

**Ore v New York Hotel Trades Council**

2017 NY Slip Op 31957(U)

September 7, 2017

Supreme Court, New York County

Docket Number: 153708/2016

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED**  
*Justice*

**PART 2**

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OLGA ORE, GREGORY ANDERSON, BARRY NYSENBAUM,  
KALLIOPE CHIONIS, DAVID WEITZMAN, ELVIRA YAKUBOVA,  
ASHOK PARIKH, MAGDA AYAC, and PAMELA DOWNES-  
COVINGTON,

**INDEX NO. 153708/2016**

**MOTION DATE \_\_\_\_\_**

Plaintiffs,

**MOTION SEQ. NO. 001**

- v -

THE NEW YORK HOTEL TRADES COUNCIL AND HOTEL  
ASSOCIATION OF NEW YORK CITY HEALTH CENTER, INC.,  
EDWARD POON, PASCALINE FONJI, and HANG PHAM,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 26, 27, 28, 29

were read on this application to/for Dismissal/Severance

**Upon the foregoing documents, it is  
ordered that the motion is **denied in all respects.****

In this action by plaintiffs Olga Ore, Gregory Anderson, Barry Nysenbaum, Kalliope Chionis, David Weitzman, Elvira Yakubova, Ashok Parikh, Magda Ayac, and Pamela Downes-Covington seeking recovery pursuant to the New York State Human Rights Law (“NYSHRL”) (section 296 of the New York State Executive Law) and the New York City Human Rights Law (“NYCHRL”) (section 8-107[1][a] of the Administrative Code of the City of New York), defendants The New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc., Edward Poon, Pascaline Fonji, and Hang Pham, in their official and individual

capacities, move, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint.<sup>1</sup> In the alternative, defendants move for severance of plaintiffs' claims on the ground that they do not share a common nucleus of fact. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **denied in all respects**.

### **FACTUAL AND PROCEDURAL BACKGROUND:**

The New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc. ("NYHTC") is a not-for-profit corporation. Doc. 1, at par. 13.<sup>2</sup> According to William Torres, Director of Human Resources for the New York Hotel Trades Council and Hotel Association of New York City Employee Benefit Funds, NYHTC operates four health centers in New York City which provide medical care for individuals employed in the New York City hotel industry and their families, each with its own pharmacy. Doc. 8, at par. 2. Plaintiffs were, at different times, employed at one or more of the health center pharmacies and were terminated for various infractions. Id., at par. 3.

Defendant Poon has been Director of Pharmacy Operations for the health centers since 2011. Id., at par. 4. He was hired as a Supervising Pharmacist in 2003, is 45 years old, was born in Aruba, and is of Asian national origin. Id., at par. 4.

Defendant Fonji was hired in 2013 as a Supervising Pharmacist in the Brooklyn Health Center Pharmacy. Id., at par. 5. She resigned in 2015 and relocated out of state. Id. She is 37, African-American, and of Cameroonian national origin. Id.

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<sup>1</sup> Pham, who was not served with process until after this motion was filed, joins in the instant application.

<sup>2</sup> Unless otherwise noted, all references are to the documents filed with NYSCEF in this matter.

Defendant Pham was hired in 2007 to work at the Harlem Health Center Pharmacy and became a Supervising Pharmacist in 2010. *Id.*, at par. 6. In 2013, she transferred to the Queens Health Center, where she worked until 2014, at which time she left the employ of the health center. *Id.* She is 42, Vietnamese, and of Asian national origin. *Id.*

During the normal course of business at the health centers, a termination recommendation (“TR”) was prepared by a manager and/or supervisor in situations where employees were terminated. Doc. 8, at par. 7. The TRs became a part of a terminated employee’s permanent employment record. *Id.*, at par. 7.

