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C

Rivera v. Ndola Pharmacy Corp.  
E.D.N.Y.,2007.

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

Siew Lian RIVERA a/k/a/ Joanne Rivera,  
Plaintiff,

v.

NDOLA PHARMACY CORP., Ndola  
Holding LLC, Khandubhai Patel, Natvar  
Patel, Madhusudan Patel, and Abdoul  
Hameed, Defendants.

No. 06-CV-2837 (NGG)(RER).

June 29, 2007.

**Background:** Employee brought action alleging violations of Fair Labor Standards Act (FLSA), New York Labor Law, New York State Human Rights Law (NYSHRL), and New York City Administrative Code, as well as common law claims for battery, intentional infliction of emotional distress, negligent retention and supervision of supervisor, and negligent infliction of emotional distress. Defendants moved for partial summary judgment on FLSA and Labor Law overtime claims, to “remand” certain state law claims, to dismiss holding company as defendant, to amend answer to assert plaintiff’s lack of standing prior to filing of bankruptcy petition and for period between bankruptcy filing and plaintiff’s

release from bankruptcy.

**Holdings:** The District Court, Reyes, United States Magistrate Judge, held that:

(1) motion to “remand” state law claims would be treated as motion to dismiss for lack of subject matter jurisdiction;

(2) employee’s FLSA and Labor Law overtime claims survived summary judgment;

(3) court would exercise supplemental jurisdiction over state law claim for sexual harassment by individual who allegedly increased her wages as result of her agreement to accompany him to breakfast and lunch;

(4) court would decline to exercise supplemental jurisdiction over other state law claims, including claims of sexual harassment by two other individuals; and

(5) defendants’ motion to amend answer to assert employee’s lack of standing to raise claims for damages other than her overtime wages prior to date of filing of bankruptcy petition was futile.

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Motions granted in part and denied in part.

West Headnotes

**[1] Federal Courts 170B ⇌29.1**

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk29 Objections to Jurisdiction, Determination and Waiver

170Bk29.1 k. In General. Most Cited Cases

**Removal of Cases 334 ⇌107(.5)**

334 Removal of Cases

334VII Remand or Dismissal of Case

334k107 Proceedings for Remand and Review Thereof

334k107(.5) k. In General. Most Cited Cases

Motion to "remand" state law claims would be treated as motion to dismiss those claims for lack of subject matter jurisdiction, where claims were never removed from state court. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

**[2] Federal Civil Procedure 170A ⇌2544**

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)3 Proceedings

170Ak2542 Evidence

170Ak2544 k. Burden of

Proof. Most Cited Cases

Burden is on party moving for summary judgment to demonstrate the absence of a genuine issue of material fact. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

**[3] Federal Courts 170B ⇌30**

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk29 Objections to Jurisdiction, Determination and Waiver

170Bk30 k. Power and Duty of Court. Most Cited Cases

Case is properly dismissed for lack of subject matter jurisdiction when district court lacks statutory or constitutional power to adjudicate it. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

**[4] Federal Courts 170B ⇌34**

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk29 Objections to Jurisdiction, Determination and Waiver

170Bk34 k. Presumptions and Burden of Proof. Most Cited Cases

When determining motion to dismiss for lack of subject matter jurisdiction, court must take all facts alleged in complaint as true and draw all reasonable inferences in favor of plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

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**[5] Federal Courts 170B ⇌33**

170B Federal Courts

170BI Jurisdiction and Powers in  
General

170BI(A) In General

170Bk29 Objections to  
Jurisdiction, Determination and Waiver170Bk33 k. Affidavits and  
Evidence in General. Most Cited Cases

On motion to dismiss for lack of subject matter jurisdiction, district court may also consider evidence outside of the pleadings. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

**[6] Federal Courts 170B ⇌33**

170B Federal Courts

170BI Jurisdiction and Powers in  
General

170BI(A) In General

170Bk29 Objections to  
Jurisdiction, Determination and Waiver170Bk33 k. Affidavits and  
Evidence in General. Most Cited Cases**Federal Courts 170B ⇌34**

170B Federal Courts

170BI Jurisdiction and Powers in  
General

170BI(A) In General

170Bk29 Objections to  
Jurisdiction, Determination and Waiver170Bk34 k. Presumptions and  
Burden of Proof. Most Cited Cases

Plaintiff bears burden of proving that subject matter jurisdiction exists by a

preponderance of the evidence. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

**[7] Federal Courts 170B ⇌14.1**

170B Federal Courts

170BI Jurisdiction and Powers in  
General

170BI(A) In General

170Bk14 Jurisdiction of Entire  
Controversy; Pendent Jurisdiction170Bk14.1 k. In General.  
Most Cited Cases

“Supplemental jurisdiction” allows federal courts to hear and decide state-law claims along with federal-law claims when they are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. 28 U.S.C.A. § 1367.

**[8] Federal Courts 170B ⇌14.1**

170B Federal Courts

170BI Jurisdiction and Powers in  
General

170BI(A) In General

170Bk14 Jurisdiction of Entire  
Controversy; Pendent Jurisdiction170Bk14.1 k. In General.  
Most Cited Cases

Claims are part of the “same case or controversy” for supplemental jurisdiction purposes when both the state law claims and federal claims derive from a common nucleus of operative fact. 28 U.S.C.A. § 1367(a).

**[9] Federal Courts 170B ⇌14.1**

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## 170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction

170Bk14.1 k. In General.

## Most Cited Cases

Once a common nucleus of operative fact between federal and state claims is found, federal court's exercise of supplemental jurisdiction over state law claims, while not automatic, is a favored and normal course of action. 28 U.S.C.A. § 1367.

**[10] Federal Civil Procedure 170A↔  
851**

## 170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(E) Amendments

170Ak851 k. Form and Sufficiency of Amendment. Most Cited Cases

Leave to amend complaint should be denied when the amendment is futile because complaint could not withstand motion to dismiss for failure to state a claim. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

**[11] Federal Civil Procedure 170A↔  
851**

## 170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(E) Amendments

170Ak851 k. Form and Sufficiency of Amendment. Most Cited

## Cases

Court should deny leave to amend complaint only when it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.

**[12] Labor and Employment 231H↔  
2385(3)**

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)6 Actions

231Hk2383 Evidence

231Hk2385 Presumptions and Burden of Proof

231Hk2385(3) k.

Working Time. Most Cited Cases

Under the FLSA, employee bringing action for unpaid overtime compensation has burden of proving that he performed work for which he was not properly compensated. Fair Labor Standards Act of 1938, § 7(a)(1), 29 U.S.C.A. § 207(a)(1).

**[13] Labor and Employment 231H↔  
2387(6)**

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(B) Minimum Wages and Overtime Pay

231HXIII(B)6 Actions

231Hk2383 Evidence

231Hk2387 Weight and Sufficiency

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231Hk2387(6) k.

## Working Time. Most Cited Cases

When employer's records are inaccurate or inadequate, employee may meet burden of proving that he performed work for which he was not properly compensated if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show amount and extent of that work as a matter of just and reasonable inference; employee may meet this burden by relying solely on his or her recollection. Fair Labor Standards Act of 1938, §§ 7(a)(1), 11(c), 29 U.S.C.A. §§ 207(a)(1), 211(c); N.Y.McKinney's Labor Law §§ 196-a, 661 ; 12 NYCRR 142-2.2.

