1997 WL 598586
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Karla Beth KUDATZKY, Plaintiff,
v.
The GALBREATH COMPANY, Galbreath/ Riverbank, L.P., Peter E. Ricker, Sr., Martin Winkelman, William Nikolis, Realty Credit Corporation, FGP 90 West Street, Inc. and FGH Realty Credit Corp., and Aegon, USA, Ageon, N.V., Defendants.

No. 96 Civ. 2693(HB). | Sept. 23, 1997.

Attorneys and Law Firms

Brian D. Graifman, Neil D. Grossman, Lawrence B. Goodman, Caro & Graifman, P.C., New York, NY, for Karla B. Kudatzky.

Joseph W. Muccia, Marc J. Gottrodge, Donna M. Gitter, Corbin, Silverman & Sanseverino, LLP, New York, NY, for Galbreath Co, Galbreath-Riverbank L.P., Peter E. Ricker, Sr., and Martin Winkelman.

Joseph E. Gulmi, James J. Cutro, Richards & O'Neil, LLP, New York, NY, for FGP 90 West Street, Inc, FGH Realty Credit Corp.

Eric J. Wallach, Heidi Lichthardt, Mark E. Greenfield, Rosenman & Colin, LLP, for Aegon USA.

OPINION AND ORDER

BAER, J.

***1** Plaintiff's complaint alleges violations of Title VII due to sexual harassment, sex discrimination, and retaliatory discharge, as well as a panoply of state law claims. Defendants move for summary judgment on all claims.[1] Plaintiff moves to strike the motions and answer of The Galbreath Company, Galbreath Riverbank, L.P., Peter E. Ricker, Sr., and Martin Winkelman (the "Galbreath Defendants") in the alternative, plaintiff seeks an adverse inference charge based on their alleged intentional document spoilation. For the reasons stated below, defendants' motion is granted in part and denied in part, while plaintiff's motion is denied in its entirety.

1 Defendants first moved to dismiss plaintiff's claims and then moved for summary judgment. The court considers the arguments in both motions and treats them combined as one for summary judgment.

I. *Background*

Plaintiff, Karla Beth Kudatzky, is a licensed real estate salesperson. In June or July of 1991 she approached members of the management of The Galbreath Company ("Galbreath"), a real estate brokerage firm, and proposed that Galbreath seek to obtain the assignment to manage an office building at 90 West Street in Manhattan (the "Building" or "90 West Street"), and that plaintiff be employed as the on-sight manager and leasing agent. The Building had just been purchased by defendant FGP 90 West Street Inc ., a subsidiary of defendant FGH Realty Credit Corp. ("FGH"), which is a subsidiary of defendants Aegon U.S.A. and Aegon N.V.[2]. On July 19, 1991, plaintiff sent a memorandum letter to defendant Peter E. Ricker ("Ricker"), who was Galbreath's new president, which recited some terms of their agreement but stated that the remainder of the agreement "would have to be outlined in specificity" and "mutually agreed upon" at a later date. As requested, Ricker countersigned the bottom of this letter. On August 28, 1991, plaintiff sent another letter to Ricker which proposed that if Galbreath obtained the management business from FGH, then plaintiff would be employed for the "life of th[at] agency." Ricker did not countersign that letter.

2 Plaintiff claims that she obtained the FGH account for Galbreath, while Galbreath contends that it was through its own contacts that the FGH account was acquired.

October 28, 1991, Galbreath and plaintiff entered into an employment agreement whereby plaintiff would receive an annual salary of $50,000 plus commission and benefits for her duties as the on-site building manager. Plaintiff alleges that she performed her job satisfactorily and claims that during her tenure, the building raised occupancy rose from 40% to 78%. In August 1994 she received a positive review and a raise.

Plaintiff claims that while working at the Building, she was subjected to unwanted and degrading sexual remarks by defendant William Nikolis, who was during the relevant period Vice President of FGH. Plaintiff alleges that some of these remarks were made in the presence of defendant Martin Winkelman, who was during the relevant period a

senior managing director of Galbreath. Additionally, plaintiff alleges she was excluded by the individual defendants from meetings, management discussions and decision making. Plaintiff was fired in October 1994 and she claims it was as a consequence of her refusal to acquiesce to Nikolis' sexual blandishments and of her refusal to become engaged in an alleged illegal "kickback" scheme whereby the FGH Defendants and the Galbreath Defendants pressured her to, among other things, approve change orders for unnecessary work.

***2** Plaintiff claims that her discharge was part of a "surprise confrontation" where defendant Ricker gave her the option of dismissal or resignation. She alleges that Ricker sequestered her in his office and refused to allow her to leave by, among other things, physical intimidation. Plaintiff also alleges that she was locked out of her office. Lastly plaintiff alleges that Galbreath filled plaintiff's position with a male employee who was not qualified for the position. Defendants, for their part, deny that any sexual harassment occurred and contend that plaintiff was fired not in retaliation for her failure to acquiesce to Nikolis' sexual advances or defendants' illegal kickback schemes, but instead because plaintiff misappropriated reimbursement checks that she received from Galbreath for allegedly business-related cellular phone calls.

After plaintiff filed a claim with the EEOC on December 14, 1994 and a right to sue letter was issued, this lawsuit ensued.