Plaintiff Olga Ore was terminated on August 12, 2015. Doc. 8, at par. 8; Doc. 9. The termination occurred because Ore prescribed the wrong drug to a patient, returned a drug to circulation in the pharmacy inventory after it was dispensed and returned by a patient, and altered pharmacy records. Doc. 9. Ore had been provided an earlier shift as a reasonable accommodation due to the fact she had multiple sclerosis (“MS”). Doc. 8., at par. 8. In April of 2015, Ore was on approved FMLA leave for a torn Achilles tendon and was terminated 7 days after she returned from leave. *Id.*

Plaintiff Anderson was terminated on August 12, 2015. Doc. 8, at par. 9.<sup>3</sup> Anderson had been given multiple warnings about his performance since 2012, including low productivity; attendance problems; failing to enter clinical interventions on the pharmacy’s computer system; failing to troubleshoot and/or contact the help desk when encountering technical issues with the pharmacy’s electronic prescribing system; failing to refrigerate medications; processing a prescription for the wrong pediatric identical twin (although this error was caught before the other twin took the medication); and failing to follow directions. Doc. 10.

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<sup>3</sup> This date appears to be incorrect since Anderson’s TR reflects that he was given a final written warning in October 2015. Doc. 10.

Plaintiff Nysenbaum was terminated on February 24, 2016 after four incidents demonstrating that his work was unsatisfactory. Doc. 8, at par. 10; Doc. 11. Nysenbaum's conduct twice resulted in delays in patient care; he misrepresented to the pharmacy management team the number of prescriptions which needed to be filled; and he failed to ensure that a patient had a proper Hepatitis C medication. Doc. 11.

Plaintiff Chionis was terminated February 24, 2016. Doc. 8, at par. 11; Doc. 12.<sup>4</sup> She was terminated because she "failed to fulfill [her] professional duties as [a] pharmacist in servicing [a] patient", leaving the patient without a proper Hepatitis C medication. Doc. 12. She admitted that she was given previous warnings for prescribing a medication to a family member and for submitting a prescription for a medical food. Doc. 2, at pars. 52-53.

Plaintiff Weitzman was terminated on September 6, 2013. Doc. 8, at par. 12; Doc. 13. He was terminated after two written warnings for leaving food in his work area, which violated the health center's policy and could have led to Department of Health violations. Doc. 13.

Plaintiff Yakubova was terminated on May 22, 2015. Doc. 8, at par. 13; Doc. 14. She was terminated for twice dispensing non-formulary medications to her spouse, thereby creating a conflict of interest as defined in her employee handbook; violating the section of the employee handbook entitled "Handling of Personal Transactions"; failing to use her professional judgment; and misappropriating company funds. Doc. 14.

Plaintiff Parikh was terminated on June 23, 2015. Doc. 8, at par. 14; Doc. 15. He was terminated due to poor productivity; failing to report accurate statistics; violating company protocol by supplying a patient with a vacation supply of medication, which a patient was obligated

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<sup>4</sup> Although the complaint refers to this plaintiff as "Kalliope Chionis," the TR describing why she was terminated refers to her as "Kalliope Kossaris." A Certificate of Marriage Registration submitted by defendants' attorney (Doc. 31) reflects that Chionis is plaintiff's married name.

to pay at cost; and typing a prescription into the health center pharmacy's system under the wrong patient's name. Doc. 15.

Plaintiff Ayac, a Supervising Pharmacist at the Brooklyn Health Center, was terminated on April 24, 2013. Doc. 8, at par. 15; Doc. 16. She was dismissed after two prior written warnings for unsatisfactory work performance. Doc. 16. Her termination occurred after she dispensed a generic Glaucoma medication to a patient who had previously experienced an allergic reaction to the same drug. Doc. 16.

Plaintiff Downes-Covington was terminated on June 12, 2014. Doc. 8, at par. 16; Doc. 17. She received two prior written warnings: for failing to properly follow protocols/policies: she failed to ensure that medications were properly stored and secured when the pharmacy closed and, on another occasion, failed to wear a surgical mask during flu season. Doc. 17. She was terminated for incorrectly dispensing an inhalation solution instead of the oral syrup form of the medication. Id. She also dispensed a prescription reading "take 1 tablet three times a day" despite the fact that the prescription directed that the patient "take 2 tablets three times a day." Id.

