Krzywinska v J&J Hotel Co. LLC
2014 NY Slip Op 30331(U)
January 27, 2014
Supreme Court, New York County
Docket Number: 115470/07
Judge: Joan A. Madden
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[* 1] SCANNED ON 2/6/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C.
Justice

PART 11

Index Number : 115470/2007
KRZYWINSKA, HALINA
vs.
J&J HOTEL
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED
FEB 06 2014
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: January 7, 2014

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 11

HALINA KRZYWINSKA and
JANUSZ PURZYNSKI,

Plaintiffs,

- against -

J&J HOTEL COMPANY LLC and
EJAZ BALUCH,

Defendants.

Index No.: 115470/07

DECISION/ORDER

MADDEN, JOAN A., J.:

In this action, plaintiff Halina Krzywinska (Krzywinska) alleges that her former employers, defendants J&J Hotel Company LLC (J&J Hotel) and Ejaz Baluch (Baluch), unlawfully discriminated against her in the terms and conditions of her employment, and terminated her employment, based on her national origin, in violation of the New York State Human Rights Law (Executive Law § 296 *et seq.*) (NYSHRL) and the New York City Human Rights Law (Administrative Code of the City of New York [Administrative Code] § 8-107 *et seq.*) (NYCHRL). Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and, pursuant to CPLR 3211 (a) (1) and (5), to dismiss the complaint based on documentary evidence and the statute of limitations.[1]

[1]In October 2012, plaintiff Janusz Purzynski settled his claims against defendants and is no longer a party to the action. *See* Settlement Agreement & General Release, Ex. D to Cohen Affirmation in Support of Defendants' Motion.

Background

Defendant J&J Hotel, at all times relevant to the complaint, owned and operated a residential and commercial, or transient, hotel located at 342 West 71st Street, New York, New York (the hotel). *See* Verified Complaint (Complaint), Ex. B to Cohen Affirmation in Support of Defendants' Motion (Cohen Aff.), ¶¶ 4, 5;[2] Verified Answer (Answer), Ex. C, ¶¶ 4, 5; Baluch Dep., Ex. F, at 97, 152-153. From 1995 until approximately 2006, the hotel manager was Youssef Khan (Khan). *Id.* at 165, 207. In November 2006, defendant Baluch was hired as the general manager of J&J Hotel. Complaint, ¶ 13; Answer, ¶ 13; Baluch Dep., Ex. F, at 15. As manager, Baluch was responsible for hiring and firing housekeepers, maintenance workers and other employees, subject to approval by his "superiors." *Id.* at 97-98. He also was responsible for scheduling staff, including housekeeping staff. *Id.* at 102; Krzywinska Dep. (Pl. Dep.), Ex. H, at 34-35.

Plaintiff Krzywinska, a Polish national, was employed by J&J Hotel as a housekeeper for approximately 12 years, from 1995 until her termination on July 26, 2007. Affidavit of Krzywinska in Opposition to Defendants' Motion (Pl. Aff. in Opp.), ¶ 2. It is not disputed that she performed her work satisfactorily.

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[2]Unless otherwise specified, all citations to exhibits are to the exhibits submitted with Cohen's Affirmation in Support of Defendants' Motion, compiled in three binders identified as Exhibits in Support of Motion to Dismiss and for Summary Judgment.

Baluch Dep., Ex. F, at 122-123, 189-190. During her employment with J&J Hotel, plaintiff was a member of a hotel services union (Union), and her employment was subject to a collective bargaining agreement (CBA) between the Union and J&J Hotel. *See* Pl. Dep, Ex. H, at 20-21, 24-26; Agreements, Exs. G-1, G-2.

Plaintiff alleges that defendants treated her differently than non-Polish employees, "specifically Muslim and Spanish employees" (Pl. Aff. in Opp., ¶ 4), and unlawfully terminated her employment based on her Polish national origin. More particularly, plaintiff alleges that "from the beginning of her employment," she was paid less than other similarly situated employees (Complaint, ¶¶ 35-36); was denied sick days and holidays that other employees were allowed to take (*id.*, ¶ 36; Pl. Aff. in Opp., ¶¶ 5, 12); was denied vacations for the first three years she worked at the hotel (Complaint, ¶ 38; Pl. Dep., Ex. H, at 36); was advised by Khan in March 2004 that she would be fired if she missed a day of work (Complaint, ¶ 39; Pl. Dep., Ex. H, at 79-80); was given more work than other housekeepers, and was required to clean more rooms than the limit imposed by the CBA. Complaint, ¶¶ 40, 44; Pl. Aff. in Opp., ¶ 13.

With respect to her claim that she was paid less than other housekeepers, plaintiff testified at her deposition that she was paid less than other employees, but she identified only one, Barbara, who was paid more. Pl. Dep., Ex. H, at 27, 29.

According to plaintiff, she and Barbara were the only two housekeepers employed at the hotel from 1995 to 1998, and Barbara left in 1999 or 2000. *Id.* at 29, 33. Plaintiff stated that, after Barbara left, she worked mostly alone, with additional housekeepers hired on a temporary basis. *Id.* at 33-34. At the time of plaintiff's termination, there were approximately ten other housekeepers employed at the hotel, and she does not claim that any of them was paid more than she was. *Id.* at 30, 117-118.

