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

Babby NAJNIN, Plaintiff,
v.
DOLLAR MOUNTAIN, INC., Mohammad Imran, Individually, and Mustafa Hadi, Individually, Defendants.

No. 14cv5758. | Signed Sept. 25, 2015.

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, District Judge.

***1** Plaintiff Babby Najnin ("Najnin") alleges that Defendant Dollar Mountain ("Dollar Mountain") failed to pay her overtime wages, violating the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL"). Najnin also alleges violations of Title VII of the Civil Rights Act of 1964 ("Title VII") and the New York City Human Rights Law ("NYCHRL"), as a result of harassment by Defendants Mustafa Hadi ("Hadi") and Mohammad Imran ("Imran"). Dollar Mountain has not answered the complaint or otherwise appeared in this action. Plaintiff now moves for default judgment and damages. For the reasons that follow, Najnin's motion is granted, in part.

BACKGROUND

From February 1, 2010 to June 12, 2013, Najnin was employed as a Dollar Mountain cashier, earning $7.25 per hour. (Decl.¶¶ 2, 23). Although she regularly worked fifty-five hours per week, Dollar Mountain paid her for forty hours per week at her regular wage of $7.25 per hour. (Decl.¶¶ 25, 26). Najnin was paid in cash. (Decl.¶ 28). In August 2012, Dollar Mountain hired Mustafa Hadi as a Store Manager, and he became Najnin's direct supervisor. (Decl.¶ 6). Hadi allegedly discriminated against and sexually harassed Najnin until she was forced to resign from her position in June 2013. (Decl.¶¶ 7–15, 23).

DISCUSSION

When a defendant defaults in an action, the plaintiff's well pleaded factual allegations are accepted as true, except for those relating to damages. *See* *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir.1992); *Angamarca v. Pita Grill 7 Inc.*, No. 11cv7777 (JGK) (JLC), 2012 WL 3578781, at *3 (S.D.N.Y. Aug. 2, 2012). Plaintiff bears the burden of substantiating her claims with evidence to prove the extent of her damages. *See* *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp .*, 973 F.2d 155, 158 (2d Cir.1992) (citing *Flaks v. Koegel*, 504 F.2d 702, 707 (2d Cir.1974)). An inquest into damages may be held on the basis of documentary evidence "as long as [the Court has] ensured that there was a basis for the damages specified in [the] default judgment." *Fustok v. ContiCommodity Servs.*, 873 F.3d 38, 40 (2d Cir.1989).

A. *Unpaid Overtime Wages*

In a wage-and-hour action, a plaintiff "has the burden of proving that [s]he performed work for which [s]he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)). However, if the employer does not then come forward with evidence disputing the employee's figures, "the court may enter judgment in the employee's favor, using her recollection to determine damages, 'even though the result be only approximate.' " *Lanzetta v. Florio's Enters., Inc.*, 763 F.Supp.2d 615, 618 (S.D.N.Y.2011) (quoting *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 67 (2d Cir.1997)).

Both federal and state law require certain employers to pay employees a minimum wage for an employee's first 40 hours of work each week. *See* 29 U.S.C. § 206(a)(1); NYLL § 652(1).[1] For every hour worked beyond 40 hours per week, both federal and state law also mandate that a non-exempt employee be paid at a rate not less than one-and-a-half times the regular rate. *See* 29 U.S.C. § 207(a)(1); 12 NYCRR § 142–2.2 (overtime rate calculated in the same manner as under the FLSA). *See also* *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 113–14 (2d Cir.2013).

1 At all times during Najnin's employment, both the federal and New York State minimum wages were $7.25, which was Najnin's hourly wage throughout her employment.

***2** Najnin's factual allegations concerning her wage-and-hour claims suggest that she was not paid for 15

overtime hours per week throughout the entire period of her employment. They may be considered reliable for purposes of a default judgment. Her employment lasted from February 1, 2010 until June 12, 2013, a total of 175 weeks. Because her overtime wages during this period should have been $10.88 per hour, or 1.5 times her regular wage of $7.25, Najnin is entitled to $28,560 in unpaid overtime wages.