Two pharmacists of Chinese and Asian national origin, Janey Wang, 28, and Chang Cai, 26, were terminated by the health center in January and November of 2014, respectively. Doc. 8, at par. 17; Docs. 18-19. Wang was dismissed for prescribing the wrong drug. Doc. 18. Cai was dismissed for "[u]nsatisfactory [w]ork [p]erformance", "due to a series of violations in [e]mployee [c]onduct", including refusing to enter prescriptions; hostile behavior, including striking a co-worker; and "unauthorized use of funds/[health center] property]", specifically searching for "pharmacists jobs" on the company computer Doc. 19.

On May 3, 2016, plaintiffs filed a summons and complaint commencing the captioned action. Docs. 1-2. In the complaint, Ore, 46 when the complaint was filed, alleged, inter alia, that

she was hired by NYHTC as a registered pharmacist at the Midtown Health Center Pharmacy in 1996, that she opened the Queens Health Center Pharmacy in August of 1996 and worked there until December, 2001, when she returned to the Midtown Health Center as a staff pharmacist; that in 2003, she received an accommodation for her multiple sclerosis (“MS”) in the form of being assigned earlier shifts due to afternoon fatigue; that she went out on leave due to MS in 2014; that she returned from disability leave on January 19, 2015 and continued to receive earlier shifts; that on January 22, 2015 she was given a “final warning”;<sup>5</sup> that she was diagnosed with a torn Achilles’ tendon on April 13, 2015 and was temporarily unable to work; that she went on disability leave the following day; that while she was on disability leave, a fellow pharmacist advised her that Poon said, in effect, “[Ore] is always on disability during the busiest times of the year;” that she returned from her disability leave on August 5, 2015; and that she was terminated on August 12, 2015. Doc. 2, at pars. 16-28. Poon allegedly also told Ore’s co-worker, Yakubova, that he was “tired of [Ore] being on disability all the time.” Doc. 2, at par. 36. Ore claimed that “[o]ther younger, non-disabled/perceived disabled, and Chinese employees were not treated this way.” Id., at par. 28.

Yakubova, 53 at the time the complaint was filed, alleged that she was hired by NYHTC as a registered pharmacist at Queens Health Center. Doc. 2, at par. 29. She worked at the health centers in Queens, Brooklyn, and Midtown before being permanently assigned to the Queens Health Center. Id., at par. 30. On January 6, 2015, Poon and Fonji issued Yakubova a written warning for being late to work and low productivity and Poon told her “all my young pharmacists in the Harlem pharmacy are being more productive.” Id., at pars. 32-33. Beginning in January 2015, Yakubova was typically assigned less desirable late shifts and was not offered overtime, unlike younger and/or Chinese employees such as Crystal Wang (20’s, Chinese) and Natisha

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<sup>5</sup> The complaint does not specify what the “final warning” was for but does allege that she had never been given any prior warning.

Sharma (20's). Id., at par. 34. On March 30, 2015, Fonji allegedly issued a final written warning containing pretextual allegations not specified in the complaint. Id., at par. 35. On May 18, 2015, Poon investigated Yakubova's involvement in dispensing a medication and recommended that she be terminated. Id., at par. 37. Yakubova alleged that younger and Chinese employees were not treated this way. Id. Yakubova claimed that, on May 28, 2015, she was terminated due to a prescription she had written with Fonji's approval in 2014. Id., at par. 38. She asserted that the reason for her termination was pretextual and that younger and/or Chinese employees were not treated this way. Id., at par. 38. She further claimed that she was replaced by Ella Shalomov, who was in her early 30's. Id., at par. 39.

Chionis, 41 when this action was started, was hired by NYHTC in 1998 as a registered pharmacist at the Queens Health Center. Doc. 2, at par. 41. From June through November 2009, Chionis was Acting Supervisor Pharmacist at the Queens Health Center. Id., at par. 44. Although Poon was satisfied with Chionis' performance, after Fonji was hired, he assigned her to less desirable late shifts, although he promised it would only be once per week on Wednesdays. Id., at pars. 47-48. Eventually, however, he assigned Chionis to late shifts with more frequency. Id., at par. 51. On June 12, 2015, Chionis was given a final warning for submitting a prescription for "medical food" in December 2014. Id., at par. 52. The same day, she was issued a written warning for filling prescriptions for a family member. Id., at par. 53. She claimed that Chinese and/or younger pharmacists were not subject to such discipline. Id., at par. 53. Additionally, on June 2, 2015, Fonji told Anderson that he could no longer switch shifts with Chionis, although Chinese and/or younger pharmacists, such as Shalomov, were permitted to do so. Id., at par. 54.