Plaintiff also testified that in 1997 or 1998, and every year through 2007, she and other employees, including non-Polish employees, complained to the Union that they were being paid less than the contract rate of pay. *Id.* at 45-47, 51-52, 53-56. In December 2006, the Union entered into a settlement agreement with J&J Hotel, on behalf of plaintiff and ten other employees, resolving the employees' claims for wages, sick leave, holiday pay and vacation pay through December 31, 2005. *See* Settlement Agreement, dated December 1, 2006, Ex. I. Plaintiff signed the agreement and received a settlement amount of $5,856.45, although she claims that she did not know what she was signing or what the money was for until "later." Pl. Dep., Ex. H, at 58-60. On December 8, 2006, she also signed an agreement setting out a payment schedule, and knew when she signed that agreement that she was receiving money for unpaid wages, which, she complained to the Union, was not enough. *Id.* at 62-63, 64-66, 68; *see*

Letter dated Dec. 6, 2006, Ex. J; Checks, Ex. K. Plaintiff acknowledged that, after the settlement agreement, and during the time that Baluch was the manager, she was paid the correct wages (Pl. Dep., Ex. H, at 275-276); and she testified that after January 1, 2006, she was paid well, and more than the other housekeepers. *Id.* at 118.

Plaintiff also claims she was denied sick leave and vacation time, but only during the first three years of her employment; after 1998, she was not denied sick leave or vacation time. *Id.* at 36. Although she testified that Khan told her, in March 2004, that she would be fired if she missed a day of work, she was not fired for taking a day off. *Id.* at 79-80, 82. She asserts, however, that, in January 2007, she took a vacation but was not paid for it until about five months later, after she complained to the "Labor Department" (Complaint, ¶ 41, Pl. Dep., Ex. H, at 37-38, 171; Pl. Aff. in Opp., ¶ 6), even though another, non-Polish employee, Yolanda, was paid in advance of her vacation in May or June 2007. Complaint, ¶ 47; Pl. Dep., Ex. H, at 39; Pl. Aff. in Opp., ¶ 6.

Also in January 2007, plaintiff claims, her hours were reduced, although she acknowledged that, generally, a reduction in staff occurred during the winter months (Pl. Dep., Ex. H, at 118-119), and that less senior employees' hours were reduced before hers. *Id.* at 150. Plaintiff testified that her hours

were reduced "to make room for" a new, Muslim housekeeper, Zarina. Pl. Aff. in Opp., ¶ 10; Pl. Dep., Ex. H, at 185-186. Baluch testified that Zarina was already working some days at the hotel when he started working there, and he then hired her as a full time housekeeper. Baluch Dep., Ex. F, at 94.

According to Baluch, when he was hired in late 2006, the hotel was in financial trouble, and the first thing he had to do was "clean up" and cut the payroll, so he fired two front desk workers and reduced the hours of some employees, including housekeepers, but did not reduce plaintiff's hours, because she had seniority. Baluch Dep., Ex. F, at 112-113, 129, 131. He further testified that plaintiff's hours were not subsequently reduced, again because she had seniority. *Id.* at 139-140. Weekly schedules shown to plaintiff at her deposition, reflecting hours she worked between late November 2006 and July 27, 2007, indicate that she worked five days almost every week, and that there were at most three days that could have been assigned to her that were not. Pl. Dep., Ex. H, at 216-219.

Plaintiff further alleges that, in 2005, former manager Khan told her he would not hire any more Polish workers (Complaint, ¶ 37; Pl. Aff. in Opp., ¶ 8), and, in 2005 and 2006, "nearly all the Polish employees" were fired. Complaint, ¶ 46; Pl. Aff. in Opp., ¶ 7. She identified three Polish employees who were fired by Khan, but she did not know under what circumstances, except

that one was fired after he returned from a two-week trip to Poland. Pl. Dep., Ex. H, at 178-182. Plaintiff and co-plaintiff Janusz Purzynski, who also is Polish, were not fired by Khan at that time, but, plaintiff claims, under the new management of Baluch, she and Purzynski began to have their working hours reduced. Pl. Aff. in Opp., ¶ 38.

Plaintiff's employment was terminated on July 26, 2007, the date that her employment authorization card expired. *See* Letters, Exs. Q, R. She claims that renewal of her work authorization was delayed due to problems within the immigration office (Complaint, ¶ 50; Pl. Dep., Ex. H, at 192; *see* Letter, Ex. R), and that she could legally work while her renewal papers were pending. Pl. Dep., Ex. H, at 186-187, 211. Plaintiff contends that other employees were permitted to work without authorization cards, and that she had, in the past, continued to work at the hotel while a renewal application was pending. Pl. Aff. in Opp., ¶¶ 15-17; Pl. Dep., Ex. H, at 236-238, 326-327. She also claims that defendants refused to reinstate her after her working papers were renewed, in September or October 2007, even though other, non-Polish housekeepers were hired after she left. *Id.* at 190-191, 228; Complaint, ¶ 52. In addition, plaintiff alleges that, after she was fired, defendants refused to pay her accrued vacation and sick leave, and prevented her from receiving unemployment benefits by providing fraudulent information in

response to her unemployment benefits claim. Complaint, ¶¶ 51, 65. Plaintiff commenced the instant action in November 2007, alleging three causes of action, for employment discrimination in violation of the NYSHRL and the NYCHRL, and for fraud. Defendants seek dismissal of all claims.

Discussion

The standards for summary judgment motions are well settled. To prevail, the moving party must establish the cause of action or defense, by tender of evidentiary proof in admissible form, "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212 (b); *Zuckerman v City of New York,* 49 NY2d 557, 562 (1980); *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such showing has been made, the opposing party must show, also by producing evidentiary proof in admissible form, that genuine material issues of fact exist which require a trial of the action. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman,* 49 NY2d at 562. The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact, or where the issue is arguable. *See Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 (1978); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957).