B. *Back Pay*

Back pay is a specific remedy for unlawful discrimination under Title VII, and the NYCHRL authorizes a broad range of remedies that undoubtedly includes back pay. *See* 42 U.S.C. § 2000e–5(g)(1); N.Y.C. Admin. Code § 8–502(a). A victim of discrimination, however, has a duty to mitigate back pay damages. See 42 U.S.C. § 2000e–5(g) (1); *E.E.O.C. v. Bloomberg L.P.*, 29 F.Supp.3d 334, n. 9 (S.D.N.Y 2014). This obligation is not an onerous one, and there is no requirement that a plaintiff be successful in obtaining comparable work, only that he or she makes a good faith effort to do so. *See, e.g.*, *Dailey v. Societe Generate*, 108 F.3d 451, 456 (2d Cir.1997). However, if the plaintiff accepts employment, even if not comparable, the new earning are subtracted from the back pay award. *See* 42 U.S.C. § 2000e–5(g)(1). Because Because Najnin fails to demonstrate that she made any attempts to secure employment since she was constructively discharged from Dollar Mountain, an award of back pay is inappropriate.

C. *Liquidated Damages*

As this Court has previously held, a plaintiff is entitled to recover liquidated damages under both the FLSA and the NYLL. *See Yuquilema v. Manhattan's Hero Corp.*, No. 13–CV–0461 (WHP)(JLC), 2014 WL 4207106, at *7 (S.D.N.Y. Aug. 26, 2014). Under the FLSA, a plaintiff who demonstrates that she was improperly denied overtime wages may recover, in addition to reimbursement of these unpaid wages, an equal amount as liquidated damages. *See* 29 U.S.C. § 216(b). If an employer's acts are "willful," the statute of limitations under the FLSA is three years. 29 U.S.C. § 255(a). Najnin alleges that the acts of Defendants were willful (*see* Compl. ¶ 76), and this Court accepts those allegations as true by virtue of the entry of default. Thus, the three-year statute of limitations period applies.

The FLSA authorizes liquidated damages for 100 percent of her uncompensated wages for the three years preceding the filing date of the complaint on July 28, 2014.[2] Plaintiff is owed $163.20 per week in unpaid overtime pay from July 28, 2011 until June 12, 2013, the date of her resignation. As there are 98 weeks between July 28, 2011 and June 12, 2013, Plaintiff is owed $15,993.60 in liquidated damages under the FLSA, equaling the total of her unpaid overtime wages during the period covered by the statute of limitations.

2 Najnin ignores the statute of limitations and contends that she should receive FLSA liquidated damages representing 100 percent of her unpaid wages for the entirety of her employment.

The NYLL also authorizes liquidated damages where an employer's actions were willful. It has a six-year statute of limitations on all claims. See NYLL §§ 198(I-a), 663(1). Prior to April 9, 2011, such liquidated damages were calculated at 25 percent of the lost pay. From April 9, 2011 forward, these state damages are set at 100 percent of unpaid wages. *See* NYLL § 663(1); 2010 N.Y. Sess. Laws, ch. 564 (S.8380) (McKinney).

***3** Because of the change in the percentage of allowable liquidated damages, two calculations are necessary here.[3] The first period runs from February 1, 2010, the start of Najnin's employment, to April 8, 2011, and amounts to $2,529.60 ($163.20 in unpaid overtime per week for the 62 weeks in this period, equals $10,118.40). The second period begins April 10, 2011 and concludes June 12, 2013, when Najnin was constructively discharged, and amounts to $18,441.60 ($163.20 in unpaid overtime per week for the 113 weeks in this period). In sum, Najnin may recover $20,971.20 in liquidated damages under the NYLL.