**[14] Labor and Employment 231H↔  
2387(6)**

## 231H Labor and Employment

## 231HXIII Wages and Hours

## 231HXIII(B) Minimum Wages and Overtime Pay

## 231HXIII(B)6 Actions

## 231Hk2383 Evidence

## 231Hk2387 Weight and Sufficiency

231Hk2387(6) k.

## Working Time. Most Cited Cases

Records submitted by employer in FLSA overtime action were insufficient evidence of employee's hours or wage rate because they only contained sampling of weeks throughout year, no records were provided for three years during which employee alleged she worked overtime, records were based on time sheets that contained only

employee's name and amount paid that week, and letters prepared during her employment list only general hours and weekly pay and thus were not evidence of actual hours worked; records were also insufficient because they contradicted employee's testimony as to hours worked. Fair Labor Standards Act of 1938, § 11(c), 29 U.S.C.A. § 211(c); N.Y.McKinney's Labor Law §§ 196-a, 661.

**[15] Labor and Employment 231H↔  
2387(6)**

## 231H Labor and Employment

## 231HXIII Wages and Hours

## 231HXIII(B) Minimum Wages and Overtime Pay

## 231HXIII(B)6 Actions

## 231Hk2383 Evidence

## 231Hk2387 Weight and Sufficiency

231Hk2387(6) k.

## Working Time. Most Cited Cases

Where employer's wage and hour records are inadequate, employee's estimates may constitute sufficient evidence in action for unpaid overtime, and employer cannot be heard to complain that damages lack exactness and precision of measurement that would be possible had it kept records. Fair Labor Standards Act of 1938, § 11(c), 29 U.S.C.A. § 211(c); N.Y.McKinney's Labor Law §§ 196-a, 661.

**[16] Federal Civil Procedure 170A↔  
2552**

## 170A Federal Civil Procedure

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## 170AXVII Judgment

## 170AXVII(C) Summary Judgment

## 170AXVII(C)3 Proceedings

170Ak2547 Hearing and  
Determination

170Ak2552 k. Ascertaining  
Existence of Fact Issue. Most Cited Cases  
While general rule is district courts may  
not assess witness's credibility at summary  
judgment stage, Second Circuit has  
recognized exception when plaintiff relies  
almost exclusively on her own testimony.

**[17] Federal Civil Procedure 170A↔  
2541**

## 170A Federal Civil Procedure

## 170AXVII Judgment

## 170AXVII(C) Summary Judgment

## 170AXVII(C)3 Proceedings

170Ak2541 k. Depositions.  
Most Cited Cases  
Though employee's past interactions with  
federal authorities brought into question  
her credibility with regard to whether she  
worked overtime on weekends, her  
admissions to having filed false income tax  
returns and having failed to report full  
amount of her income during previous  
bankruptcy proceedings were insufficient  
for her deposition testimony to be deemed  
not credible at summary judgment stage of  
FLSA proceeding for unpaid overtime.  
Fair Labor Standards Act of 1938, §  
7(a)(1), 29 U.S.C.A. § 207(a)(1).

**[18] Federal Civil Procedure 170A↔  
2498**

## 170A Federal Civil Procedure

## 170AXVII Judgment

## 170AXVII(C) Summary Judgment

## 170AXVII(C)2 Particular Cases

170Ak2497 Employees and  
Employment Discrimination, Actions  
Involving

170Ak2498 k. Fair Labor  
Standards Act Cases. Most Cited Cases  
Genuine issue of material fact, as to  
whether employee performed work for  
which she was inadequately compensated,  
precluded partial summary judgment for  
employer on her overtime claims under  
FLSA and New York law. Fair Labor  
Standards Act of 1938, § 7(a)(1), 29  
U.S.C.A. § 207(a)(1); 12 NYCRR 142-2.2.

**[19] Federal Courts 170B ↔14.1**

## 170B Federal Courts

170BI Jurisdiction and Powers in  
General

## 170BI(A) In General

170Bk14 Jurisdiction of Entire  
Controversy; Pendent Jurisdiction

170Bk14.1 k. In General.  
Most Cited Cases  
Although supplemental jurisdiction is  
discretionary, once claims constitute part  
of the same case or controversy, the  
exercise of supplemental jurisdiction is the  
preferred course of action unless there is a  
compelling reason not to. 28 U.S.C.A. §  
1367.

**[20] Federal Courts 170B ↔16**

## 170B Federal Courts

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170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction

170Bk16 k. Labor Relations. Most Cited Cases

In FLSA action for unpaid overtime compensation, district court would exercise supplemental jurisdiction over state law claim for sexual harassment by individual who allegedly increased her wages as result of her agreement to accompany him to breakfast and lunch and began sexually harassing her, in part during meetings, by repeatedly attempting to have sex with her; claim did not raise novel or complex issue of state law, nor had court dismissed all claims over which it had original jurisdiction, and sexual harassment claim was intricately connected to employee's FLSA overtime claim because it was directly linked to her allegations that her wages were \$500 per week. 28 U.S.C.A. § 1367; Fair Labor Standards Act of 1938, § 7(a)(1), 29 U.S.C.A. § 207(a)(1).

#### [21] Federal Courts 170B ⇌16

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction

170Bk16 k. Labor Relations. Most Cited Cases

Typically, supplemental jurisdiction is

appropriate for claims during employment relationship because those claims arise from the same underlying factual basis. 28 U.S.C.A. § 1367.

#### [22] Federal Courts 170B ⇌16

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction

170Bk16 k. Labor Relations. Most Cited Cases

In FLSA action for unpaid overtime compensation, district court would decline to exercise supplemental jurisdiction over state law claims for sexual harassment and retaliation by two individuals under New York State Human Rights Law (NYSHRL) and New York City Administrative Code, negligent retention and supervision of supervisor, intentional infliction of emotional distress, and battery; those claims primarily occurred after employee stopped working overtime and involved both different rights and underlying facts than employee's overtime claim, and employment relationship was insufficient to create a "common nucleus of operative fact" where it was the sole fact connecting overtime claim and remaining state law claims. 28 U.S.C.A. § 1367; Fair Labor Standards Act of 1938, § 7(a)(1), 29 U.S.C.A. § 207(a)(1).

#### [23] Bankruptcy 51 ⇌2553

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51 Bankruptcy

51V The Estate

51V(C) Property of Estate in General

51V(C)2 Particular Items and

Interests

51k2552 Rights of Action;  
Contract Rights Generally

51k2553 k. In General.

Most Cited Cases

**Bankruptcy 51 ⇌ 2558**

51 Bankruptcy

51V The Estate

51V(C) Property of Estate in General

51V(C)2 Particular Items and

Interests

51k2558 k. After-Acquired  
Property; Proceeds; Wages and Earnings.  
Most Cited Cases

In order to determine whether cause of action that accrues after petition has been filed but before bankruptcy proceeding terminates becomes property of bankruptcy estate, courts look to connection between cause of action and petitioner's prebankruptcy past; if cause of action is sufficiently rooted in prebankruptcy past and so little entangled with bankrupt's ability to make an unencumbered fresh start, it becomes property of the bankruptcy estate. 11 U.S.C.A. § 541(a).

**[24] Bankruptcy 51 ⇌ 2553**

51 Bankruptcy

51V The Estate

51V(C) Property of Estate in General

51V(C)2 Particular Items and

Interests

51k2552 Rights of Action;  
Contract Rights Generally

51k2553 k. In General.