Additionally, Chionis alleged that Chinese and/or younger employees did not receive warnings for committing similar offenses. Id., at par. 55. Specifically, she alleged that Shalomov

was not written up for being late, improperly submitting a non-medication for medication-based authorization, failing to attend a pharmacy meeting, and leaving the drop off window to the pharmacy open. Id., at par. 55. A pharmacist named Thomas Fattah, in his 20's, missed a pharmacy meeting and a Chinese pharmacist named Susan Lee left the pharmacy window open overnight and they were not disciplined. Id. Chionis "believed that at least one [representative of NYHTC] instructed Fonji to terminate older and/or non-Chinese employees. Id., at par. 57.

On March 2, 2016, Poon terminated Chionis. Supervising Pharmacist Biju Balakrishnan claimed that Chionis refused to fill a prescription for Harvoni, a Hepatitis C medication. Id., at par. 58.<sup>6</sup> Chionis alleged that, because Poon sent a January 19, 2016 email directing that any dispensing of Harvoni, Sovaldi or Daklinza had to be personally overseen by the Supervising Pharmacist, she could not have filled the prescription. Id., at par. 58.<sup>7</sup>

Gregory Anderson, 53 at the time the action was commenced, was hired as a "floater" pharmacist and was promoted to registered pharmacist at the Queens Health Center. Id., at par. 59. In March 2015, Poon reprimanded Anderson, in the presence of Fonji, for staying late to finish his work. Id., at par. 61. On March 27, 2015, Anderson received a written warning for failure to contact the administration prior to coming to work late. Id., at par. 62. However, Anderson alleged that he contacted Fonji before arriving late. Id. On September 25, 2015, Anderson received a final warning for failing "to enter clinical pharmacy intervention and prior authorizations into the Intranet base system." Id., at par. 63. On November 12, 2015, Anderson was terminated for "low productivity and other alleged wrongdoing that would not typically result in an employee's

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<sup>6</sup> Chionis claimed that "the actual medication Balakrishnan referred to was not Harvoni, but instead Solvadi and Daklinza", also Hepatitis medications. Id., at par. 58 and Par. 58, n. 6. Chionis did not deny that she refused to fill a prescription for one or both of these other Hepatitis medications.

<sup>7</sup> Chionis did not allege, however, that the email stated that the Supervising Pharmacist had to *personally* dispense these medications.

termination.” Id., at par. 64. He alleged that the allegations of wrongdoing were pretextual and that other Chinese and/or younger employees were not treated this way. Id. He claimed that he was replaced with a younger and/or Chinese employee. Id., at par. 65.

Weitzman, 50 at the time of the commencement of the action, was hired as a registered pharmacist at the Midtown Health Center and was immediately promoted to full time staff pharmacist there. Id., at par. 66. In July of 2003, Weitzman was asked to be the supervising pharmacist but he declined the offer. Id., at par. 67. In July of 2004, Weitzman was transferred to the Brooklyn Health Center. Id., at par. 69. In or about October, 2012, Sarina Jean-Louis, approximately 40 years old, was transferred to the Brooklyn Health Center. Id., at par. 70. In mid-January 2012, Brooklyn Health Center Administrator Daniel Cytryn, approximately 60 years old, was transferred to the Queens Health Center, and Jean-Louis became the new administrator. Id., at par. 71. In April 2013, Weitzman received a written warning from Poon for alleged productivity issues which, he claims, were pretextual. Id., at par. 73. His supervisor challenged the warning, but it was not withdrawn. Id., at par. 73. In July 2013, Weitzman received a negative annual performance review of 2 out of 5 from Poon. Id., at par. 74. In August 2013, Fonji issued Weitzman a written warning (for an unspecified act) which resulted in a three day suspension. Id., at par. 75. He maintained that the allegations of wrongdoing in the review and the warning were pretextual and that Chinese and/or younger employees were not treated this way. Id., at pars. 74-75. On September 9, 2013, Poon and Fonji terminated Weitzman because a hamburger was found at his work station while he was on vacation. Id., at par. 76. Weitzman denied leaving a hamburger at his work station and asserted that Chinese and/or younger employees were not treated this way. Id., at par. 76.