3 In calculating NYLL liquidated damages, Najnin ignores the 25 percent rate that was in effect before April 9, 2011.

D. *Emotional Distress Damages*

To obtain emotional distress damages, a plaintiff must establish actual injury and the award must be "supported by competent evidence" in addition to a plaintiff's subjective testimony. *Patrolmen's Benevolent Ass'n of N.Y., Inc. v. City of New York*, 310 F.3d 43, 55 (2d Cir.2002). "Garden variety" emotional distress claims lacking extraordinary circumstances and without medical corroboration generally merit $5,000 to $35,000 awards. *See Becerril v. East Bronx NAACP Child Development* Center, 08CIV10283 (PAC) (KNF), 2009 WL 2611950 at *6 (S.D.N.Y. Aug. 18, 2009). Cases with evidence of debilitating and permanent alterations in lifestyle may merit larger awards.

Najnin's evidence of emotional distress consists of her testimony that she felt extremely uncomfortable (Decl.¶ 7), shocked (Decl.¶ 12), disgusted and intimidated (Decl.¶ 15), and distraught (Decl.¶ 16) as a result of Defendants' sexual harassment. She also states that she began taking Xanax to combat stress. (Decl.¶ 16). Najnin's allegations of emotional distress are relatively "garden variety," and are stated as conclusions drawn by Najnin herself. Without any medical documentation, a damages award of $75,000 is inappropriate. *Compare* Manson v. Friedberg and Oldstone Ventures, LLC. 08CIV3890 (RO), 2013 WL 2896971, at *7–*8 (awarding $50,000 for emotional distress that was "significant" where plaintiff submitted documentation from her physician that she was prescribed three medications, was diagnosed as depressed, suffered migraines and post-concussive syndrome). This Court finds an award of $25,000 is sufficient to address Najnin's claim of emotional distress.

E. *Preiudgment Interest*

Najnin also seeks an award of prejudgment interest on her FLSA and NYLL damage awards. The decision to award prejudgment interest is discretionary, and is based on the need to fully compensate the wronged party, fairness of the award, and the remedial purpose of the statute involved. *Wickham Contracting Co. v. Local Union No. 3*, 955 F.2d 831, 833–34 (2d Cir.1992) (citing *Loeffler v. Frank*, 486 U.S. 549, 557–58 (1988)). Additionally, awarding prejudgment interest "prevents the defendant employer from attempting to 'enjoy an interest-free loan for as long as it can delay paying out back wages[,]' and helps ensure that the plaintiff is meaningfully made whole." *Gierlinger v. Gleason*, 160 F.3d 858, 874 (2d Cir.1998) (internal citations omitted) (quoting *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 145 (2d Cir.1993)).

***4** Because FLSA liquidated damages are also a form of compensatory judgment, courts do not award statutory prejudgment interest on any portion of a plaintiff's recovery for which FLSA liquidated damages were awarded. *Yuquilema v. Manhattan's Hero Corp.*, No. 13–CV–0461 (WHP)(JLC), 2014 WL 4207106, *11 (S.D.N.Y. Apr. 4, 2014). By contrast, because liquidated damages provided for by the NYLL are considered punitive in nature, a plaintiff is entitled to an award of prejudgment interest on the portion of compensatory recovery arising under state law. *Angamarca v. Pita Grill 7 Inc.*, 2012 WL 3578781, at *9 (quoting *Santillan v. Henao*, 822 F.Supp.2d 284, 298 (E.D.N.Y.2011)); *see also Reilly v. Natwest Market Group Inc.*, 181 F.3d 253, 265 (2d Cir.1999).

Pursuant to state law, a successful plaintiff may receive prejudgment interest at a rate of nine percent per year. N.Y. C.P.L .R. §§ 5001, 5004. Where the plaintiff's damages were incurred at various times, interest may be computed from a "single reasonable intermediate date" between the dates on which the plaintiff started and stopped incurring the damages. N.Y. C.P.L.R. § 5001(b). In wage and hour cases, the midpoint of the plaintiff's employment within the limitations period is commonly considered a reasonable choice. *Tackie v. Keff Enterprises, LLC*, No. 14–CV–2074 (JPO), 2014 WL 4626229, *6 (S.D.N.Y. Sept. 16, 2014).