II. *Discussion*

A. Motion for Summary Judgment by the RCC Defendants and Aegon U.S.A.

Defendants FGP 90 West Street, Inc., FGH, and Realty Credit Corp. ("RCC"), the successor corporation to FGH (together, the "RCC Defendants"), and Aegon U.S.A. move for summary judgment and argue that because they were not named as respondents in plaintiff's EEOC complaint plaintiff cannot properly bring a cause of action against them. Plaintiff objects and argues that because these defendants were named in the body of the complaint, she is not barred from bringing suit against them. Plaintiff only named Galbreath as a respondent in her EEOC complaint.

The general rule in this district is that the court only has subject matter jurisdiction over actions against those individuals named as respondents in an EEOC charge. *Bridges v. Eastman Kodak Co.*, 822 F.Supp. 1020, 1023 (S.D.N.Y.1993). However, the "identity of interest" exception to this rule provides that a court may assert jurisdiction over an unnamed party if it has an identity of interest with the named party. This reasonable exception arose because EEOC charges "generally are filed by parties not versed in the vagaries of Title VII." *Johnson v. Palma*, 931 F.2d 203, 209 (2d Cir.1991). To determine whether there is an identity of interest between the named and unnamed party, the court must consider four factors: (1) whether the role of the unnamed party was known to plaintiff at the time of filing the EEOC charge; (2) whether the interests of the named party are so similar to the unnamed party's "that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings"; (3) whether the unnamed party's absence from the EEOC proceedings resulted in actual prejudice to it; and (4) "whether the unnamed party has in some way represented to the [plaintiff] that its relationship with the [plaintiff] is to be through the named party." *Id.* This exception applies only where a plaintiff was not represented by counsel when she filed her EEOC charge. *Tarr v. CreditSuisse Asset Management*, 958 F.Supp. 785, 794 (E.D.N.Y.1997) (citing *Sharkey v. Lasmo*, 906 F.Supp. 949,954 (S.D.N.Y.1995)).

***3** Here, plaintiff admits that she was represented by counsel when she filed her EEOC charge. Kudatzky Dep. at 7–8. Indeed, she stated that she hired a law firm for the specific purpose of filing her EEOC charge. *Id.* Consequently, leaving aside the fact, as noted below, that the four part test would be determinative against plaintiff, since plaintiff was represented by counsel, the identity of interest exception is inapplicable to her and this court has no jurisdiction over the RCC Defendants and Aegon U.S.A., *See Tarr*, 958 F.Supp. at 794.

First, plaintiff clearly knew the RCC Defendants's and Aegon's names and identities. Indeed, she alleges that she introduced Galbreath to these parties. Second, the interests of Galbreath on the one hand and the RCC Defendants and Aegon U.S.A. on the other cannot be said to be similar for the purposes of obtaining voluntary conciliation and compliance. They are separate entities. *See Johnson v. District Council*, 1995 WL 567426 at *3 (S.D.N.Y. Sept.25, 1995). Furthermore, Galbreath did not have the authority to settle disputes for these defendants. As to the third part of the test, plaintiff argues that defendants cannot show actual prejudice because the EEOC proceedings were perfunctory. However, as these defendants point out, if RCC or Aegon had been named, the investigation may not have been

perfunctory and "might have ... result[ed] in a termination of the charges" against them. *Johnson v. Palma*, 931 F.3d at 210; *see also*, *Smith v. Local Union 28*, 877 F.Supp. 165, 173 (S.D.N.Y.1995). Lastly, plaintiff does not claim that the RCC Defendants or Aegon U.S.A. indicated that their interests were represented by Galbreath. Indeed, she claims instead that the RCC Defendants and Aegon U.S.A. dealt with plaintiff separately. Each factor weighs against finding that RCC and Aegon had an identity of interest with Galbreath.

Consequently, because plaintiff failed to name the RCC Defendants and Aegon U.S.A. as respondents in her EEOC complaint, while represented by experienced counsel, and because there is no identity of interest between the named and unnamed parties, plaintiff's Title VII claims against the RCC Defendants and Aegon U.S.A. must be dismissed.

B. Galbreath's Motion for Summary Judgment On Claim of Sexual Harassment[3]

3 Plaintiff concedes that none of her Title VII claims are viable as against individuals that are named as defendants. *See Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir.1995). Plaintiff also concedes that to the extent her complaint may be read to include a cause of action pursuant to 42 U.S.C. § 1981, such claim is not viable because § 1981 only applies to cases of race discrimination. *See Bloomfield v. Banco Bilbao Vizcaya, S.A.*, 1995 WL 49269 (S.D.N.Y. Feb.8, 1995).

Galbreath argues that plaintiff's sexual harassment claim must be dismissed because: (1) she has failed to allege facts that establish the existence of a hostile work environment; (2) Galbreath cannot be liable as a matter of law for the acts of defendant Nikolis, a non-employee and (3) plaintiff's claims are time-barred. For the reasons stated below, I find that these arguments lack merit.

1. Hostile Work Environment

In order for a plaintiff to prevail on a hostile work environment claim, she must show "(1) that her workplace was permeated with discriminatory intimidation ... sufficiently severe or pervasive to alter the conditions of her employment, and (2) that a specific basis exists for imputing the conduct that created the hostile work environment to the employer." *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir.1996). In determining whether or not a hostile work environment exists, the court should consider factors such as "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or whether a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Isolated incidents will not merit relief. *Kotcher v. Rosa and Sullivan Appliance Center*, 957 F.2d 59, 62 (2d Cir.1992).