Barry Nysenbaum, 47 at the time the action was commenced, was hired by NYHTC as a registered pharmacist at the Queens Health Center. Id., at par. 77. In 2015, Nysenbaum received a poor annual review from Fonji. Id., at par. 79. Nysenbaum alleged that the allegations of wrongdoing in the annual review were pretextual. Id., at par. 79. On September 25, 2015, Nysenbaum received a final written warning for unsatisfactory work performance. Id., at par. 80. Nysenbaum claimed that the warning falsely alleged that he “failed to enter clinical pharmacy interventions and prior authorization requests into the database, left a ‘considerable’ amount of work’ behind for his colleagues, and had low pharmacist productivity.” Id., at par. 80. He claimed that the allegations of wrongdoing in the annual review and final warning were pretextual and that Chinese and/or younger employees were not treated this way and named certain younger and/or Chinese individuals who were not punished despite their failure to make proper entries into the database. Id. Nysenbaum was terminated on February 29, 2016 for an incident involving refills of a Hepatitis C medication. Id., at par. 81. He denied any responsibility for the incident, as did Chionis, based on Poon’s email directing that the dispensing of all Hepatitis drugs must be overseen by the Supervising Pharmacist. Id., at par. 81. He insisted that since Balakrishnan, and not he, was Supervising Pharmacist, he was not responsible for filling the prescription. Id.

Parikh, 64 at the time the action was commenced, was hired by NYHTC as a registered pharmacist at the Brooklyn Health Center. On September 25, 2014, Parikh received a written warning for an alleged lack of productivity. Id., at par. 84. On May 2, 2015, Supervising Pharmacist Danny Lu, who is Chinese, issued Parikh a second warning for alleged productivity issues and a prescription error. Id., at par. 85. After receiving the second warning, Parikh was warned that Lu and Poon “wanted to get rid of him.” Id., at par. 86. On May 20, 2015, Parikh received a final written warning from Lu for allegedly unsatisfactory work. Id., at par. 87. He was

terminated on June 25, 2015 for alleged productivity issues. Id., at par. 88. He claimed that the allegations in the warnings and the reason for his termination were pretextual and that younger and/or Chinese employees were not treated this way. Id., at pars. 84, 85, 87.

Downes-Covington, 65, was hired as a registered pharmacist at the Queens Health Center. Id., at par. 89. On February 6, 2014, Downes Covington was issued a written warning when she failed to refrigerate a medication at the end of a day. Id., at par. 91. She was also issued a second warning for failing to wear a flu mask. In May 2014, Downes-Covington took a FMLA leave to care for her mother. Id., at par. 93. The leave was granted in June 2014. Id., at par. 94. On or about June 11, 2014, she took one day of FMLA leave. Id., at par. 95. On or about June 12, 2014, when she returned to work, she was terminated by Pham for failing to recognize that another pharmacist had incorrectly typed a label. Id., at par. 96. Downes-Covington alleged that the reasons for her warnings, as well as for her termination, were pretextual and that younger and/or Chinese employees were not treated this way. Id., at pars. 91, 92, 96.

Ayac, 61 when this action was commenced, was hired by NYHTC as a registered pharmacist at the Midtown Health Center in 2010 and, in 2011, she was transferred to the Brooklyn Health Center. Id., at pars. 97-98. In late 2011, Poon was promoted to Director of Pharmacy Operations and implemented a new rule requiring pharmacists to fill 25 prescriptions per hour. Id., at par. 100. Ayac told company representatives that this was an unsafe quota since a pharmacist should not have to fill out more than 15 prescriptions per hour. Id., at par. 101. In 2012, Ayac was issued a written warning for failing to write up Weitzman for low productivity. Id., at par. 102. On January 29, 2013, Ayac took FMLA leave for 8 weeks, during which time Jack Luu, who was Chinese and approximately 30 years old, interviewed for her position. Id., at par. 104. On March 25, 2013, Ayac returned from her FMLA leave. Id., at par. 105. On the day she