Although her employment with Dollar Mountain lasted from February 1, 2010 until June 12, 2013, she is only entitled to prejudgment interest for her unpaid wages from February 1, 2010 until July 27, 2011. Because Najnin was owed $163.20 in unpaid overtime wages during this 77 week period, the principal to which the nine percent interest rate should be applied is $12,566.40. Najnin is entitled to a prejudgment interest award on this amount from the midpoint date for this period, October 25, 2010.

F. *Attorney's Fees and Costs*

Najnin's counsel seeks an award of attorney's fees in the amount of $5,950. (Declaration of Alex Umansky, Esq. (Umansky Decl.), ¶¶ 2, 18). In addition, Najnin's counsel seeks an award of $547 for costs incurred while filing the various submissions in this case. (Umansky Decl. ¶¶ 2, 23). Under both the FLSA and the NYLL, a prevailing plaintiff may recover her reasonable attorney's fees and costs. *See* 29 U.S.C. § 216(b); NYLL § 198(1–3). District courts enjoy broad discretion when setting a fee award, but they must clearly and concisely state reasons supporting the award. *Hensley v. Eckerhart* 461 U.S. 424, 437 (1983); *Matusick v. Erie Cntv. Water Auth.*, 757 F.3d 31, 64 (2d Cir.2014) ("We afford a district court considerable discretion in determining what constitutes reasonable attorney's fees in a given case, mindful of the court's 'superior understanding of the litigation and ... what essentially are factual matter.' ") (quoting *Hensley*).

An appropriate fee award is determined by calculating the lodestar amount, or "the product of a reasonable hourly rate and the reasonable number of hours required by the case." *Millea v. Metro–North R.R.*, 658 F.3d 154, 166 (2d Cir.2011) (quoting *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 183 (2d Cir.2008)); *see also Perdue v. Kenny A. ex rel. Winn*, 558 U.S. 542, 543 (2010).

***5** Najnin's counsel performed a total of 17 hours of work on this case, at the rate of $350 per hour, for a total of $5,950 in legal fees. Counsel's rate, at $350 per hour, is reasonable based on the nature of the case and his experience. "Courts in this district have determined in recent cases that a fee ranging from $250 to $450 is appropriate for experienced litigators in wage-and-hour cases." *Yuquilema v. Manhattan's Hero Corp.*, No. 13–CV–0461 (WHP) (JLC), 2014 WL 4207106, *14 (S.D.N.Y. Apr. 4, 2014); *see Johnson v. Strive E. Harlem Empl. Group*, 2014 U.S. Dist. LEXIS 10342, *3 (S.D.N.Y. Jan. 28, 2014) (awarding $300 per hour rate for Mr. Umansky in a case with only Title VII and NYCHRL discrimination claims).

In his declaration, Najnin's counsel notes that the 17 hours spent on this case consisted of drafting, filing, and serving the summons and complaint, preparing a damages demand letter, and working on the default judgment motion. (Umansky Decl. ¶ 19). This is reasonable. Najnin is therefore awarded $5,950 as recovery for attorney's fees and $547 in costs.

CONCLUSION

Plaintiff Babby Najnin's motion for default judgment against Defendant Dollar Mountain, Inc. is granted. The Clerk of Court is directed to enter default judgment against Defendant Dollar Mountain, Inc. in the amount of:

- $28,560 in unpaid overtime wages;
- $15,993.60 in FLSA liquidated damages;
- $20,971.20 in NYLL liquidated damages; prejudgment interest on $12,566.40 at a rate of 9% from October 25, 2010;
- $25,000 in emotional distress damages; and
- $5,950 in attorney's fees and $547 in costs.

Najnin's claims against Mohammad Imran and Mustafa Hadi are dismissed for failure to prosecute under Federal Rule of Civil Procedure 4. The Clerk of Court is directed to terminate the motion pending at ECF No. 8 and mark this case closed.

SO ORDERED.

All Citations

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