***4** Here, plaintiff alleges that defendant Nikolis made sexual remarks to her "more than 10 and less than 20" times during business meetings. Kudatzky Dep. at 445. She alleges that when she asked for a raise, he "asked [her] out." *Id.* at 459. Plaintiff also claims that Nikolis made references to sado-masochistic behavior and repeatedly asked plaintiff about her boyfriends and "what she liked to do with them." *Id.* at 85, 458. Finally, plaintiff alleges that Nikolis kissed her twice at a business-related Christmas party. *Id.* at 420–21. Allegations similar to these have passed muster to defeat summary judgment. *Kotcher*, 957 F.2d at 61–3. On balance, I find that a reasonable jury could conclude that Nikolis' comments permeated plaintiff's workplace with discriminatory intimidation sufficiently severe to alter the conditions of her work environment.

2. Galbreath's Liability for Acts of Non–Employees

According to the EEOC Guidelines, "[a]n employer may also be responsible for the acts of non-employees, with respect to sexual harassment in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate or appropriate corrective action." 29 C.F.R. § 1604.11(e). In determining whether to impose liability the court should consider "the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." *Id.* While these Guidelines are not controlling, they represent a body of experience to which the courts may resort for guidance. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141–42, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976). And although the general view is that employers cannot be held liable for harassment that occurs outside of the workplace, *see Whitaker v. Carney*, 778 F.2d 216, 221 (5th Cir.1985), it is increasingly recognized that employers may be liable for harassment committed by nonemployees in the workplace where the employer knows of the harassment but fails to act. *See Powell v. Las Vegas Hilton Corp.*, 841 F.Supp. 1024, 1027 (D. Nevada 1992). Indeed, the Ninth Circuit recently held that "an employer may be liable for sexual harassment on the part of a private individual ... where the employer either ratifies or acquiesces in the harassment by not taking

immediate and/or corrective actions when it knew or should have known of the conduct." *Folkerson v. Circus Circus Enterprises, Inc.*, 107 F.3d 754, 756 (9th Cir.1997); *see also Woods–Pirozzi v. Nabisco Foods*, 29 N.J.Super. 252, 268–69 (App.Div.1996) (holding that an employer can be liable for sexual harassment by an independent contractor). In reaching this conclusion, I am mindful "that while the harasser may not be an employee, the victim is ... [[and] an employer that knows or should know its employee is being harassed *in the workplace*, regardless of by whom, should take appropriate action." *Woods–Pirozzi*, 290 N.J.Super. at 269, 675 A.2d 684 (emphasis added).

***5** Here, plaintiff has alleged that she complained to Winkelman and Ricker on numerous occasions about Nikolis' behavior to no avail. Galbreath argues that because the alleged conduct occurred outside of Galbreath's offices it should not be held liable. *See Rothman v.. The Halstead Property*, Index No. 129483/95 (N.Y.S.Ct. June 25, 1996). However, Title VII is designed to protect against sexual harassment in the workplace—not only in the defendant's workplace, but in the workplace of its employees. Where, as here, defendant requires that an employee work at a cite other than the defendant's corporate offices it would defeat the purpose of Title VII to absolve defendant of liability under the statute simply because its employee's work cite is different than the defendant's. Furthermore, in terms of Galbreath's control over Nikolis, Nikolis was the President of FGH and was Galbreath's client; Galbreath, much like a casino owner or the employer of an independent contractor, could have deterred Nikolis and his alleged sexual harassment of plaintiff. *See Powell*, 841 F.Supp. at 1030; *Woods–Pirozzi;* 290 N.J.Super. at 273, 675 A.2d 684. Therefore, because I find that an employer can be liable for the sexual harassment by a non-employee and because I find that an issue of fact exists as to whether or not Galbreath is liable here, Galbreath's motion for summary judgment on this ground must be denied.

3. Statute of Limitations

In New York, a plaintiff must file a charge of discrimination with the EEOC within 300 days of the alleged unlawful employment practice. *See*42 U.S.C. § 2000e–5(e)(1); *Van Zandt*, 80, F.3d at 712. Where "plaintiff experiences a continuous practice and policy of discrimination, however, the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it." *Cornwell v. Robinson*, 23 F.3d 694, 703–04 (2d Cir.1994) (internal quotation marks and citation omitted). In this Circuit, a continuing violation exists where "there is evidence of an ongoing discriminatory policy or practice, such as use of discriminatory seniority lists or employment tests ... [or where the defendant] allow[s] related incidents of discrimination ... to continue unremedied for so long as to amount to a discriminatory practice or policy." *Van Zandt*, 80 F.3d at 713 (citation omitted). Moreover, "[b]y its nature, a claim of 'hostile environment' discrimination turns on the existence of a continuing violation, rather than on any individual offensive act." *Engelmann v. National Broadcasting Co.*, 1996 WL 76107 at *15 (S.D.N.Y. Feb.22, 1996).