In employment discrimination cases, courts also urge caution in granting summary judgment, because direct evidence of an employer's discriminatory intent is rarely available. *See Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997); *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 43-44 (1st Dept 2011). "'[A]ffidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.'" *Sibilla v Follett Corp.*, 2012 WL 1077655, *5, 2012 US Dist LEXIS 46255, *13-14 (ED NY 2012), quoting *Gallo v Prudential Residential Servs., Ltd. Partnership*, 22 F3d 1219, 1224 (2d Cir 1994); *see Desir v City of New York*, 453 Fed Appx 30, 33 (2d Cir 2011). Moreover, while "the burden of persuasion of the ultimate issue of discrimination always remains with the plaintiffs" (*Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 6 NY3d 265, 271 [2006]), "a plaintiff is not required to *prove* his claim to defeat summary judgment." *Ferrante*, 90 NY2d at 630.

Defendants seek dismissal of the complaint on the grounds that plaintiff cannot establish that she was treated differently than other similarly situated workers, and that there was a nondiscriminatory reason for terminating plaintiff's employment, that is, that she no longer was authorized by federal immigration authorities to work, and that to retain her would have subjected J&J Hotel to fines and penalties under federal immigration law.

Defendants also argue that certain of plaintiff's claims are barred by the statute of limitations. In support of their motion, defendants submit the deposition testimony of plaintiff and defendant Baluch, as well as numerous documents, including records reflecting the work schedules and hourly rates of pay of plaintiff and other similarly situated employees.

At the outset, the court rejects plaintiff's argument that the motion should be denied because defendants failed to submit an affidavit based on personal knowledge as required by CPLR 3212 (b). Contrary to plaintiff's contention, "[t]he fact that defendant[s'] supporting proof was placed before the court by way of an attorney's affirmation annexing deposition testimony and other proof, rather than affidavits of fact on personal knowledge," does not defeat defendants' right to summary judgment. *Alvarez*, 68 NY2d at 325; *see Olan v Farrell Lines, Inc.*, 64 NY2d 1092, 1093 (1985). To the extent, however, that the affirmation of defendants' attorney, particularly in reply, contains factual assertions not based on personal knowledge and otherwise unsupported by evidence (*see e.g.* Cohen Reply Aff., ¶¶ 16, 19), such affirmation, like any affirmation or affidavit of any person not based on personal knowledge, is "without evidentiary value." *Zuckerman*, 49 NY2d at 563; *see GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 966, 968 (1985).

Employment Discrimination under the NYSHRL and the NYCHRL

Under the NYSHRL and the NYCHRL, it is unlawful for an employer to fire or refuse to hire or employ, or otherwise to discriminate in the terms, conditions and privileges of employment, because of, as relevant here, an individual's national origin. Executive Law § 296 (1) (a); Administrative Code § 8-107 (1) (a). Both statutes require that their provisions be "construed liberally" to accomplish the remedial purposes of prohibiting discrimination. Executive Law § 300; Administrative Code § 8-130; *see Albunio v City of New York*, 16 NY3d 472, 477-478 (2011); *Matter of Binghamton GHS Employees Fed. Credit Union v State Div. of Human Rights*, 77 NY2d 12, 18 (1990); *Sanders v Winship*, 57 NY2d 391, 395 (1982). Further, the NYCHRL, as amended by the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]) (Restoration Act), "explicitly requires an independent liberal construction analysis [of its provisions] ... targeted to understanding and fulfilling ... the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights law." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 (1st Dept 2009); *see* Administrative Code § 8-130; *Albunio*, 16 NY3d at 477-478 (2011); *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 112 (1st Dept 2012); *Bennett*, 92 AD3d at 34.

Employment discrimination claims brought under the NYSHRL

generally are analyzed pursuant to the burden-shifting framework established by the United States Supreme Court in *McDonnell Douglas Corp. v Green* (411 US 792 [1973]) for cases brought pursuant to Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.*). *See Stephenson*, 6 NY3d at 270; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 n 3 (2004); *Ferrante*, 90 NY2d at 629. Under *McDonnell Douglas*, the plaintiff has the initial burden of establishing a prima facie case of employment discrimination. 411 US at 802; *see Stephenson*, 6 NY3d at 270; *Ferrante*, 90 NY2d at 629; *Melman*, 98 AD3d at 113-114; *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 122-123 (1st Dept 2007).

To establish a prima facie case of employment discrimination, a "plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Forrest*, 3 NY3d at 305; *see Stephenson*, 6 NY3d at 270 n 2; *Braithwaite v Frankel*, 98 AD3d 444, 445 (1st Dept 2012); *Melman*, 98 AD3d at 113-114; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1st Dept 2009). Plaintiff's burden at this stage has been described as "de minimis" or "minimal." *See St. Mary's Honor Ctr. v Hicks*, 509 US 502, 506 (1993);

Braithwaite, 98 AD3d at 445; *Melman*, 98 AD3d at 115; *Wiesen v New York Univ.*, 304 AD2d 459, 460 (1st Dept 2003); *DeNigris v New York City Health & Hosp. Corp.*, 861 F Supp 2d 185, 194 (SD NY 2012). Once the plaintiff has established a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by demonstrating that there was a legitimate and nondiscriminatory reason for its employment decision. If that showing is made, the burden shifts back to the plaintiff to prove that the employer's reason was a pretext for discrimination. *See Texas Dept. of Community Affairs v Burdine*, 450 US 248, 253 (1981); *Forrest*, 3 NY3d at 390-391; *Ferrante*, 90 NY2d at 629-630; *Melman*, 98 AD3d at 114.