Most Cited Cases

**Federal Civil Procedure 170A ⇌ 851**

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(E) Amendments

170Ak851 k. Form and  
Sufficiency of Amendment. Most Cited  
Cases

In FLSA action, motion to amend answer to assert employee's lack of standing to raise claims for damages other than her overtime wages prior to date of filing of bankruptcy petition was futile; employee's claims she performed overtime work were maintainable without any reference to her prebankruptcy past and thus were not sufficiently rooted therein to become property of the bankruptcy estate. 11 U.S.C.A. § 541(a); Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.; Fair Labor Standards Act of 1938, § 7(a)(1), 29 U.S.C.A. § 207(a)(1).

\*384 John A. **Beranbaum**, Kristen E. Finlon, **Beranbaum** Menken Ben-Asher & Bierman LLP, New York, NY, for Plaintiff.

Deborah A. Del Sordo, Ahmuty, Demers & McManus, Paul Thomas Shoemaker, Greenfield, Stein & Senior, LLP, Nadia Moussa, Lewis Brisboiss Bisgaard & Smith LLP, New York, NY, for Defendants.

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**\*385 OPINION**

REYES, United States Magistrate Judge.

Plaintiff Siew Lian Rivera (“plaintiff” or “Rivera”) brought this action alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 216(b) (“FLSA”), New York Labor Law, Articles 6 and 19 (“Labor Law”), New York State Human Rights Law, Executive Law §§ 290 *et seq.* (“Human Rights Law”), and the Administrative Code of the City of New York §§ 8-101 *et seq.* (“Administrative Code”), as well as asserting the following common law claims: battery, intentional infliction of emotional distress, negligent retention and supervision of a supervisor, and negligent infliction of emotional distress.

Before this Court is Ndola Pharmacy Corp.'s (“Ndola Pharmacy”), Ndola Holding LLC's (“Ndola Holding”), Khandubhai Patel's (“K.Patel”), Natvar Patel's (“N.Patel”), Madhusudan Patel's (“M.Patel”), and Abdoul Hameed's (“Hameed”) motion for partial summary judgment and to remand certain state law claims. Also before this Court is defendants Ndola Pharmacy's, Ndola Holding's, K. Patel's, and N. Patel's motion to amend the answer and, upon amendment, dismiss plaintiff's claims arising that arose prior to her discharge from bankruptcy, and to dismiss the complaint with respect to defendants Ndola Holding, K. Patel, and N. Patel. The parties have consented to have me decide these motions pursuant to 28 U.S.C. § 636(c)(1).

[1] For the reasons set forth below, defendants' motion for partial summary judgment is denied and the motion to “remand” is granted in part and denied in part.<sup>FN1</sup> The motion to amend the answer and dismiss plaintiff's claims prior to her discharge from bankruptcy is granted in part and denied in part. The motion to dismiss the claims against defendants Ndola Holding, K. Patel, and N. Patel is granted in part and denied in part.

FN1. Defendants curiously denominate their motion as one to remand; however, the Court cannot remand these claims because they were never removed from state court. Thus, the Court treats this motion as a motion to dismiss for lack of subject matter jurisdiction. For the reasons set forth below, the motion to dismiss is granted in part and denied in part.

*Facts*<sup>FN2</sup>

FN2. In support of their motions, defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel submitted a statement of undisputed facts, Statement of Facts Pursuant to Local Rule 56.1 (“Defs' 56.1 Stmt”), an affidavit by their attorney Deborah Del Sordo, Del Sordo Affidavit in Support of

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Defendants' Motion ("Del Sordo Aff."), a memorandum of law, Del Sordo Memorandum of Law ("Del Sordo Memo"), a reply affidavit, Del Sordo Reply Affidavit ("Del Sordo Reply Aff."), and a reply memorandum of law, Del Sordo Reply Memorandum of Law ("Del Sordo Reply Memo"). Defendants M. Patel and Hameed submitted an affidavit by their attorney Nadia L. Moussa, Moussa Affidavit in Support of Defendants' Motion ("Moussa Aff."), and a memorandum of law, Moussa Memorandum of Law ("Moussa Memo").

From 1999 until January 2006, plaintiff was employed by Ndola Pharmacy. Defs' 56.1 Stmt ¶ 1; Plaintiff's Response to Defendants' Rule 56.1 Statement of Undisputed Material Facts ("Pl's 56.1 Response") ¶ 1. Plaintiff was never employed by Ndola Holding, a limited liability company that was incorporated separately from Ndola Pharmacy and that files its taxes separately. Defs' 56.1 Stmt ¶¶ 3-5; Pl's 56.1 Response ¶¶ 3-5. Plaintiff's W-2 forms were issued solely by Ndola Pharmacy. Defs' 56.1 Stmt ¶ 6; Pl's 56.1 Response ¶ 6.

Plaintiff alleges that she regularly worked more than 40 hours a week during the entire period of her employment without\*386 receiving compensation for her overtime hours. Complaint ¶¶ 19-20. She alleges that at the time her employment ended, she made \$500 a

week. *Id.* ¶ 18. She further alleges that N. Patel increased her wages as a result of her agreement to accompany him to breakfast and lunch. *Id.* ¶ 25. According to plaintiff, N. Patel began sexually harassing her, in part during these meetings, by repeatedly attempting to have sex with her, hugging her against her will, and sending her gifts and cards. Complaint ¶¶ 26-31. Sometime in 2003, N. Patel discovered plaintiff had a boyfriend and discontinued his advances. *Id.* ¶ 32.

Plaintiff additionally alleges that Hameed made sexually suggestive statements to her, hugged her, and attempted to kiss her. Complaint ¶¶ 33-37. She alleges that when she rejected Hameed's advances, Hameed and another employee treated her with hostility and made false accusations to her employers in retaliation. *Id.* ¶¶ 38-40, 57, 68. Plaintiff also alleges M. Patel made sexually suggestive statements to her, touched her breast and butt, attempted to kiss her, and displayed his genitals to her. *Id.* ¶¶ 42-69. She alleges that N. Patel did not investigate any of the alleged incidents when she complained about the harassment, and that K. Patel threatened to fire her and prevented her from reporting the harassment to the police. *Id.* ¶¶ 51-56, 58, 68-71.

Discussion<sup>FN3</sup>

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FN3. Plaintiff does not object to the dismissal of Ndola Holding from the current suit; therefore, that motion is granted. Plaintiff's Reply Memorandum of Law ("Pl's Reply Memo") at 20. Because defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel concede that there remains a material issue of fact as to whether N. Patel and K. Patel are individually liable as employers for the purposes of plaintiff's FLSA and state overtime claims, the motion to dismiss these claims against N. Patel and K. Patel is denied. Del Sordo Reply Aff. ¶ 4(d).

## I. Relevant Legal Standards

### A. Summary Judgment

[2] A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden is on the moving party to demonstrate the absence of a genuine issue of material fact. *Am. Int'l Group, Inc. v. London Am. Int'l Corp.*, 664 F.2d 348, 351 (2d Cir.1981). In addition, the court must resolve all

ambiguities and draw all reasonable inferences in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If, however, the opposing party fails to make a showing of an essential element of its case for which it bears the burden of proof, summary judgment will be granted. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548; *Smith v. Half Hollow Hills Cent. Sch. Dist.*, 349 F.Supp.2d 521, 524 (E.D.N.Y.2004).