Here, plaintiff filed her EEOC complaint on December 14, 1994, and therefore the alleged sexual harassment must have occurred after February 17, 1994. Plaintiff alleges that much of the alleged sexual harassment occurred at meetings in 1993. The Galbreath defendants contend that Nikolis stopped attending these meetings in 1993. However, at plaintiff's deposition she testified that at least some of Nikolis' harassment occurred when a certain Jean Johnstone worked at Galbreath. Kudatzky Dep. at 1252. Ms. Johnstone began to work at Galbreath in August 1994, so at least some of the alleged harassment occurred in August 1994, within the statutory time period. Furthermore, while "discrete incidents of discrimination" will ordinarily not amount to a continuing violation, *Van Zandt*, 80 F .3d at 708, plaintiff here has alleged that she reported Nikolis' behavior to her superiors at Galbreath, and that some of the alleged harassment occurred in front of defendant Winkelman, a senior managing director of Galbreath, and was not addressed to say nothing of corrected. Therefore, viewing the evidence in the light most favorable to plaintiff, I find that plaintiff has established a continuing violation by virtue of the fact that the alleged harassment continued for long enough to amount to a discriminatory policy on the part of Galbreath and that at least some of the acts that constituted such violation occurred within the limitations period. Accordingly, plaintiff's sexual harassment claim is not time barred.

C. Galbreath's Motion for Summary Judgment as to Plaintiff's Sex Discrimination Claim

***6** Galbreath advances several grounds for summary judgment on the sex discrimination claim with respect to jurisdiction. The law is clear that district courts have jurisdiction in Title VII cases only over such claims that are either included in the plaintiff's EEOC charge or are based on conduct that is reasonably related to them. *Cruz v. Ecolab Pest Elimination Division*, 817 F.Supp. 388, 391 (S.D.N.Y.1993).

Three types of "reasonably related" claims are recognized in this Circuit, including those where "the conduct complained of would fall within the 'scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.' " *Butts v. Dept. of Housing*, 990 F.2d 1397, 1402 (2d Cir.1993) (citation omitted). Although this rule, like the identity of interest exception discussed above, is based on a loose pleading standard in recognition that those who fill out EEOC charges frequently do so without counsel, there appears to be no prerequisite that plaintiff not have counsel to benefit from this rule.

Nonetheless, plaintiff's sex discrimination claim must fail because plaintiff is unable to establish a genuine issue of fact that sex was a motivating factor in defendants' decision to terminate her employment.

By now, the burden shifting analysis for Title VII cases that was first articulated by *McDonnell Douglas Corp. v. Green* is familiar. 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) is well known. The plaintiff must first establish a *prima facie* case of sex discrimination by proving that: (1) she is a member of a protected group; (2) she was qualified for the position; (3) she was terminated; and (4) that such termination occurred under circumstances that give rise to an inference of discrimination. *See Fisher v. Vassar College*, 114 F.3d 1332, 1335 (2d Cir.1997). "The burden of establishing a prima facie case is not onerous, and has been frequently described as minimal." *Casanova v. General Mills Restaurants, Inc.*, 1997 WL 473840 at *2 (S.D.N.Y. Aug.15, 1997) (internal quotation marks and citation omitted).

Once plaintiff establishes a *prima facie* case, the defendant must articulate a legitimate, non-discriminatory reason for the adverse employment decision. *Chertkova v. Connecticut Life Ins.*, 92 F.3d 81, 87 (2d Cir.1996). Once the defendant has shouldered this burden, the Second Circuit has recently stated that the burden shifts back to plaintiff to prove that an impermissible factor, such as sex, motivated the employment decision. *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 119 (2d Cir.1997).

Plaintiff has satisfied the first three elements of her prima facie case. Although defendant argues that she was not qualified for the job because of her alleged nonpayment of cellular phone bills and fraudulently procured reimbursement checks, "reliance on the behavior incidents cited to justify her termination fails to undercut a finding of qualification to perform the substantive aspects of her job." *Casanova*, 1997 WL 473840 at *4. As to the last element, plaintiff has established (albeit marginally) the requisite inference of discrimination. She alleges that shortly after complaining to defendants about Nikolis' sexual harassment and about requests she had received to participate in "illegal and unethical activities" that she implies were being perpetrated by members of the "good-old boy network" present at Galbreath, Comp. ¶¶ 34, 39, she was fired without warning and replaced by a man with less experience. Comp. ¶ 44.

***7** Defendants, for their part, have articulated a legitimate non-discriminatory reason for plaintiff's termination. They allege that plaintiff submitted reimbursement requests for her Cellular One portable phone account for certain business calls, but in fact these reimbursement requests included personal calls. In addition, they claim that plaintiff did not use these checks to pay her Celluar One account, but instead pocketed the money. Consequently, the Cellular One account was in arrears. In late September, 1994, when Galbreath contacted Cellular One to open another account for a customer, they were told that they would be unable to do so until Kudatzky's account was paid in full. Affidavit of Elliot Kosoffsky ¶ 3. Defendants allege they uncovered plaintiff's fraud upon further investigation, confronted plaintiff, and gave her the option of resigning or being terminated.