returned, Ayac was issued a written warning for failing to comply with productivity standards relating to the quota of 25 prescriptions per hour. *Id.*, at par. 106. As part of her final warning, Ayac was directed to impose the 25 prescription per hour quota on her staff. *Id.*, at par. 107. On May 3, 2013, Ayac was terminated for failing to follow management's instructions regarding productivity and work flow. *Id.*, at par. 108. She alleged that "[t]he instruction was to get older employees, such as [Weitzman], [Parikh], and Sydney Goodkin (approximately 74 years old), to fill out 25 prescriptions per hour – which was an unreasonable instruction." *Id.*, at par. 108. She claimed that the allegations in the written warning and the reasons for her termination were pretextual and that Chinese and/or younger staff were not treated this way. *Id.*, at pars. 106, 108.

Plaintiff alleged that Poon was promoted to Director of Pharmacy Operations in March of 2011 and hired 16 pharmacists, "eleven [of whom were] Asian (predominantly Chinese), and the majority are younger than each of the [p]laintiffs." *Id.*, at par. 110. Plaintiffs, none of whom is Chinese, claim that they were terminated based on their age, national origin, and/or race. *Id.*

As a first cause of action, all plaintiffs alleged that they were terminated due to their age, race, and/or national origin in violation of the NYSHRL. *Id.*, at par. 112. They further claimed that Ore was terminated in violation of the NYSHRL based on her disability or perceived disability. *Id.*

As a second cause of action, all plaintiffs alleged that they were terminated due to their age, race, and/or national origin in violation of the NYCHRL. *Id.*, at par. 115. They further claimed that Ore was terminated in violation of the NYCHRL based on her disability or perceived disability. *Id.*

On July 15, 2016, defendants filed the instant motion seeking to dismiss the complaint or, in the alternative, to sever plaintiffs' claims since they do not arise from a shared nucleus of

common facts. Doc. 5. In support of the motion, defendants submit, inter alia, the affidavit of William Torres, Director of Human Resources for the New York Hotel Trades Council and Hotel Association of New York City Employee Benefit Funds, who states, inter alia, that each plaintiff was terminated for the reasons set forth in the TRs annexed as exhibits to his affidavit. Plaintiffs oppose the motion.

### **CONTENTIONS OF THE PARTIES:**

In support of the motion, defendants allege that plaintiffs fail to state a claim of discrimination based on age, race, or national origin pursuant to the NYSHRL or the NYCHRL. Defendants claim that “[p]laintiffs do not point to a single Chinese employee who purportedly engaged in the same infractions or policy and/or procedure violation(s) as any of the [p]laintiffs and who was not terminated.” Def.’s Memo. Of Law, at p. 17. Indeed, argue defendants, two pharmacists of Chinese national origin, Janey Wang, 28, and Chang Cai, 26, were terminated by the Health Center in January and November of 2014, respectively, for policy and procedure violations. Docs. 18 and 19.

Defendants maintain that the only supervisor comments plaintiffs cite in support of their claims of age discrimination are that Poon allegedly told Yakubova “all my young pharmacists in the Harlem Pharmacy are being more productive” (Doc. 2, at par. 33) and told Chionis “I know you hate me for changing your shifts, I was hired to do a job and I did it.” (Id., at par. 57). These comments, maintain defendants are insufficient as a matter of law to constitute evidence of age discrimination.

Defendants further assert that Ore failed to establish a claim of discrimination based on disability or perceived disability pursuant to the NYSHRL or NYCHRL. They claim that “one

stray remark allegedly made by Poon”, that Ore was “always on disability at the busiest time of the year” was insufficient as a matter of law to give rise to an inference of discrimination based on disability.

In the alternative, defendants seek a severance of plaintiffs’ claims pursuant to CPLR 603 on the ground that they each involve separate allegations, individuals, and time periods.