Courts have similarly applied the *McDonnell Douglas* burden-shifting framework to employment discrimination claims brought under the NYCHRL, even after the 2005 Restoration Act required an independent analysis of such claims. *See Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 740-741 (2d Dept 2013); *Melman*, 98 AD3d at 113-114; *Gordon v Kadet*, 95 AD3d 606, 606-607 (1st Dept 2012); *Phillips v City of New York*, 66 AD3d 170, 196-197 (1st Dept 2009); *Baldwin*, 65 AD3d at 965. Recently, however, the First Department, in *Bennett*, considered "whether, and to what extent" the *McDonnell Douglas* framework should continue to be applied to claims brought under the NYCHRL, and while upholding the *McDonnell Douglas* standard as basically sound, the

Court instructed that when a defendant has offered evidence of a nondiscriminatory basis for its actions, "a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to the question of whether a prima facie case has been made out in the first place." 92 AD3d at 39-40; *see Furfero v St. John's Univ.*, 94 AD3d 695, 697 (2d Dept 2012).

Instead, the court should "proceed directly to looking at the evidence as a whole" (*Bennett*, 92 AD3d at 45) to determine whether defendant, as the moving party, has met its burden of showing that "no jury could find defendant liable under any of the evidentiary routes -- *McDonnell Douglas*, mixed motive, 'direct' evidence, or some combination thereof." *Id.*; *see Melman*, 98 AD3d at 113-114. This approach also has been "implicitly endorsed" by courts in the context of claims brought under federal and state laws. *See Attard v City of New York*, 451 Fed Appx 21, 23-24 (2d Cir 2011), *cert denied* __ US __, 132 S Ct 1975 (2012) (because employer presented nondiscriminatory reason for termination, court need not decide whether plaintiff "made a prima facie case and instead may proceed directly to the ultimate inquiry"); *Oluyomi v Napolitano*, 811 F Supp 2d 926, 940 (SD NY 2011), *affd* 2012 WL 3711373, 2012 US App LEXIS 18296 (2d Cir 2012) (same); *Alfano v Starbucks Corp.*, 2012 WL 2353763, 2012 NY Misc LEXIS 2746, 2012 NY Slip Op 31548(U) (Sup Ct, NY County 2012) (applying mixed motives analysis to NYSHRL claim).

Courts subsequently have held, following *Bennett*, that "an action brought under the NYCHRL must, on a motion for summary judgment, be analyzed both under the *McDonnell Douglas* framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases." *Melman*, 98 AD3d at 113; *see Carryl v MacKay Shields, LLC*, 93 AD3d 589, 589-590 (1st Dept 2012); *Godbolt v Verizon N.Y. Inc.*, 2013 WL 361144, 2013 NY Misc LEXIS 219, 2013 NY Slip Op 30100(U) (Sup Ct, NY County 2013). Thus, once a defendant has produced evidence of a legitimate reason for its action, "t]he plaintiff must either counter the defendant's evidence by producing pretext evidence (or otherwise), or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by discrimination." *Bennett*, 92 AD3d at 39; *see Brightman*, 108 AD3d at 741; *Melman*, 98 AD3d at 127; *Carryl*, 93 AD3d at 590; *Williams*, 61 AD3d at 78 n 27.

With respect to the statute of limitations, actions to recover damages for alleged discrimination under the NYSHRL and the NYCHRL are subject to a three-year statute of limitations. CPLR 214 (2); Executive Law § 297 (9); Administrative Code § 8-502 (d); *see Kent v Papert Cos.*, 309 AD2d 234, 240 (1st Dept 2003); *Alimo v Off-Track Betting Corp.*, 258 AD2d 306, 306-307 (1st Dept 1999). Plaintiff commenced this action, by filing a summons and complaint, on November 19, 2007. Any alleged

discrimination that occurred prior to November 19, 2004 is, therefore, not actionable, unless it was part of a "continuing violation." *See generally National R.R. Passenger Corp. v Morgan*, 536 US 101 (2002). Plaintiff does not dispute that the three-year statute of limitations precludes claims of disparate treatment arising prior to November 19, 2004, and otherwise does not address this branch of defendants' motion, except to assert that time-barred claims, or claims barred by the settlement agreement, do not prevent the court from "weighing the totality of the circumstances" as evidence of discriminatory intent. *See* Beckwith Affirmation in Opposition to Defendants' Motion, ¶ 31.

While plaintiff is correct that an employee may use untimely "prior acts as background evidence in support of a timely claim" (*Morgan*, 536 US at 113; *see Hughes v United Parcel Serv., Inc.*, 4 Misc 3d 1023[A], 2004 NY Slip Op 51008[U], **6 [Sup Ct, NY County 2004]), evidence in this case shows that there are no timely claims of unequal payment of wages, provision of sick leave and vacation, or assignment of work.

Plaintiff's claim that she was paid less than other housekeepers is supported solely by her assertion that, prior to 1999, when she was one of only two housekeepers employed by the hotel, she was paid less than the other housekeeper. Pl. Dep., Ex. H, at 29. This claim, therefore, is untimely, and plaintiff otherwise offers no evidence that other housekeepers were paid

more than she was. To the extent that plaintiff argues that the 2005 settlement of a grievance alleging underpayment of wages, filed by the Union on behalf of plaintiff and other employees, including non-Polish employees, supports her claim for discriminatory payment of wages, there is no evidence that the grievance included any claim that she was paid less than other employees because of her national origin. Further, the settlement resolved all pay claims through December 2005, and, as plaintiff acknowledged, after the settlement of the Union grievance, she was paid correctly, and more than the other housekeepers. *Id.* at 118, 275-276.