Plaintiff, who is marginally able to meet the standard for a *prima facie* case, fails to raise a triable issue of fact as to whether her gender was a motivating factor or contributed to defendants' decision to terminate her. Her proof consists of her vague allegations that to be part of the "good-old boy" network she was expected to participate in an illegal kickback scheme. Furthermore, plaintiff's claims in her complaint that she was excluded from golf games and telephone discussion is belied by her deposition testimony in which she concedes that she could not specify any telephone discussion from which she was excluded and admits that she does not play golf. Kudatzky Dep. at 482–83; 480–82. Also, plaintiff's claim that she was replaced by a man does not sustain her burden. *See Sassower v. City of White Plains*, 742 F.Supp. 151, 157 (S.D.N.Y.1990). Furthermore, while plaintiff contends that the man she was replaced with had less experience than her, defendants contend that they offered the job to a woman first and that the man who replaced her was paid a salary much less than hers. Where, as here, plaintiff has marginally established a *prima facie* case, and where she has come forward with nothing more than conclusory allegations, she has not raised a genuine issue of material fact that sex played a motivating

factor in defendants' decision to terminate her. *See* Mieri v. Dacon, 759 F.2d 989, 998 (2d Cir.1985). Consequently, plaintiff's claim for discriminatory discharge based on her sex must be dismissed.

D. Galbreath's Motion for Summary Judgment as to Plaintiff's Retaliatory Discharge Claim

The burden shifting analysis discussed above also applies to plaintiff's claim for retaliatory discharge. To establish a *prima facie* case of retaliatory discharge plaintiff must establish that: (1) she participated in a protected activity; (2) the defendant was aware of this activity; (3) that the plaintiff suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action. Here, plaintiff has established a *prima facie* case (again marginally) because she alleges that she complained to defendants about Nikolis' behavior and she made the Galbreath defendants aware of the fact that she was asked to participate in an illegal kickback scheme. Comp. ¶ 42. Defendants' argument that this does not amount to a protected activity is simply incorrect. *See* Iannone v. Frederic R. Harris. Inc., 941 F.Supp. 403, 410 (S.D.N.Y.1996) (protected activity includes registering a complaint, which "need not be a formal claim filed with a court; ... it may simply be an objection voiced to the employer").

***8** However, for the same reasons as stated above in Section C, plaintiff's claim for retaliatory discharge fails because she has failed to establish that a genuine issue of material fact exists as to whether or not a retaliatory motive played a role in defendants' decision to terminate plaintiff. She offers nothing more than conclusory allegations that she was fired because she "refused to get involved with Nikolis sexually," Kudatzky Aff. ¶ 34, and because she was not a part of the "good old boy" network. Accordingly, plaintiff's claim for retaliatory discharge must be dismissed.

E. Plaintiff's State Law Claims

Plaintiff also alleges thirteen state law causes of action: (1) sexual discrimination under New York Executive Law; (2) wrongful discharge; (3) breach of contract; (4) breach of implied covenant of good faith and fair dealing; (5) promissory estoppel; (6) wage law violations; (7) quantum meruit; (8) unjust enrichment; (9) breach of fiduciary duty; (10) tortious interference with contract; (11) unlawful imprisonment; (12) intentional infliction of emotional distress; and (13) negligence. [4]

4 Plaintiff had also alleged a claim for prima facie tort, but has withdrawn that claim.

A district court may exercise supplemental jurisdiction over state 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 under Article III."28 U.S.C. § 1367(a)(1). In order for the federal and state claims to be considered part of the same case or controversy, they must derive from a common nucleus of operative fact. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

Having dismissed plaintiff's discriminatory discharge and retaliatory discharge claims, the only claim over which this court has original jurisdiction is plaintiff's sexual harassment claim. Because plaintiff's state law claims arise out of the same facts as plaintiff's sexual harassment claim and because their dismissal would result in duplicative litigation, *see* *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F.Supp. 667, 680 (S.D.N.Y.1995), I will exercise supplemental jurisdiction over them. I address each of plaintiff's claims below.

1. Discrimination Under New York Executive Law (Fourth Cause of Action)

Plaintiff brings a cause of action under New York State Executive Law § 296, which prohibits an employer from discriminating against an employee on the basis of her sex. N.Y.Exec.Law § 296(1)(a). Since the same analysis that is used to determine the sufficiency of Title VII claims is also applied to these claims, plaintiff's claims for sex discrimination and retaliatory discharge, but not her claim for sexual harassment, are dismissed. *See* Boyce v. New York City Mission Society, 963 F.Supp. 290, 295 (S.D.N.Y.1997). Furthermore, plaintiff's claim for sexual harassment pursuant to § 296 is viable against individuals named as defendants. *See* Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir.1995).

2. Wrongful Discharge (Fifth Cause of Action) and Breach of Contract (Sixth Cause of Action)

***9** In order to determine whether a parties' preliminary agreement is binding, the court must determine whether or not those parties intended to be bound by analyzing: "(1) the language of the agreement; (2) the context of negotiations; (3) the existence of open terms; (4) partial performance;

and (5) the necessity of putting the agreement in final form, as indicated by the customary form of such transaction." *Arcadian Phosphates Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir.1989) (citing *Teachers Ins. & Annuity Assn. v. Tribune*, 670 F.Supp. 491, 499–503 (S.D.N.Y.1987)).