To overcome a motion for summary judgment, the opposing party must show that there is an issue of material fact in dispute. That is, the disputed fact must be one which "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 242, 106 S.Ct. 2505. If the opposing party does not set forth specific facts showing that there is a genuine issue for trial, summary judgment is appropriate. FED.R.CIV.P. 56(c).

### B. Motion to Dismiss for Lack of Subject Matter Jurisdiction

[3][4][5][6] "A case is properly dismissed for lack of subject matter jurisdiction under \*387 Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000); FED.R.CIV.P. 12(b)(1). When determining a motion to dismiss for lack of subject matter jurisdiction, "the

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court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff.” *Natural Res. Def. Council v. Johnson*, 461 F.3d 164, 171 (2d Cir.2006) (quoting *Sweet v. Sheahan*, 235 F.3d 80, 83 (2d Cir.2000)); see also *Mascoll v. Strumpf*, No. 05-CV-667, 2006 WL 2795175, at \*2-3 (E.D.N.Y. Sept. 26, 2006). The district court may also consider evidence outside of the pleadings. *Makarova*, 201 F.3d at 113. Plaintiff bears the burden of proving that subject matter exists by a preponderance of the evidence. *Id.*; see also *Mascoll*, 2006 WL 2795175, at \*3.

### C. Supplemental Jurisdiction

[7][8][9] Plaintiff alleges this court has jurisdiction over her state law claims pursuant to 28 U.S.C. § 1367. Complaint ¶ 4. “Supplemental jurisdiction allows federal courts to hear and decide state-law claims along with federal-law claims when they are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.” *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 387, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) (citation and internal quotation marks omitted); 28 U.S.C. § 1367(a). Claims are part of the same case or controversy when both the state law claims and federal claims “derive from a common nucleus of operative fact.” FN4 *Briarpatch*, 373 F.3d at 308 (citation and internal quotation marks omitted); *City of*

*Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997). Once a common nucleus is found, a federal court's exercise of supplemental jurisdiction, “while not automatic, is a favored and normal course of action.” *Promisel v. First American Artificial Flowers*, 943 F.2d 251, 254 (2d Cir.1991). However, the court has discretion to decline to exercise supplemental jurisdiction if “the claim raises a novel or complex issue of State law,” the state law claims “substantially predominates,” the district court has dismissed all claims over which it has original jurisdiction, or “in exceptional circumstances, there are other compelling reasons for declining jurisdiction.” 28 U.S.C. § 1367(c).

FN4. Plaintiff suggests that the Second Circuit now requires only “a loose factual connection between the claims.” Pl's Reply Memo at 10 (citing *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 213 (2d Cir.2004)). The language upon which plaintiff relies, however, was merely dicta, as the Court found that the claims met the “common nucleus of operative fact” test. *Ford Motor Credit Co.*, 358 F.3d at 214. Furthermore, later Second Circuit cases have still applied the “common nucleus of operative fact” test. See *Briarpatch Limited, L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 308 (2d Cir.2004).

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*D. Amendment of Pleadings*

[10][11] Leave to amend “shall be freely given when justice so requires.” FED.R.CIV.P. 15(a). However, leave to amend should be denied when the amendment is futile because it “could not withstand a motion to dismiss pursuant to FED.R.CIV.P. 12(b)(6).” *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir.2002). Thus, a court should deny leave only when “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Ricciuti v. N.Y.C. Transit Authority*, 941 F.2d 119, 123 (2d Cir.1991) (citing to *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

**\*388** II. *Plaintiff's FLSA And Labor Law Claims Survive Summary Judgment*

All defendants have moved for partial summary judgment on plaintiff's FLSA and Labor Law overtime claims. Defendants argue that there is no material issue of fact with regard to these claims because plaintiff has provided no evidence other than her deposition testimony to establish that she worked overtime.<sup>FN5</sup> Defendants contend that plaintiff's testimony is insufficient because she fails to mention specific dates on which she worked overtime. Defendants further argue that plaintiff's testimony is not credible because she admitted that she lied to federal agencies in the past. Specifically, plaintiff

testified that she filed false income tax returns and failed to report the full amount of her income during her previous bankruptcy proceedings. Plaintiff argues in opposition that because her employer failed to keep accurate records, her recollection of hours worked constitutes sufficient evidence of overtime violations. Plaintiff also argues that although she admitted lying to federal agencies in the past, her admission is insufficient to find her testimony not credible as a matter of law.

FN5. The FLSA provides that “[e]xcept as otherwise provided in this section, no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.” 29 U.S.C. § 207(a)(1) (2007). Similarly, the Labor Law provides that “[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in ... the Fair Labor Standards Act of 1938, as amended.” N.Y. COMP.CODES R. & REGS. tit. 12, § 142-2.2 (2007).

[12][13] Under the FLSA, an employee

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bringing an action for unpaid overtime compensation “has the burden of proving that he performed work for which he was not properly compensated.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). When the employer’s records are inaccurate or inadequate, the employee may meet this burden “if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” FN6 *Id.*; see also *Tho Dinh Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 31-32 (2d Cir.2002). Plaintiff may meet this burden by relying solely on his or her recollection. *Doo Nam Yang v. ACBL Corp.*, 427 F.Supp.2d 327, 335 (S.D.N.Y.2005).

FN6. The Labor Law incorporates a similar standard, stating “failure of an employer to keep adequate records ... shall not operate as a bar to filing of a complaint by an employee. In such a case the employer in violation shall bear the burden of proving that the complaining employee was paid wages, benefits, and wage supplements.” N.Y. LAB. LAW § 196-a (2007).

[14] The records submitted by defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel do not meet the requirements of federal and state law.

The FLSA provides that “[e]very employer subject to any provision of this chapter ... shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him...”29 U.S.C. § 211(c) (2007). Similarly, the Labor Law provides that “[e]very employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary...”N.Y. LAB. LAW § 661 (2007). \*389 Defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel submitted records compiled by N. Patel in preparation for his deposition, plaintiff’s W-2s, and letters prepared during plaintiff’s employment at her request. Del Sordo Aff., Exh. E, F, H; Del Sordo Reply Aff., Exh. B.

Defendants have not provided sufficient evidence of plaintiff’s hours or wage rate. The records compiled by N. Patel in preparation for his deposition are insufficient because they only contain a sampling of weeks throughout the year, and no records have been provided for 2002 through 2004, years during which plaintiff alleges she worked overtime. Del Sordo Reply Aff., Exh. B. The records N. Patel compiled were based on time sheets that contained only the employee’s name and amount paid that week. Del Sordo Aff., Exh. H. Thus, these records are insufficient evidence of the hours worked

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by plaintiff. In fact, N. Patel testified that the pharmacy did not keep records of the hours employees worked, and that he threw away the sheets of paper that the supervisors gave him each week containing the employees' hours. *Id.* Plaintiff's W-2s also do not provide evidence of her worked hours or her wage rate. Del Sordo Aff., Exh. F. Finally, the letters prepared during plaintiff's employment list only general hours and weekly pay. Del Sordo Aff., Exh. E. While these letters would possibly provide data for the calculation of plaintiff's hourly wage rate, they do not provide evidence of plaintiff's actual hours worked. *Id.* Finally, defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel allege that the cash register tapes provide sufficient documentation of plaintiff's hours, but these have not been provided to the court. Del Sordo Reply Aff. ¶ 13.