Plaintiff's claim that she was not allowed sick leave or vacation time also is not supported by evidence of any denial of such leave after 1998. As she testified, she was not allowed to take vacation or sick time during the first three years of her employment, but she does not deny that she subsequently took, and was paid for, sick leave and vacations. Plaintiff's allegation that on one occasion, in January 2007, she was not paid for a vacation until she complained to the Labor Department, when another, non-Polish, housekeeper, "Yolanda," was paid for her vacation before she took it, is insufficient to support a finding of discrimination. Plaintiff's assertion that Yolanda received a pre-vacation payment is unsupported by any evidence, but, even if it occurred, plaintiff does not deny that she received the

vacation pay, and offers no evidence of any other instances of late payment. Similarly, plaintiff's testimony that threats by Khan and Baluch to fire her if she took days off, when she admittedly was not fired for taking days off, and was permitted to take sick days and vacation days, fails to raise a triable issue of fact as to discriminatory treatment. At her deposition, plaintiff acknowledged that, at the time her employment ended, she was not owed any payments except the post-termination payments of accrued vacation and sick leave, and it is not disputed that during the course of this litigation, defendants made those payments to plaintiff, through her attorney. *See* Cohen Aff., ¶¶ 88-89; Letter dated August 30, 2012, and Check, Ex. AA.

Evidence further shows that plaintiff was not required to work more than other housekeepers. Plaintiff testified that each day the housekeepers were assigned rooms to clean by being given keys and rooms numbers, with instructions on what services were to be provided (*id.* at 102), and Baluch testified that the rooms to be cleaned were divided equally among the housekeepers working on any given day. Baluch Dep., Ex. F, at 212. Although plaintiff claimed that she was assigned more rooms to clean, she did not know if all housekeepers got the same number of rooms, she did not know if she was assigned more rooms, and she could not identify any housekeeper who worked less than she did. Pl.

Dep., Ex H, at 102-104, 109. Daily room assignment sheets produced by defendants also indicate that plaintiff and other housekeepers cleaned approximately the same number of rooms. *See* Assignment Sheets, Ex. O; Cohen Aff., ¶ 51. Records produced by defendants also refute plaintiff's claim that her hours were unfairly reduced in January 2007, and she does not deny that all employees' hours were reduced in the winter when business decreased, and that, as one of the most senior employees, her hours were reduced only after the hours of most of the other workers were reduced. Pl. Dep., Ex. H, at 119, 150; Baluch Dep., Ex. F, at 129, 139-140.

In view of the above, plaintiff's claims of disparate treatment with respect to wages, vacation and sick leave, work assignments and reduction in hours, cannot be sustained. The court, therefore, turns to plaintiff's claim that her employment was unlawfully terminated based on her national origin.

Defendants contend that they terminated plaintiff's employment on July 26, 2007, because her employment authorization card expired on that date, and she was no longer qualified to work. Relying on the Immigration Reform and Control Act of 1986 (IRCA) (8 USC § 1324a), defendants argue that they were required by law to discharge plaintiff upon discovery of her unauthorized status, and would be subject to criminal penalties if they did not. *See* Memorandum of Law in Support of Defendants' Motion, at

13.

In 1986, "Congress enacted IRCA, a comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v National Labor Relations Bd.*, 535 US 137, 147 (2002); 8 USC § 1324a. Section 1324a (a) (1) requires employers to verify the immigration status of prospective employees and makes it unlawful for an employer to knowingly hire an unauthorized worker. Section 1324a (a) (2) makes it "unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." Under 8 USC § 1324a (e) (4) (A), if an employer is found, after notice and an opportunity for a hearing, to have violated § 1324a (a), it is subject to civil fines. Under 8 USC § 1324a (f) (1), criminal penalties may be imposed if an employer engages in a pattern or practice of violations.

Plaintiff does not dispute that she was required to have a work authorization card to continue being lawfully employed, that her work authorization card expired on July 26, 2007, and that she did not receive a new card until September or October 2007. As defendants have presented evidence of a nondiscriminatory reason for its decision to discharge plaintiff, the court, in light of *Bennett*, proceeds to the "ultimate" question of whether,

considering all of the evidence and drawing all reasonable inferences in plaintiff's favor, there are triable issues of fact as to whether discrimination played any part in defendants' decision to terminate plaintiff's employment. *See Furfero*, 94 AD3d at 697; *Bennett*, 92 AD3d at 45; *Attard*, 451 Fed Appx at 23.

Plaintiff argues that defendants' stated reason for terminating her employment was a pretext for discrimination based on her Polish national origin and was part of an effort to get rid of all Polish employees, as demonstrated by the termination of almost all Polish employees. She also asserts that, because she had begun the process of renewing her green card, it was legal for her to continue to work, and claims that other, non-Polish employees were permitted to work without valid authorization cards.

Plaintiff identifies five employees or former employees who, she attests, were allowed to work at the hotel without valid working papers: "Digna," "Mercy," Moran Ruben, Florence Amoaka, and Ahmed Salfar. Pl. Aff. in Opp., ¶ 16. Defendants produced evidence, not disputed by plaintiff, to show that Digna and Ahmed Salfar had permanent resident cards and, at all relevant times, were authorized to work at the hotel. *See* Permanent Resident Cards, Exs. A, D to Cohen Reply Aff. The employment status of Mercy, identified by defendants as Araliza Valentin, is less clear, and there is conflicting testimony about whether she was

authorized to work. Plaintiff testified that Mercy was working without papers (Pl. Dep., Ex. H, at 219-220), and Baluch testified that he fired Mercy in April 2007 because she did not have authorization to work. Baluch Dep., Ex. F, at 209-210. Defendants produce a copy of a permanent resident card for Mercy, however, and submit an affidavit of Iris Peralta, a housekeeper employed at the hotel since 2005, who attests that Mercy had valid working papers. *See* Permanent Resident Card, Ex. B to Cohen Reply Aff.; Peralta Aff., Ex. C to Cohen Reply Aff. Defendants' counsel also asserts that Mercy had a permanent resident card, and he claims that Baluch fired her because it was discovered that the card did not belong to her, although that was not Baluch's testimony. Cohen Reply Aff., ¶ 13 n 1; *see* Baluch Dep., Ex. F, at 209-210.