Plaintiff bases many of her state law claims on a "June Agreement" entered into by the parties, which actually refers to the July 19, 1991 letter signed by both plaintiff and defendant Ricker. The letter's language, however, indicates that the parties did not intend to be bound by their agreement, but instead indicates that the letter is an unenforceable agreement to agree. See *Lieberman v. Good Stuff Corp.*, 1995 WL 600864 *3 (S.D.N.Y. Oct.11, 1995). Perhaps most important is that the parties expressly stated that the "[t]erms and conditions [of their agreement] would be mutually agreed upon," thereby leaving open the material terms of their agreement. Muccia Aff.Ex. 3. Because price is "an essential ingredient of every contract for the rendering of services, the absence of such term renders the understanding as an unenforceable agreement to agree." *Cooper Square Realty Inc. v. A.R.S. Management, Ltd.*, 181 A.D.2d 551, 581 N.Y.S.2d 50, 51 (App.Div.1992); *cf. Phil Kriegel Assocs. Inc. v. M. Lahm Knitting Mills, Inc.*, 179 A.D.2d 539, 579 N.Y.S.2d 44, 45 (App.Div.1992). Furthermore, the parties did not use language that implied a "firm commitment" or "binding agreement." *Arcadian Phosphates*, 884 F.2d at 73.

It should also be noted that plaintiff herself stated that the October and November 1991 employment agreements "outlined my agreement with The Galbreath Company concerning [90 West Street] ."Kudatzky Aff.Ex. A. Conspicuously, she does not even refer to the allegedly binding agreement entered into by the parties by virtue of the July, 1991 letter. *See also* Kudatzky Dep. at 811. Finally, plaintiff testified at her deposition that she understood the July leper was an "agreement to enter into another agreement." Kudatzky Dep. at 326. Consequently, the July 19, 1991 letter is an unenforceable agreement to agree and the October 28, 1991 and the November 1991 amendment to that agreement (the "employment agreement") constitute the enforceable agreement between the parties.

With this in mind, I now turn to plaintiff's claim for wrongful discharge. In New York, an employee is an at-will employee absent an employment contract that specifically restricts an employer's right to discharge an employee. *See Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 304–05, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983). Furthermore, an employee is also considered at-will unless there is a definite period of employment clearly specified in a contract. *Id.* at 300–1, 461 N.Y.S.2d 232, 448 N.E.2d 86. As plaintiff concedes, an at-will employee may be fired "at any time for any reason or even for no reason." *Id.*

***10** Plaintiff's wrongful discharge claim centers around her allegation that she was fired for failing to participate in the defendants' alleged illegal "kickback" scheme. The employment agreement does not limit Galbreath's ability to fire plaintiff; nor does it specify that plaintiff was to be employed for a definite amount of time. Consequently, plaintiff is an at-will employee, subject to discharge for any reason. *Id.* Therefore plaintiff's claim for wrongful discharge must be dismissed.

Plaintiff also alleges that defendants breached their contract because they have failed to pay plaintiff commissions due under the employment agreement for her procurement of the management agreement for 90 West Street. Defendants contend that they do not owe plaintiff any money because the employment agreement only provides for commissions to be paid to plaintiff for any "new" management agreements that she procures, the 90 West Street management agreement was not "new" when the parties signed the employment agreement and that plaintiff, in any event, did not "procure" the 90 West Street agreement. However, I find that plaintiff has raised an issue of fact with respect to whether or not 90 West Street was a "new" management agreement and whether or not plaintiff procured such agreement. Therefore, defendants' motion for summary judgment as to plaintiff's breach of contract claim is denied.

3. Breach of the Implied Covenant of Good Faith and Fair Dealing (Seventh Cause of Action)

"It is well-settled ... that an implied covenant of good faith does not attach to employment contracts governed by New York law." *Tischmann v. ITT/Sheraton Corp.*, 882 F.Supp. 1358, 1367 (S.D.N.Y.1995). Because the only enforceable contract at issue here is the employment agreement, this claim must be dismissed as a matter of law.

4. Promissory Estoppel (Eighth Cause of Action)

Plaintiff alleges in her complaint:

> Galbreath represented to plaintiff that she was to participate as a principal in Galbreath's management and leasing

> of the Property, would be the on-site management/leasing agent for the life the [sic] FGH/Galbreath contract and any extensions thereof, an [sic] would be paid a stated remuneration....

Plaintiff claims that she relied on those representations to her detriment and has been damaged. Comp. ¶ 82. In New York a cause of action for promissory estoppel may lie "where there is 'a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance.' " *Totalplan Corp. of America v. Colborne*, 14 F.3d 824, 833 (2d Cir .1994) (citation omitted). Plaintiff's promissory estoppel claim fails for proof that the Galbreath Defendants made a clear and unambiguous promise. Although the promises that plaintiff alleges in ¶ 82 of her complaint were part of the July 19, 1991 unenforceable agreement to agree and plaintiff's subsequent proposals, the parties never agreed to these terms. Consequently, plaintiff's claim must be dismissed. *See id.*(holding that there is no cause of action for promissory estoppel where rights plaintiff sought to enforce were proposed only in draft agreements).