The records provided are also insufficient because they contradict N. Patel's testimony. During his deposition, N. Patel testified that plaintiff began working part-time in May 2003. Del Sordo Aff., Exh. H. However, plaintiff's W-2s do not reflect any decrease in her yearly gross income. Del Sordo Aff., Exh. E; *see also* Pl's Reply Memo at 26. Plaintiff testified that she became a part-time employee in June or July 2004, yet plaintiff's W-2s again do not reflect any change in yearly gross income. Del Sordo Aff., Exh. C, E; *see also* Pl's Reply Memo at 26. Finally, N. Patel testified that the hourly wage rate listed at the top of the

documents prepared for his deposition refers to plaintiff's net hourly wage rate and the letters prepared during plaintiff's employment refer to plaintiff's gross wages, but both contain the same figures. FN7 Del Sordo Aff., Exh. E, H; Del Sordo Reply Aff., Exh. B.

FN7. For example, in the year 2001, N. Patel's documents show plaintiff earning \$6 an hour in net pay, resulting in plaintiff receiving \$240 in net pay for the week of May 18, 2001, yet a letter prepared during plaintiff's employment dated May 1, 2001, stated that plaintiff was earning \$240 in gross pay at the time. Del Sordo Aff., Exh. E; Del Sordo Reply Aff., Exh. B.

[15] As defendants' records are inadequate, plaintiff's estimates may constitute sufficient evidence, and "the employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records." *Mt. Clemens Pottery Co.*, 328 U.S. at 688, 66 S.Ct. 1187; *see, e.g., Tho Dinh Tran*, 281 F.3d at 29, 31 (plaintiff's estimates of his work hours constituted sufficient evidence); *Reich v. Southern New England Telecommunications*, 121 F.3d 58, 67 (2d Cir.1997) (same); *Doo Nam Yang*, 427 F.Supp.2d at 333, 336 (same); *cf. Grochowski v. Phoenix Construction*, 318 F.3d 80, 88 (plaintiffs did not provide sufficient evidence where records\*390

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submitted did not provide a basis for determining both the hours and wages of plaintiffs). During her deposition, plaintiff testified that her normal hours were 9:00 a.m. to 5:00 p.m., Monday to Friday. Del Sordo Aff., Exh. C. Beginning in early 2000 until June or July 2004, plaintiff worked at least three times per week from 9:00 a.m. to 7:30 p.m. at N. Patel's request. *Id.* During the same period, plaintiff worked three Saturdays a month for six hours, and one Sunday a month for six hours. *Id.* Plaintiff claims she did not receive compensation for her overtime work. *Id.* At least one other employee, Daritza Peña, saw plaintiff working on two to three weekends per month during 2004 and did not recall observing plaintiff receive compensation for this work. Affirmation of Kristen E. Finlon in Opposition to Defendants' Motion for Dismissal and Summary Judgment ("Finlon Aff."), Exh. C ¶ 4, 7. <sup>FN8</sup> While defendants are correct that this does not establish that Rivera was working overtime, rather than making up lost hours, Del Sordo Reply Aff. ¶ 11, Peña's affidavit does support Rivera's testimony. Plaintiff has also provided sufficient evidence of her wages. During this time period, plaintiff testified she was paid \$500 a week. Del Sordo Aff., Exh. C; *see also* Finlon Aff., Exh. A ¶ 3.

FN8. Defendants argue that Peña's affidavit should not be considered because "courts should not consider affidavits of parties

executed for the exclusive purposes of creating an issue of fact to defeat motions for summary judgment." Del Sordo Reply Memo at 8 (citing *Mack v. United States*, 814 F.2d 120 (2d Cir.1987)); *see also* Del Sordo Reply Aff. ¶ 11. However, defendants misstate the holding of *Mack*. In *Mack*, the court refused to consider an affidavit submitted by a party where the affidavit directly contradicted the party's earlier testimony during his deposition, stating "[i]t is well settled in this circuit that a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment." *Mack*, 814 F.2d at 124 (citations omitted). In contrast, Peña is not a party, and as she has not been previously deposed. Therefore, her affidavit cannot contradict her prior deposition testimony. As such, the affidavit is considered by the court on this motion.

[16] Defendants also argue that plaintiff's testimony alone is insufficient because plaintiff is not a credible witness. While the general rule is that district courts may not assess a witness's credibility at the summary judgment stage, *e.g.*, *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505, the Second Circuit has recognized an exception when plaintiff relies almost exclusively on her own testimony. *See Jeffreys v. City of New York*, 426 F.3d 549,

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551 (2d Cir.2005). When a plaintiff does rely almost exclusively on her own testimony, the district court may dismiss the case if no reasonable jury would credit plaintiff's testimony. *Id.* (affirming summary judgment where the only evidence was plaintiff's testimony, which "was 'so replete with inconsistencies and improbabilities' that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in his complaint") (citing *Jeffreys v. Rossi*, 275 F.Supp.2d 463, 475 (S.D.N.Y.2003)); *see also Dove v. City of New York*, No. 03-CV-5052, 2007 WL 805786, at \*5-6 (E.D.N.Y. Mar. 15, 2007) (granting summary judgment where plaintiff's testimony revealed he had no personal knowledge of alleged conspiracy to assault him, was contradicted by hospital records, and provided contradictory descriptions of plaintiff's alleged injuries); *Ward v. Coughlin*, No. 93-CV-1250, 1996 WL 631747, at \*3 n. 6 (N.D.N.Y. Oct. 21, 1996) (granting summary judgment where the only evidence submitted by plaintiff was his own affidavit, which was "conclusory and speculative and [was] contradicted by much of the evidence in the record"); \*391 *Schmidt v. Tremmel*, No. 93 CIV. 8588, 1995 WL 6250, at \*3 (S.D.N.Y. Jan.6, 1995) (granting summary judgment where "no reasonable person would undertake the suspension of disbelief necessary to give credit to the allegations" made in the complaint).

Defendants claim that plaintiff is not a

credible witness because she lied to federal authorities in the past. Moussa Aff. ¶ 15. In particular, they point to plaintiff's admission that she filed false income tax returns while she worked at the pharmacy. Del Sordo Aff., Exh. C, F; *see also* Del Sordo Aff. ¶ 9, 12; Moussa Aff. ¶ 8; Del Sordo Reply Aff. ¶ 16. Plaintiff also admitted reporting a false income in her bankruptcy petition and on a worker's compensation record.<sup>FN9</sup> Del Sordo Aff., Exh. C, D, G; *see also* Del Sordo Aff. ¶ 7, 9, 13; Moussa Aff. ¶ 7, 10; Del Sordo Reply Aff. ¶ 16. Finally, defendants contend that the letters written during plaintiff's employment include letters in plaintiff's own handwriting that indicate she did not work overtime.<sup>FN10</sup> Del Sordo Aff., Exh. C, E; *see also* Del Sordo Aff. ¶ 10; Moussa Aff. ¶ 9; Del Sordo Reply Aff. ¶ 16.

FN9. Plaintiff's bankruptcy petition reported that she made \$440 a month. Del Sordo Aff., Exh. H. Plaintiff's worker's compensation record reported that she made \$240 a week. Del Sordo Aff., Exh. D.