As to the other two employees identified by plaintiff, Moran Ruben (Ruben) and Florence Amoaka (Amoaka), defendants submit only their attorney's affirmation stating that they were no longer employed at the hotel when Baluch became manager, and that Baluch had nothing to do with their employment or termination. Cohen Reply Aff., ¶ 16. Notably, Baluch does not submit an affidavit to that effect, and defendants otherwise provide no evidence related to the employment or termination of Ruben and Amoaka. Even if they worked at the hotel prior to Baluch's employment as manager, absent evidence showing when they were

employed, whether they had valid work authorization cards, and the reasons for their termination, defendants have not eliminated material issues of fact as to whether that the two were permitted to work without authorization cards.

Plaintiff also testified that, between 2001 and 2006, three Polish employees, identified as Gregor Szostak, Jerry Karmilowicz, and Bogdan Chakzynski, were fired for unknown reasons. Pl. Aff. in Opp., ¶ 7; Pl. Dep., Ex. H, at 178-1820. At the time that her employment ended, she testified, there were only two Polish employees, including co-plaintiff Janusz Purzynski (*id.* at 178); both are no longer employed by defendants, and plaintiff submits that Purzynski was forced to resign when his hours were reduced. Pl. Aff. in Opp., ¶ 10. While defendants assert that the terminations occurred prior to Baluch becoming manager, they submit no evidence addressing the reasons for terminating the Polish employees, or whether any Polish employees remain.

Plaintiff further testified that she was replaced by a Muslim housekeeper, Zarina (*id.*; Pl. Dep. Ex. H, at 185), and that she sought reinstatement in October 2007, and was refused, although other housekeepers had been hired. Pl. Aff. in Opp., ¶ 19; Pl. Dep., Ex. H, at 227-228, 244-245. While Baluch testified that no one was hired after October 2007, because the hotel was being shut down (Baluch Dep., Ex. F, at 141, 154), he admitted

that he promoted Zarina to full-time status after plaintiff left, and that he hired a new housekeeper, Jorden. *Id.* at 91-92, 93-94. Work schedules submitted by defendants also reflect that Jorden was hired in September 2007, and that another new employee, Nolasco, was hired in October 2007, around the same time that, as defendants acknowledged, plaintiff could have been rehired. *See* Work Schedules (dated September 17, 2007 and following), Ex. T; Email dated October 24, 2007, Ex. X. Plaintiff attests, moreover, that two other new employees, Maria and Marlene, were hired in September 2008. Pl. Aff. in Opp., ¶ 44; *see* Work Schedules, Ex. C to Pl. Aff. In reply, defendants' counsel asserts that Maria and Marlene were interns, as indicated on the schedules, and were not paid (Cohen Reply Aff., ¶¶ 19-20), although his assertions, again, are not based on personal knowledge or supported by admissible evidence.

There is no dispute that during the more than 12 years that plaintiff was employed at the hotel, she was authorized to work. Plaintiff testified that she renewed her work authorization card each year, and, even when receipt of the renewal card was delayed, she continued to work. Pl. Dep., Ex H, at 191-192, 195-197, 237. Plaintiff also testified that she applied for a replacement work authorization card in February or March 2007, more than three months before the expiration date of her 2006-

2007 card (Pl. Dep., Ex. H, at 332[3]), and that the delay in receiving a new card was not caused by her, but was the result of procedural issues at the immigration office. *Id.* Nonetheless, according to defendants, because she could not provide a current work authorization card on July 26, 2007, IRCA required them to immediately terminate her employment.

"The primary purpose of IRCA was to make it more difficult to employ undocumented workers and to punish the employers who offer jobs to these workers." *National Labor Relations Bd. v A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F3d 50, 55 (2d Cir 1997); *see Balbuena v IDR Realty LLC*, 6 NY3d 338, 353 (2006); *Matter of Amoah v Mallah Mgt., LLC*, 57 AD3d 29, 32-33 (3d Dept 2008). Under IRCA, employers, before hiring an immigrant, must verify that the prospective worker has documentation, issued by federal immigration authorities, showing his or her eligibility to work. *See* 8 USC § 1324a (a) (1); *Balbuena*, 6 NY3d at 353. An employer who knowingly hires an undocumented worker or "unknowingly hires an illegal alien but subsequently learns that an alien is not authorized to work and does not immediately terminate the employment relationship" may be subject to civil fines or criminal penalties. *Id.* at 353-354; *see* 8 USC § 1324a

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[3]The transcript of plaintiff's March 20, 2013 deposition, as originally submitted with defendants' moving papers, was missing half of the pages. At the court's request, counsel for defendants submitted a copy of the complete transcript.

(a).

This is not a case, however, where the employer hired an undocumented worker, or subsequently discovered that the worker never had valid working papers. Defendants do not claim that plaintiff was not authorized to work when they hired her in 1995, or at any time prior to July 26, 2007, and they do not deny that plaintiff's application for renewal of her work authorization card was pending when she was fired. Plaintiff, in fact, received a renewal card in September or October 2007, and defendants recognized at that time that she was again eligible for employment.