5. Wage Law Violations (Ninth Cause of Action)

***11** A plaintiff is entitled to relief under New York Labor Law § 190*et seq.* only if plaintiff has a contractual right to such wages. *Cf. Pashaian v. Eccelston Props. Ltd.*, 1993 WL 322835 at *2 (S.D.N.Y. Aug.16, 1993). Because plaintiff has raised a genuine issue of material fact as to whether or not she is entitled to commissions under the employment agreement, *see* Part E.1, *supra*, I find that plaintiff has similarly raised an issue of fact as to whether or not defendants violated New York's wage laws. Defendants' motion for summary judgment as to this claim is therefore denied.

6. Quantum Meruit (Tenth Cause of Action)

In New York, a plaintiff cannot state a cause of action for quantum meruit where there is a written employment agreement already in place. *See Zolotar v. New York Life Ins. Co.*, 172 A.D.2d 27, 576 N.Y.S.2d 850 (App.Div.1991). As discussed above, the parties entered into a viable employment contract on October 28, 1991. Consequently, plaintiff's tenth cause of action must be dismissed.

7. Unjust Enrichment (Eleventh Cause of Action) and Breach of Fiduciary Duty (Twelfth Cause of Action)

Where, as here, a written agreement exists which covers the "subject matter of the claims based on ... unjust enrichment, such claim[ ] [is] precluded as a matter of law." *AEB & Assoc. Design Group v. Tonka Corp.*, 853 F.Supp. 724, 731 (S.D.N.Y.1994). Also, an employer owes no fiduciary duty to an at-will employee. *Weintraub v. Phillips, Nizer, Benjamin. Krim & Ballon*, 172 A.D.2d 254, 568 N.Y.S.2d 84, 85 (App.Div.1991).

Plaintiff claims that the Galbreath Defendants were unjustly enriched by her efforts to procure the FGH management agreement. However, the employment agreement signed by the parties covers this. Consequently plaintiff cannot state a cause of action for unjust enrichment. Similarly, the employment agreement establishes that plaintiff is an at-will employee, to whom defendants owed no fiduciary duty. Consequently, both of these claims must be dismissed.

8. Tortious interference With Contract (Thirteenth Cause of Action)

Defendant moves to dismiss this claim as to Galbreath, and plaintiff concedes that she asserts this cause of action only against the individual defendants. Accordingly, plaintiff's claim for tortious interference with a contract against Galbreath is dismissed.

9. False Imprisonment (Fourteenth Cause of Action)

In order to establish a false imprisonment claim in New York, a plaintiff must demonstrate that: "(1) defendant intended to confine plaintiff; (2) plaintiff was conscious of the confinement; (3) plaintiff did not consent to the confinement; and (4) the confinement was not otherwise privileged. *DeMarco v. Sadiker*, 952 F.Supp. 134, 141 (S.D.N.Y.1996). A cause of action will not lie for false imprisonment where an employee is questioned during regular business hours in familiar surroundings, if she is not threatened and is free to leave at any time. *Malanga v. Sears, Roebuck and Co.*, 109 A.D.2d 1054, 487 N.Y.S.2d 194, 196 (App.Div.1985).

***12** Here, plaintiff alleges that defendant Ricker falsely imprisoned her when he fired her because he told her he would not let her leave until she resigned and at one point stood in front of the door to his office. However, plaintiff cannot recall how long she was in Mr. Ricker's office, nor does plaintiff allege that she was threatened in any way.

Furthermore, plaintiff's deposition testimony regarding Mr. Ricker's statements conflicts with her other allegations that she was given the choice of being fired or resigning. Because a reasonable jury could not find that plaintiff was falsely imprisoned, defendants motion for summary judgment on this claim must be granted.

10. Intentional Infliction of Emotional Distress (Fifteenth Cause of Action)

A plaintiff that alleges a cause of action for intentional infliction of emotional distress must establish "the existence of '(1) an extreme and outrageous act by the defendant, (2) an intent to cause severe emotional distress, (3) resulting severe emotional distress, (4) caused by the defendant's conduct.' " *Johnson v. Harron*, 1995 WL 319943 *29 (N.D.N.Y. May 23, 1995). These standards are strictly applied by New York courts. *Realmuto v. Yellow Freight System*, 712 F.Supp. 287–89 (E.D.N.Y.1989). The alleged conduct must be [s]o outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Johnson*, 1995 WL 319943 at *29 (citation omitted). In New York, courts have upheld a claim for intentional infliction of emotional distress based on charges of sexual harassment. *See O'Reilly v. Executone of Albany, Inc.*, 121 A.D.2d 772, 503 N.Y.S.2d 185, 186 (App.Div.1986).

As analyzed above, plaintiff has established that a genuine issue of material fact exists as to whether or not she was sexually harassed. Based on her allegations and deposition testimony that describe the "explicit remarks ... and innuendo," *Shapiro v. AOE/RICOH. Inc.*, 1997 WL 452026 *5 (S.D.N.Y. Aug.7, 1997), I cannot hold as matter of law that defendants' conduct was not sufficiently extreme or outrageous, and therefore defendants' motion must be denied. *See Wishner v. Continental Airlines*, 1997 WL 420286 *5 (S.D.N.Y. July 25, 1997).

11. Negligence (Sixteenth Cause of Action)

In New York, an employer cannot be held liable in tort for failure to prevent, hire or train its employees from acting in a discriminatory manner. *Gilliard v. New York Public Library System*, 597 F.Supp. 1069, 1081 (S.D.N.Y.1984). Therefore, to the extent that plaintiff's claims against defendants relate to their failure to remedy the alleged sexual harassment, plaintiff's claim must be dismissed.