FN10. Plaintiff cannot recall if she submitted these letters to Medicaid. Del Sordo Aff., Exh. C.

Additionally, defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel argue that plaintiff is not a credible witness because her testimony is implausible. Plaintiff claims to have

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taught piano lessons in 2004 when she also claimed to have worked overtime. Del Sordo Reply Aff. ¶ 14; Rivera Aff. ¶ 6. These defendants conclude that plaintiff was teaching piano lessons on the weekend, contrary to plaintiff's and Peña's testimony that plaintiff was working at Ndola Pharmacy on the weekend. Del Sordo Reply Aff. ¶ 14; *see* Del Sordo Aff., Exh. C; Finlon Aff., Exh. C ¶ 4. They also argue that plaintiff could not have worked until 7:30 p.m. three nights a week because her daughter was in an after-school program that ended at 5:30 p.m. Del Sordo Reply Aff. ¶ 15; *see* Finlon Aff., Exh. A ¶ 7, D.

[17] While defendants are correct that plaintiff's past interactions with federal authorities bring into question her credibility, they are not fatal to her claim at this stage. Although plaintiff admitted she lied about her hours and wages in the past, it does not follow that she must necessarily be lying about her hours and wages to the Court. In *Doo Nam Yang*, 427 F.Supp.2d at 334, which involved an FLSA overtime claim, the plaintiff was found to be a credible witness despite inconsistencies between his testimony regarding his hours and wages and his income taxes. *Id.* (stating "the Court believes that while Yang may have filed false tax returns, his testimony concerning his wages was truthful"). Similarly, in *Blake v. Race*, No. 01-CV-6954, 2007 WL 952063, (E.D.N.Y. Mar.29, 2007), the court refused to grant summary judgment despite significant evidence that the witness had

previously provided false testimony. *Id.* at \*1. Despite the evidence, including a conclusion by a district court judge in another proceeding in 2001 that the plaintiff's primary witness was "a witness who no longer cares about the truth or falsity of his testimony," the court stated that the credibility judgment should be made by the jury. *Id.* (internal citations omitted); *cf. Jeffreys v. City of New York*, 426 F.3d at 552 (affirming summary judgment on plaintiff's claim that he was beaten and thrown out of window by police officers because plaintiff was unable to \*392 provide any identifying features of officers that allegedly attacked him, could not recall the number of police officers present, and had confessed to jumping out of window on three separate occasions). Thus, I find that plaintiff's admissions are insufficient for her testimony to be deemed not credible at this stage of the proceeding. While defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel argue that plaintiff has "continuously changed her testimony as to critical material facts," Del Sordo Reply Aff. ¶ 16, they do not provide any information as to which facts plaintiff has changed or when plaintiff changed her testimony. As such, the determination of plaintiff's credibility should be left to the jury.

[18] With respect to the allegations that plaintiff's testimony is implausible, defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel's conclusions are but one way of interpreting the evidence. A reasonable jury could

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conclude that plaintiff taught piano lessons only on the days of the weekend when she was not working overtime. For example, on weekends when plaintiff worked at the pharmacy on Saturday, she may have taught piano lessons on Sunday. Alternatively, a reasonable jury could conclude that plaintiff taught piano lessons after her shifts ended on weekends. Furthermore, plaintiff explained that on the evenings she worked until 7:30 p.m. she would either pick up her daughter from the after-school program and take her daughter back to the store with her or she would arrange for someone else to pick her daughter up. Finlon Aff., Exh. A ¶ 8. Thus, plaintiff's statements are not inherently inconsistent, and her testimony cannot be considered not credible as a matter of law. Plaintiff has established that there is an issue of genuine fact in dispute, and therefore defendants' motion for partial summary judgment on plaintiff's FLSA and Labor Law overtime claims is denied.

### III. Defendants' Motion to Dismiss Is Granted in Part

All defendants have moved to dismiss plaintiff's state law claims alleging violations of the Human Rights Law, the Administrative Code, battery, intentional infliction of emotional distress, negligent retention and supervision of a supervisor, and negligent infliction of emotional distress for lack of subject matter

jurisdictions.<sup>FN11</sup> Defendants contend that the Court does not have supplemental jurisdiction over these state law claims because they do not share a common nucleus of facts with the federal overtime claim. Defendants argue that the only fact the claims share in common is that they occurred during plaintiff's employment at Ndola Pharmacy, and they contend this is insufficient. Defendants further argue that these state law claims and the federal overtime claim are separately maintainable. Plaintiff argues in opposition that the employment relationship is sufficient to create a common nucleus of facts. Plaintiff further argues that the alleged sexual harassment of N. Patel, Hameed, and M. Patel led to an overall hostile work environment. Finally, plaintiff contends that N. Patel's alleged sexual harassment arises from the same facts as her federal overtime claim because it is linked to her wage rate during the time period she alleges she was working overtime.

FN11. Defendants do not challenge the court's exercise of supplemental jurisdiction over plaintiff's state law overtime claims. Moreover, these claims clearly meet the "same case or controversy" requirement as they arise out of the same events as the FLSA overtime claims.

**\*393** A. *Plaintiff's Sexual Harassment Claim Against N. Patel*

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Plaintiff's allegations of sexual harassment by N. Patel, in violation of the Human Rights Law and the Administrative Code, clearly derive from the same "common nucleus of operative fact" as plaintiff's FLSA overtime claim. As discussed earlier, in order to recover for her overtime claim, plaintiff must prove her wages. Plaintiff alleges her wages were \$240 per week on the books and \$260 per week off the books. *Del Sordo Aff.*, Exh. C. She further alleges that N. Patel increased her wages as a result of her agreement to be his "friend" and accompany him to breakfast and lunch. *Id.*; Complaint ¶ 25; *see also* *Finlon Aff.*, Exh. A ¶ 3. According to plaintiff, N. Patel began sexually harassing her, in part during these meetings.<sup>FN12</sup> Complaint ¶¶ 26-31. Sometime in 2003, N. Patel discovered plaintiff had a boyfriend and discontinued his advances. *Id.* ¶ 32; *Finlon Aff.*, Exh. A ¶ 9. Plaintiff alleges N. Patel reduced her pay by \$100, in part because he refused her advances, and plaintiff became a part time employee. *Finlon Aff.*, Exh. A ¶ 10. Plaintiff's allegations of sexual harassment against N. Patel are closely related to her wages during her employment, and as such, arise from a "common nucleus of operative fact" as her FLSA overtime claim.

FN12. Plaintiff claims N. Patel repeatedly attempted to have sex with her, hugged her against her will, and sent her gifts and cards.

Complaint ¶¶ 26-31.

Defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel argue that plaintiff's allegations of sexual harassment are unrelated to her FLSA overtime claim because plaintiff cannot recover for the original act in 2000, when N. Patel initially increased plaintiff's pay. The statute of limitations on a claim of sexual harassment is three years; thus, plaintiff cannot recover for any alleged sexual harassment violations occurring prior to June 6, 2003. *Del Sordo Reply Aff.* ¶ 8, 10; *Del Sordo Reply Memo* at 4. Plaintiff, however, may be able to recover for related acts, as she has alleged a pattern of sexual harassment by N. Patel that did not end until sometime in 2003, and would be able to recover for any harassing acts occurring after June 6, 2003. Complaint ¶ 32; *Finlon Aff.*, Exh. A ¶ 9. Furthermore, plaintiff's claim of sexual harassment is relevant to the issue of plaintiff's wages because she alleges N. Patel decreased her wages after she refused him. *Finlon Aff.*, Exh. A ¶¶ 9-10.