IRCA regulations require a decision on a work authorization application to be made within 90 days of receipt of the application, or an interim work authorization will be granted to the applicant for a period up to 240 days. 8 CFR 274a.13. IRCA also provides, as a good faith defense to an employer, that "a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement." 8 USC § 1324a (b)(6). Moreover, pursuant to IRCA regulations, enforcement proceedings are begun once a complaint is filed against the employer, and only complaints with "a reasonable probability of validity" are investigated. 8 CFR 274a.9 (a) and (b).

Defendants do not claim that any complaint was made against them regarding plaintiff, and do not allege that they were subject to any actual penalties. Defendants gave plaintiff no warning that her termination was imminent, other than a letter dated July 23, 2007 (Ex. Q), which plaintiff testified she did not receive until July 25, 2007 (Pl. Dep., Ex. H, at 255-256), the day before she was fired. Further, they gave plaintiff no more than three days to produce a current work authorization card, even though she had a history of authorization, a satisfactory work record, and a long tenure at the hotel. Pursuant to the CBA, plaintiff was eligible for six weeks leave and, although she did not request such a leave in writing, there is a dispute about whether the Union contacted defendants to request one, and defendants acknowledge that she would have been eligible for a leave. Baluch Dep., Ex. F, at 211-212; Pl. Dep., Ex. H, at 229.

Under the circumstances here, it is not clear, and defendants submit no authority to support finding, that they would have been subject to penalties or prosecution for continuing plaintiff's employment and giving her a reasonable amount of time to complete the renewal process and produce a valid card. *See generally NLRB v A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F3d at 57 (in retaliatory discharge case under NLRA, undocumented workers ordered reinstated on condition workers

provide authorization documents "within a reasonable time"). Nor would it appear to contravene the purpose and policy of IRCA - to deter the hiring of illegal immigrants - to retain plaintiff during the renewal process, considering that she had repeatedly renewed her work authorization card for years, and did obtain a renewal of her work authorization within a reasonable time.

Courts have long recognized that "discrimination is rarely so obvious or its practices so overt that recognition of it is instant and conclusive, it being accomplished usually by devious and subtle means." *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 183 (1978); *see Ferrante*, 90 NY2d at 631; *Bennett*, 92 AD3d at 37; *Sogg v American Airlines, Inc.*, 193 AD2d 153, 160 (1st Dept 1993). Consequently, in view of the fundamental public policy to eliminate and prevent discrimination in employment, and as now has been expressly stated with respect to claims under the NYCHRL, where a plaintiff puts forth "some evidence that at least one of the reasons proferred by defendant is false, misleading or incomplete, a host of determinations properly made only by a jury come into play." *Bennett*, 92 AD3d at 43.

Thus, even if no single piece of evidence examined alone would warrant denial of defendants' motion, all of the evidence taken together, and viewed in the light most favorable to plaintiff, raises sufficient issues of fact concerning

defendants' asserted reason for terminating plaintiff's employment to allow this case to go forward. Evidence presented by defendants fails to resolve such questions as whether other employees were permitted to work without authorization, whether plaintiff's position was filled, even when she was eligible to work, the basis for terminating other Polish employees, and whether plaintiff's inability to produce a renewal card was the real reason for her termination. Accordingly, defendants are not entitled to summary judgment dismissing plaintiff's claim for unlawful termination.

To the extent that defendants argue that plaintiff's discrimination claims are preempted by IRCA, that argument is unavailing. IRCA expressly preempts state and local laws "imposing civil or criminal sanctions . . . upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a (h) (2). The statute is silent, however, as to its preemptive effect on any other state or local laws, and "[t]he plain language of section 1324a (h) (2) appears directed at laws that impose fines for hiring undocumented aliens." *Balbuena* 6 NY3d at 357; *see Pineda v Kel-Tech Constr., Inc.*, 15 Misc 3d 176, 186 (Sup Ct, NY County 2007). Defendants do not argue that the state and local human rights laws impose civil or criminal sanctions upon those who hire unauthorized immigrants.

Moreover, IRCA "does not reduce the legal protections and remedies for undocumented workers under other laws" (*NLRB v A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F3d at 56), and it is not intended "'to undermine or diminish in any way labor protections in existing law.'" *Matter of Amoah*, 57 AD3d at 32-33 (citation omitted). New York courts have found, for example, that claims brought by undocumented immigrants, in the context of worker protections under state labor laws, as well as in the context of tenant protections under rent regulation laws, are not preempted by IRCA. *See Balbuena*, 6 NY3d at 358-359, 363 (IRCA does not preempt undocumented worker's personal injury claim under state Labor Law); *Matter of Amoah*, 57 AD3d at 30 (undocumented worker's claim for wages under Workers' Compensation Law not preempted by IRCA); *1504 Assoc., L.P. v Westcott*, 41 Misc 3d 6 (App Term, 1st Dept 2013) (undocumented status not a ground for denying tenant succession rights); *Recalde v Bae Cleaners, Inc.*, 20 Misc 3d 827 (Sup Ct, NY County 2008) (refusal to offer tenant renewal lease based on "questionable immigration status" violates NYCHRL); *Gomez v F & T Intl. (Flushing, N. Y.) LLC*, 16 Misc 3d 867 (Sup Ct, NY County 2007) (undocumented worker injured as result of Labor Law violations not precluded from claiming lost wages); *compare Hoffman Plastic Compounds Inc. v NLRB*, 535 US 137 (undocumented worker who provided fraudulent papers in violation of federal law

could not be awarded back pay for work performed as a result of an employer's unfair labor practice; distinguished by *Balbuena* and *Matter of Amoah*).

