and (4) there is a causal connection between the protected activity and the alleged retaliatory conduct (*Brightman v. Prison Health Service, Inc.*, 108 A. D. 3d 739, 740 [2<sup>nd</sup> Dept. 2013]). Once the plaintiff has made this showing, the burden shifts to the employer to present legitimate, independent and nondiscriminatory

reasons to support its actions (*Id.*). If the employer meets this burden, the plaintiff has an obligation to show that the reasons put forth by the employer are merely a pretext (*Id.*).

Here, assuming that plaintiff could make out a *prima facie* case of retaliation, the federal court has already found that CUNY's reasons for its actions were legitimate, and that plaintiff failed to raise a genuine issue of fact as to the offered reasons or discriminatory motive (*Milione*, 567 Fed. Appx. at 38-39). Consequently plaintiff is collaterally estopped from relitigating these critical issues. Under these circumstances defendants' motion for summary judgment dismissing the retaliation claims pursuant to NYCHRL, namely the eighth and tenth causes of action.

On a hostile work environment claim pursuant to NYCHRL, the issue is whether the plaintiff has been treated less well than other employees because of his national origin (see *Hernandez v. Kaisman*, 103 A.D.3d 106, 114 [1<sup>st</sup> Dept. 2012]; *Nelson*, *supra* at 999). The Second Circuit noted that Dean Tamburri modified the titles of six Calandra employees, and required that all official public communications be approved in advance (*Milione*, Fed. Appx. at 41). The Second Circuit also cited plaintiff's testimony that "he does not believe Dean Tamburri (himself an Italian American) was motivated by Milione's Italian-American status" (*Id.*). In opposition plaintiff has failed to provide any evidence that he was treated less well than others because he is Italian American. For this reason, he has no claim of hostile work environment pursuant to NYCHRL, and defendants' motion for summary judgment dismissing the eleventh and twelfth causes of action must be granted.

The remainder of the parties' contentions in

support of, and in opposition to, the motion for summary judgment need not be addressed.

Based on the foregoing, plaintiff's cross-motion for an order pursuant to CPLR 3212(f) granting plaintiff the opportunity to conduct discovery and directing a Preliminary Conference for the purpose of scheduling discovery is denied as moot.

Finally, the motion by the Fund for leave to serve and file a brief as *amicus curiae* must be considered. The term "amicus curiae" means "friend of the court," and an amicus has been described as "one, who, as a stander by, when a judge is in doubt or mistaken in a matter of law, may inform the court" (*Spota v. County of Suffolk*, 2012 WL 4584566 [Sup. Ct., Suffolk Cty., 2012], *affd in pt, dsmd. in pt*, 110 A.D.3d 2013 [2<sup>nd</sup> Dept. 2013], citing *Kruger v. Bloomberg*, 1 Misc.3d 192, 195 [Sup. Ct., N.Y. Cty., 2003]). The function of an *amicus curiae* is to call the court's attention to law or facts or circumstances that might otherwise escape its consideration (*Kruger, supra* at 195-196). At the trial level, there is no right to file an *amicus* brief, and the court has discretion to address this on an *ad hoc* basis (*Price v. New York City Bd. of Educ.* 16 Misc.3d 543, 554 [Sup. Ct. N.Y. Cty., 2007]).

On this record, where the parties have been well-represented first in federal court and now in state court, the court discerns no need for a grant of *amicus* status to the Fund. Nor is this a case of special public interest warranting additional briefing (*Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc.3d 450, 454 [Sup. Ct., Tompkins Cty., 2012]). Accordingly, the motion for leave to serve and file an *amicus* brief is denied.

The foregoing constitutes the Decision and Order of the Court.

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

Dated: December 1, 2014  
Mineola, N.Y.