[19][20] Although supplemental jurisdiction is discretionary, once claims constitute part of the same case or controversy, the exercise of supplemental jurisdiction is the preferred course of action unless there is a compelling reason not to. *See Promisel*, 943 F.2d at 254. There does not appear to be any reason why the Court should not exercise supplemental jurisdiction over plaintiff's sexual harassment claim as it relates to N. Patel. It does not raise a novel or complex

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issue of state law, nor has the Court dismissed all claims over which it has original jurisdiction. Plaintiff's sexual harassment claim is intricately connected to her FLSA overtime claim because it is directly linked to her allegations that her wages were \$500 per week. Therefore, defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel's motion to remand plaintiff's sexual harassment claim against N. Patel is denied.

*B. The Remaining State Law Claims Must Be Dismissed*

[21] Typically, supplemental jurisdiction is appropriate for claims during the employment relationship because those claims arise from the same underlying factual basis. *See, e.g., \*394 Treglia v. Town of Manlius*, 313 F.3d 713, 723 (2d Cir.2002) (exercise of supplemental jurisdiction was proper where plaintiff's state and federal claims arose "out of approximately the same set of events"); *Promisel*, 943 F.2d at 254 (exercising supplemental jurisdiction where plaintiff's federal ADEA claim and state law claims were based on plaintiff's termination). However, the only factual link between plaintiff's claims of sexual harassment by M. Patel and Hameed, unlawful retaliation, negligent retention and supervision of a supervisor, intentional infliction of emotional distress, and battery (collectively "plaintiff's remaining state law claims") and the FLSA overtime claim

is that the underlying events occurred during the course of plaintiff's employment by Ndola Pharmacy.

The Circuits are divided as to whether the employment relationship alone is sufficient to find a "common nucleus of operative fact" between an employee's FLSA claims and state law claims. *Lyon v. Whisman*, 45 F.3d 758 (3d Cir.1995) (employment relationship was insufficient); *cf. Prakash v. American Univ.*, 727 F.2d 1174 (D.C.Cir.1984) (employment relationship was sufficient). Although the Second Circuit has yet to address this issue, precedents suggest that the link is too tenuous in the instant case to provide a "common nucleus of operative fact." In *Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir.1990), the court found there was no "common nucleus of operative fact" where the federal claim raised "legal issues completely unrelated to those presented by the state" claim. *Id.* at 164; *see also Bu v. Benenson*, 181 F.Supp.2d 247, 254 (S.D.N.Y.2001) (claims were not "part of the same case or controversy" where state law claims "involve[d] different rights, different interests, and different underlying facts" than the federal law claims). Additionally, courts have held that there is no common nucleus of operative fact where the events underlying the federal claims occur at a different time than the events underlying the state law claims. *See, e.g., Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1033 (2d Cir.1980) (no common nucleus of fact where the events relevant to

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the federal claim occurred prior to the contract date but the events relevant to the state law claim occurred after); *Bray v. City of New York*, 356 F.Supp.2d 277 (S.D.N.Y.2004) (plaintiffs' status as bike ride participants did not render claims "part of the same case or controversy" because the federal claim involved events which occurred during the bike ride whereas the state law claim involved events which occurred before the bike ride).

Plaintiff's remaining state law claims primarily occurred after plaintiff stopped working overtime and involve both different rights and underlying facts than plaintiff's overtime claims. Plaintiff's remaining state law claims all arise from the alleged sexual harassment of M. Patel and Hameed. M. Patel's alleged sexual harassment did not begin until April 2005, Complaint ¶ 42, and Hameed's alleged sexual harassment occurred around July 2005. *Id.* ¶ 37. However, plaintiff acknowledged that she did not work overtime after June or July 2004. Pl's 56.1 Response ¶ 2. Thus, at least the majority of the events surrounding plaintiff's remaining state law claims occurred after plaintiff stopped working overtime.

Additionally, none of the events alleged in plaintiff's remaining state law claims are relevant to plaintiff's FLSA overtime claim. Plaintiff alleges that Hameed made sexually suggestive statements to her, hugged her, and attempted to kiss her. Complaint ¶¶ 33-37. She alleges that when she rejected

Hameed's advances, Hameed and another employee treated her with hostility and made false accusations \*395 to her employers in retaliation. *Id.* ¶¶ 38-40, 57, 68. Plaintiff also alleges M. Patel made sexually suggestive statements to her, touched her breast and butt, attempted to kiss her, and displayed his genitals to her. *Id.* ¶¶ 42-69. She alleges that N. Patel did not investigate any of the alleged incidents when she complained about the harassment, and that K. Patel threatened to fire her and prevented her from reporting the harassment to the police. *Id.* ¶¶ 51-56, 58, 68-71.

Plaintiff argues that the sexual harassment of M. Patel and Hameed contributed to the overall hostile environment of the pharmacy; however, plaintiff has not alleged that this hostile environment was related to her failure to receive overtime compensation or an increase or decrease in her wages.<sup>FN13</sup> Pl's Reply Memo at 12; *see, e.g., Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 705 (2d Cir.2000) (finding no "common nucleus of operative fact" where the common fact between the federal claim and the state law claims was a bank loan and the loan "was irrelevant to the federal claim"). Plaintiff further argues that the sexual harassment allegations against M. Patel are relevant to her FLSA overtime claim because M. Patel was purportedly responsible for reporting her hours. Pl's Reply Memo at 14; *see also* Del Sordo Aff., Exh. H. However, the alleged sexual harassment by M. Patel did

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not occur until after plaintiff stopped working overtime. See Complaint ¶ 42; Pl's 56.1 Response ¶ 2.

FN13. The sexual harassment allegations against M. Patel and Hameed are only related, if at all, to the sexual harassment allegations against N. Patel, a claim over which this court does not have original jurisdiction. Pl's Reply Memo at 12.

Plaintiff cites to the Second Circuit's holding in *Ford Motor Credit Co.*, 358 F.3d at 213-214, in support of her argument that the employment relationship satisfies the common nucleus test; however, that case is distinguishable. In *Ford Motor Credit Co.*, the Second Circuit found a "common nucleus of operative fact" between plaintiff's allegations of racial discrimination and Ford's counterclaims that plaintiffs were in default on their car loans. *Id.* The court found that all claims originated "from the Plaintiffs' decisions to purchase Ford cars." *Id.* at 214. Unlike the instant case, all claims could be traced to a single loan transaction between each individual plaintiff and Ford. Here, plaintiff's claims arise from many transactions occurring over several years and are related only because they occurred while plaintiff was an employee of Ndola Pharmacy.

[22] Plaintiff's employment relationship is insufficient to create a "

common nucleus of operative fact" where it is the sole fact connecting plaintiff's federal overtime claim and the remaining state law claims. As such, plaintiff's remaining state law claims do not form part of the same case or controversy as plaintiff's FLSA overtime claim; thus, the Court declines to exercise supplemental jurisdiction over these claims. Therefore, plaintiff's claims of sexual harassment by M. Patel and Hameed and retaliation under the Human Rights Law and the Administrative Code, negligent retention and supervision of a supervisor, intentional infliction of emotional distress, and battery are dismissed without prejudice.<sup>FN14</sup>

FN14. Plaintiff remains free, of course, to pursue these claims in another forum.