In opposition, plaintiffs argue that defendants’ motion must be denied since they have stated claims of age and race/national origin discrimination pursuant to the NYSHRL and NYCHRL. Ore also argues that she has established a claim for discrimination based on a disability or perceived disability. Plaintiffs further assert that the documents submitted by defendants should not be considered by this Court because they do not unequivocally establish a defense as a matter of law. Although plaintiffs do not deny that they were terminated for the reasons stated in the TRs, they insist that their terminations were pretextual, and that they were actually fired due to their age, race, and/or national origin, as well as disability in Ore’s case. Finally, they assert that their claims should not be severed in the event defendants’ motion is denied.

In reply, defendants reiterate their contention that plaintiffs failed to state claims for discrimination based on age, race/national origin, and disability. They further assert that this court should consider the TRs in support of their motion. Finally, they ask that defendant Pham be permitted to join with the other defendants in seeking dismissal since he was not served with process until after the instant motion was filed.

## LEGAL CONCLUSIONS:

### **Dismissal of the Complaint**

Defendants move for dismissal of the complaint pursuant to CPLR 3211(a)(1) and (a)(7). “[R]egardless of which subsection of CPLR 3211 (a) a motion to dismiss is brought under, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Ray v Ray*, 108 AD3d 449, 451 (1st Dept 2013); *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001); *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). “However, factual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence.” *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 (1st Dept 2015) (internal quotation marks, brackets and citations omitted). “Where extrinsic evidence is used, the standard of review on a CPLR 3211 (a) (7) motion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one.” *M & B Joint Venture, Inc. v Laurus Master Fund. Ltd.*, 49 AD3d 258; 260 (1st Dept 2008), *mod* 12 NY3d 798 (2009) (internal quotation marks and citation omitted); *see Basis Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134-135 (1st Dept 2014); *Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp.*, 144 AD3d 1093, 1094-1095 (2d Dept 2016); *Allen v Gordon*, 86 AD2d 514, 514-515 (1st Dept 1982), *affd* 56 NY2d 780 (1982).

For a complaint to be dismissed based upon evidence submitted in the context of a CPLR 3211 (a) (7) motion, the evidence submitted by defendant must “flatly contradict” the allegations in the complaint (*NRES Holdings, LLC v Almanac Realty Sec. VI, LP*, 140 AD3d 640, 640 [1st Dept 2016]; *see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976] *MCAP Robeson Apts. L.P. v MuniMae TE Bond Subsidiary, LLC*, 136 AD3d 602, 602 [1st Dept 2016]; *see also*

*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134-135 [1st Dept 2014]) such that “the essential facts have been negated beyond a substantial question” (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 95 NY2d 659 [2000]).

A defendant seeking to dismiss a claim under CPLR 3211 (a) (1) must submit documentary evidence to “conclusively establish that [the plaintiff] has no cause of action.” *Rovello v Orofino Realty Co., Inc.*, 40 NY2d at 636; *see NRES Holdings, LLC v Almanac Realty Sec. VI, LP*, 140 AD3d at 640; *see also United States Fire Ins. Co. v North Shore Risk Mgt.*, 114 AD3d 408, 409 (1st Dept 2014); *Matter of Walker*, 117 AD3d 838, 839 (2d Dept 2014); *State of N.Y. Workers’ Compensation Bd. v Madden*, 119 AD3d 1022, 1028-1029 (3d Dept 2014).

Here, since the affidavit of Torres and the TRs submitted by defendants in support of their motion do not constitute “documentary evidence” as contemplated by CPLR 3211(a)(1), such as notes, mortgages, deeds, and contracts (*see Fontanetta v John Doe 1*, 73 AD3d 78, 83-84 [2d Dept 2010]), dismissal cannot be granted pursuant to that section. Thus, this Court’s discussion will be limited to that branch of the motion seeking dismissal pursuant to CPLR 3211(a)(7) on the ground that plaintiffs fail to state a cause of action.