F Plaintiff's .Motion Based on The Galbreath Defendants' Alleged Intentional Document Spoilation

This case has been rife with discovery disputes, and hopefully this will be the last ink spilt and tree felled in that regard. Plaintiff claims that she was barred from her office after she was fired on October 19, 1994 and she claims that the Galbreath Defendants destroyed certain documents that were in her office that were relevant to the relief she seeks here, despite the fact that almost immediately she requested that all documents in her office be preserved. When plaintiff served its document request that the Galbreath Defendants produce "[a]ll documents and items left in plaintiff's office at 90 West Street at the time of her termination," the Galbreath Defendants objected to the request on the grounds of overbreadth and irrelevance. This document request was the subject of a hearing before Magistrate Judge Katz, who held that such request was overbroad and irrelevant. Plaintiff appealed Magistrate Judge Katz's rulings to this court, and finding Magistrate Judge Katz's ruling were not clearly erroneous, I denied plaintiff's application. Plaintiff now moves to strike the Galbreath Defendants' motions and their Answer or, in the alternative, for an adverse inference against the Galbreath Defendants and to bar them from introducing certain evidence because they destroyed the documents in plaintiff's office.

***13** The law is clear that the court has the authority to impose sanctions on a party for failure to produce evidence, either pursuant to Fed.R.Civ.P. 37(b) or the court's "inherent powers to sanction parties 'acting in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Church of Scientology Internat'l v. Time Warner, Inc.*, 1994 WL 38677 at *2 (S.D.N.Y. Feb.4, 1994) (citation omitted). When the court relies on its inherent power, it should exercise "restraint and discretion." *Id.* (internal quotations and citation omitted).

Because no court order was issued here with respect to the documents in plaintiff's office, the court appears to have no authority to impose sanctions under Fed.R.Civ.P. 37(b). *Id.* The threshold question with respect to imposing sanctions for document spoilation based on the court's inherent powers is whether the party "knew or should known that the destroyed evidence was relevant to pending, imminent or reasonably foreseeable litigation." *Shaffer v. RWP Group, Inc.*, 169 F.R.D. 19, 24 (E.D.N.Y.1996). Based on plaintiff's allegations, it appears that the Galbreath Defendants knew that such documents were relevant. However, plaintiff's application fails for a couple of reasons. First, she has

produced no evidence to support her allegation that the documents have actually been destroyed. Plaintiff has offered the affidavit of Jerry Jones which states that when he went into plaintiff's office to retrieve some of his artwork that plaintiff had had in her office, he saw people were going through her files and putting some of them in a laundry cart. Jones Aff. at ¶¶ 2–3. Defendants have submitted affidavits that they did not destroy any documents. *See, e.g.,* Winkelman Aff. ¶¶ 5–6. In each case that the parties cite, it appears that a prerequisite to relief for document spoilation is that the documents have been lost or destroyed. *See, e.g.,* *Skeete v. McKinsey & Co., Inc.*, 1993 WL 256659 at *2 (S.D.N.Y. July 7, 1993).

However, even if the defendants did destroy the documents, plaintiff would not be entitled to an adverse inference charge. Such a charge is appropriate "[w] hen the contents of a document are relevant to an issue in a case [so that the] trier of fact ... may receive the fact of the document's ... destruction as evidence that the party which has prevented production did so out of the well-founded fear that the contents would harm him." *Id.* at 25. Here, however, Magistrate Judge Peck decided (and I have affirmed) that plaintiff failed to establish that these documents are relevant. Therefore, plaintiff cannot be entitled to an adverse inference charge. *See* *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 76–77 (S.D.N.Y.1991).

Similarly, "[i]n weighing and determining the appropriateness and severity of sanctions, judges should examine the materiality and value of the suppressed evidence upon the ability of a [party] to fully and fairly prepare for trial." *Id.* at 26–27 (alteration in the original) (citation omitted). Again, because the documents plaintiff requested have been ruled irrelevant, no prejudice has accrued to plaintiff, and consequently this court chooses not to exercise its inherent power to strike the defendants' motion and its answer. Therefore, plaintiff's motion is denied. Similarly, defendants' motion for costs with respect to this application is also denied.

III. *Conclusion*

***14** For the reasons stated above, the motion for summary judgment made by the RCC Defendants and Aegon U.S.A. is GRANTED. The Galbreath Defendants' motion for summary judgment of plaintiff's Title VII claims is DENIED with respect to her claim for sexual harassment, but GRANTED with respect to her claim for discriminatory discharge based on her sex and retaliatory discharge. Lastly, the Galbreath Defendants' motion for summary judgment on plaintiff's state law claims is GRANTED with respect to her Fifth, Seventh, Tenth, Eleventh, Twelfth, Thirteenth (as to The Galbreath Company only), Fourteenth and Sixteenth causes of action, but DENIED with respect to her Sixth, Ninth, Thirteenth (as to the individual defendants) and Fifteenth causes of action. Plaintiff's motion with respect to the alleged intentional document spoilation is DENIED, as is the Galbreath Defendants' motion for fees on that application. The remainder of the claims will be tried in November, 1997.

SO ORDERED.