*C. Motion to Amend the Answer and Upon Amendment to Dismiss*<sup>FN15</sup>

FN15. All parties concede that plaintiff may not recover wages for overtime prior to the filing of the bankruptcy petition on November 14, 2000. 11 U.S.C. § 541(a)(6); Pl's Reply Memo at 6; Del Sordo Reply Aff. ¶ 4(b); Del Sordo Reply Memo at 2. Therefore, the motion to amend the answer and to dismiss plaintiff's claims prior to November 14, 2000, is granted. Defendants Ndola Pharmacy,

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Ndola Holding, K. Patel, and N. Patel also contend that the \$260 plaintiff received off the books was a friendly cash gift rather than wages, and thus should not be recoverable. Del Sordo Reply Aff. ¶¶ 4-5. However, plaintiff's wages is an issue of fact that must be resolved by the jury.

Defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel seek to \*396 amend their answer to assert an affirmative defense of lack of standing, and upon the amendment, to dismiss plaintiff's claims that arose prior to her discharge from bankruptcy.<sup>FN16</sup> Del Sordo Notice ¶ 1. Defendants contend that plaintiff may not recover punitive damages, liquidated damages, or attorney's fees prior to her discharge from bankruptcy on March 14, 2001. Del Sordo Reply Aff. ¶ 4(b). The motion to amend the answer must be granted if these damages are a part of plaintiff's bankruptcy estate. All of the causes of actions that could be brought by plaintiff on the date of filing her petition became property of her bankruptcy estate upon the filing of the petition. 11 U.S.C. § 541(a)(1)<sup>FN17</sup>; see also *In re Costello*, 255 B.R. 110, 113 (Bkrcty.E.D.N.Y.2000). However, after the filing of the bankruptcy petition, "property of the estate is distinct from the property of the debtor." *In re Bell*, 225 F.3d 203, 215 (2nd Cir.2000). Property acquired by the estate after the commencement of the case becomes property of the estate. 11 U.S.C. § 541(a)(7); see also *Bell*, 225 F.3d at 215.

In contrast, property acquired by the debtor after the commencement of the case does not enter the estate. *Bell*, 225 F.3d at 215.

FN16. Defendants originally claimed plaintiff was discharged on April 11, 2001; however, defendants have conceded that the actual date was March 14, 2001. Del Sordo Notice of Motion ("Del Sordo Notice") ¶ 1; Del Sordo Reply Aff. ¶ 3(b).

FN17. 11 U.S.C. § 541(a) provides in relevant part that "[t]he commencement of a case under ... this title creates an estate. Such an estate is comprised of all the following property ... (1) All legal or equitable interests of the debtor in property *as of the commencement of the case.*" (Emphasis added.)

[23] In order to determine whether a cause of action that accrues after the petition has been filed but before the bankruptcy proceeding terminates becomes property of the estate, courts look to the connection between the cause of action and the petitioner's pre-bankruptcy past. If the cause of action "is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start," it becomes property of the bankruptcy estate. *In re Strada Design Associates, Inc.*, 326 B.R. 229, 236 (Bkrcty.S.D.N.Y.2005)

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(quoting *Segal v. Rochelle*, 382 U.S. 375, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966)); see also *Charts v. Nationwide Mut. Ins. Co.*, 300 B.R. 552 (D.Conn.2003); *In re Doemling*, 127 B.R. 954, 957 (W.D.Pa.1991); cf. *Tilley v. Anixter Inc.*, 332 B.R. 501, 507-508 (D.Conn.2005) (causes of action that accrue post-petition but prior to the termination of the bankruptcy proceeding become part of the bankruptcy proceeding); *Correll v. Equifax Check Services*, 234 B.R. 8, 10-11 (D.Conn.1997) (same).

[24] Plaintiff's overtime claims are not sufficiently rooted in her pre-bankruptcy past to become property of the bankruptcy estate.<sup>FN18</sup> Unlike other cases in which claims have been held to be rooted in the pre-bankruptcy past, plaintiff's allegations \*397 that she performed overtime work are maintainable without any reference to her pre-bankruptcy past. Although plaintiff will need to refer to some pre-petition events in order to prove her wages, specifically, the alleged increase in her pay due to her friendship with N. Patel, these events are not for these purposes related to plaintiff's allegations that she was not compensated for overtime work. See, e.g., *Charts*, 300 B.R. at 558 (causes of action arising from contract formed after filing of bankruptcy petition are not part of the bankruptcy estate); *Doemling*, 127 B.R. at 957 (causes of action arising from a car accident that occurred five months after the bankruptcy petition was filed are not part of the bankruptcy estate); *Cruz v. Montgomery*, 799 N.Y.S.2d 159

(N.Y.Sup.Ct.2004) (medical malpractice claims arising after the petition was filed are not part of the bankruptcy estate); *Lamanna v. Carrigan*, 196 Misc.2d 98, 762 N.Y.S.2d 233 (N.Y.City Civ.Ct.2003) (causes of action arising from a car accident that occurred one month after the bankruptcy petition was filed are not part of the bankruptcy estate); cf. *Strada*, 326 B.R. at 238 (holding post-petition claims of malpractice were rooted in the pre-bankruptcy past because the allegations of lack of due care related to the firm's pre-petition advice and the plaintiff's injury was suffered at the moment the petitions were filed). Thus, plaintiff's claims are not sufficiently rooted to her pre-bankruptcy past in order to make them property of the bankruptcy estate.

FN18. As defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel seek to amend the answer to include the affirmative defense of lack of standing with regards to plaintiff's FLSA and Labor Law overtime claims only, those are the sole claims addressed here.

Because plaintiff's overtime claims would not have been property of the bankruptcy estate, defendants Ndola Pharmacy, Ndola Holding, K. Patel, and N. Patel's motion to amend the answer to assert plaintiff's lack of standing to raise claims for damages other than her overtime wages prior to March 14, 2001 is futile.

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As such, defendants' motion to amend the answer to assert plaintiff's lack of standing prior to March 14, 2001 is denied.

November 14, 2000 and plaintiff's release from bankruptcy on March 14, 2001 is denied.

### *Conclusion*

For the reasons stated above, defendants' motion for partial summary judgment on plaintiff's FLSA and state law overtime claims is denied. Defendants' motion to "remand" plaintiff's state law claim of sexual harassment by N. Patel is denied. Since the Court declines to exercise supplemental jurisdiction over plaintiff's state law claims of sexual harassment by M. Patel and Hameed, unlawful retaliation, negligent retention and supervision of a supervisor, intentional infliction of emotional distress, and battery, those claims are dismissed without prejudice. Defendants Ndola Pharmacy's, Ndola Holding's, K. Patel's, and N. Patel's motion to dismiss Ndola Holding is granted. Defendants Ndola Pharmacy's, Ndola Holding's, K. Patel's, and N. Patel's motion to dismiss N. Patel and K. Patel is denied. Defendants Ndola Pharmacy's, Ndola Holding's, K. Patel's, and N. Patel's motion to amend the answer to assert plaintiff's lack of standing prior to the filing of plaintiff's bankruptcy petition on November 14, 2000 is granted. Finally, defendants Ndola Pharmacy's, Ndola Holding's, K. Patel's, and N. Patel's motion to amend the answer to assert plaintiff's lack of standing for the period between

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