Pursuant to the NYSHRL, as set forth in Executive Law section 296 (1) (a), it is an unlawful discriminatory practice for an employer to terminate an individual based, inter alia, on his or her age, race, national origin, or disability. Similarly, pursuant to the NYCHRL, as set forth in New York City Administrative Code section 8-107(1)(a), it is unlawful, inter alia, to discharge an individual based on his or her age or perceived age, race, national origin, or disability. The NYCHRL is to be construed more liberally than its state or federal counterparts. *Barnum v New York City Tr. Auth.*, 62 AD3d 736, 738 (2d Dept 2009). The court must evaluate the claims with

regard for the NYCHRL's "*uniquely broad and remedial purposes*" . . . ." *Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 (1<sup>st</sup> Dept 2009) (*emphasis added*).

In connection with their respective claims of discrimination based on race, national origin, age, and/or disability, plaintiffs must establish that they have a prima facie case of discrimination by showing that "(1) [he or ] she is a member of a protected class; (2) [he or] she was qualified to hold the position; (3) she was terminated from employment . . . ; and (4) the discharge . . . occurred under circumstances giving rise to an inference of discrimination." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004); *see also McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973); *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 (1<sup>st</sup> Dept 2009).

At the pleading stage, "employment discrimination cases are themselves generally reviewed under notice pleading standards" and plaintiff is not required to establish his or her prima facie case with any heightened level of specificity beyond what is required pursuant to the CPLR. *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 (1<sup>st</sup> Dept 2009).

Affording the complaint a liberal construction and accepting all facts as alleged therein to be true, and according the plaintiffs the benefit of every favorable inference (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]), plaintiffs have stated causes of action alleging discrimination based on their age, race, and/or national origin, and, in the case of Ore, based on disability as well, pursuant to the NYSHRL and the NYCHRL. "A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action." *Kaplan v New York City Dept. of Health & Mental Hygiene*, 142 AD3d 1050, 1051 (2d Dept 2016). Thus, "whether the pleading will later survive a motion for summary judgment, or whether the party will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss" *Kaplan*, 142 AD3d, at 1051, quoting *Lieberman v Green*, 139 AD3d 815, 816 (2d Dept 2016). The TRs

submitted by defendants in support of the instant motion do not entitle them to dismissal pursuant to CPLR 3211(a)(7) since they do not negate beyond a substantial question the essential facts, i.e., that plaintiffs were allegedly terminated as the result of discriminatory employment actions. *Biondi*, 257 AD2d, at 81. However, this Court notes that the TRs could, at some point during this litigation, be a basis for defendants' entitlement to summary judgment dismissing the complaint, as they suggest that the employment actions taken by defendants were for "legitimate, independent, and nondiscriminatory reasons." *Forrest*, 3 NY3d at 305.

### **Severance**

Defendants argue in the alternative that, if their motion to dismiss is denied, then each of the plaintiffs' claims should be severed since they arise from different transactions and over different time periods. However, defendants have failed to establish that a joint trial of all of plaintiffs' claims together would result in "prejudice or substantial delay." *Vecciarelli v Kings Pharms., Inc.*, 71 AD3d 595, 596 (1<sup>st</sup> Dept 2010), quoting *Sichel v Community Synagogue*, 256 AD2d 276 (1<sup>st</sup> Dept 1998). Additionally, plaintiffs allege an "overall pattern and practice of discrimination to a degree" at this early stage of the litigation. *Vecciarelli*, 71 AD3d, at 596. Moreover, the joint trial of plaintiffs' claims "can serve judicial efficiency and avoid the risk of inconsistent verdicts." *Vecciarelli*, 71 AD3d, at 596. Thus, that branch of the motion seeking severance is denied.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants' motion is denied in all respects; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 30 days after service of a copy of this order by plaintiffs' counsel with notice of entry; and it is further;

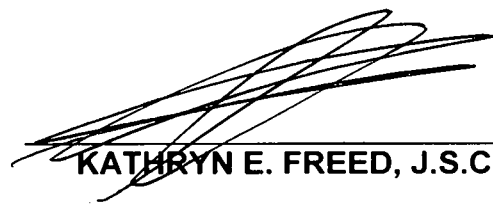
ORDERED that the parties are to appear for a preliminary conference in this matter on November 21, 2017 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

9/7/2017

DATE

KATHRYN E. FREED  
J.S.C.

  
KATHRYN E. FREED, J.S.C.

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