The Court of Appeals has observed that "[t]he presumption against preemption is especially strong with regard to laws that effect the states' historic police powers over occupational health and safety issues." *Balbuena*, 6 NY3d at 356. Similarly, the human rights laws are "deemed an exercise of the police power of the state" (Executive Law § 290 [2]) "to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life," and, to that end, to "eliminate and prevent discrimination from playing any role in actions relating to employment." *See* Executive Law § 290; Administrative code § 8-101. Just as "there is no conflict between IRCA and state laws requiring maintenance of a safe workplace" (*Matter of Amoah*, 57 AD3d at 34), there is no conflict between IRCA and state and local laws requiring a discrimination-free workplace. *See generally Recalde*, 20 Misc 3d at 833 (NYCHRL intended to prevent aliens from being treated unfairly in housing, employment and other areas of life).

Defendants' argument that plaintiff's discrimination claims must be arbitrated is without merit. First, issues exist as to whether those claims fall within the scope of the CBA's arbitration provision (*but see Conde v Yeshiva Univ.*, 16 AD3d

185, 186 [1st Dept 2005] [employees not obligated to arbitrate employment discrimination claim where CBA does not "clearly and unmistakably waive their statutory right to a judicial forum"]; *compare McClellan v Majestic Tenants Corp.*, 68 AD3d 574 [1st Dept 2009] [CBA contained "clear and unmistakable" waiver]),[4] "[l]ike contract rights generally, a right to arbitration may be modified, waived or abandoned." *Sherrill v Grayco Builders, Inc.*, 64 NY2d 261, 272 (1985), citing *Matter of City of Yonkers v Cassidy*, 44 NY2d 784, 785 (1978); *Matter of Zimmerman v Cohen*, 236 NY 15, 19 (1923). Moreover, "a litigant may not compel arbitration when its use of the courts is 'clearly inconsistent with [its] later claim that the parties were obligated to settle their differences by arbitration.'" *Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66 (2007), quoting *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 372 (2005).

"[W]here the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the

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[4]As defendants admit, the CBA in effect at the time of plaintiff's termination had a broad grievance arbitration clause, which does not expressly include discrimination claims. *See* Memorandum of Law in Support of Defendants' Motion, at 7; *compare Johnson v Tishman Speyer Props., L.P.*, 2009 WL 3364038, 2009 US Dist LEXIS 96464 (SD NY 2009) (CBA expressly provided discrimination claims were subject to arbitration); *Rodriguez v Four Seasons Hotels LTD*, 2009 WL 2001328, 2009 US Dist LEXIS 59683 (SD NY 2009) (employment contract mandated arbitration of discrimination claims).

arbitral forum is satisfactory." *De Sapio v Kohlmeyer*, 35 NY2d 402, 405 (1974). Parties cannot, for example, draw on such advantages of the judicial process as pretrial disclosure not generally available in arbitration, and then also seek "the benefits of arbitration, including freedom from disclosure in accordance with the CPLR, from strict application of substantive principles of law and evidentiary rules, and from judicial review for errors of law and fact." *Sherrill*, 64 NY2d at 273-274. Further, "contesting the merits through the judicial process is an affirmative acceptance of the judicial forum and waives any right to [arbitration]." *De Sapio*, 35 NY2d at 405.

Here, defendants' full participation in this litigation for more than six years, including extensive discovery and a motion seeking a determination of the merits, demonstrates a preference for the judicial forum "clearly inconsistent" with their claim that the parties now must go to arbitration. *See Flores*, 4 NY3d at 372 (electing to participate in litigation for 16 months through discovery and filing of note of issue waived right to arbitration); *Sherrill*, 64 NY2d at 273 ("singly pursuing" litigation, including extensive discovery, over extended period waived right to arbitrate); *De Sapio*, 35 NY2d at 406 (use of discovery procedures shows affirmative acceptance of judicial forum); *Masson v Wiggins & Masson, LLP*, 110 AD3d 1402 (3d Dept 2013) (even where arbitration asserted as affirmative defense,

participation in litigation and receipt of benefits of discovery waived right to arbitration); *Accessory Corp. v Capco Wai Shing*, 39 AD3d 344, 345 (1st Dept 2007) (participation in discovery waived right to arbitrate).

Turning to plaintiff's third cause of action for fraud, that claim is dismissed. Her fraud claim is based solely on an allegation that defendants falsely reported to the unemployment office of the New York State Department of Labor that she had worked for them for only a short period of time, and that this resulted in the denial of unemployment benefits to her. Complaint, ¶¶ 65-67. At her deposition, however, plaintiff admitted that the reason for denial of unemployment benefits that was given to her in a notice from the New York State Department of Labor was that, at the time that she applied, she was not authorized to work. Pl. Dep., Ex. H, at 248-251; *see* Notice of Determination to Claimant, Ex. BB. In correspondence asking the Department of Labor to review her case, and challenging the denial of benefits, plaintiff also acknowledged that the denial was based on the Department of Labor's determination that she was not legally available to work. *See* Letter dated Sept. 20, 2007, Ex. B to Beckwith Aff. in Opp. Plaintiff further testified that "after a while" the problem was "fixed," and she began collecting benefits. Pl. Dep., Ex. H, at 251; *see* Unemployment Insurance documents, Ex. B to Beckwith Aff. in Opp.

Accordingly, it is

ORDERED that defendants' motion is granted only to the extent that the third cause of action for fraud is dismissed, and the motion otherwise is denied; and it is further

ORDERED that the remaining causes of action are severed and shall continue; and it is further

ORDERED the parties shall forthwith proceed to mediation.

Dated: January 27, 2014 ENTER:

J.S.C.