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

PRESENT: SOLOMON Justice

PART 55

MENG L. JI, ETAL

-v-

BELLE WORLD BEAUTY, INC., ETAL.

INDEX NO. 603228/08

MOTION DATE 7/25/11

MOTION SEQ. NO. 10

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for amend complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4
Replying Affidavits	5-6

Cross-Motion: ☐ Yes ☒ No

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

FILED

AUG 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/17/11

J.S.C.
ANNE S. SOLOMON

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

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MENG L. JI and YING ZHU,

Plaintiffs,

-against-

BELLE WORLD BEAUTY, INC., KOK LIM TSUN and PUI F. CHANG,

Defendants.

----------X

Index No. 603228/2008

DECISION & ORDER

SOLOMON, J.:

This action arises from the allegations of plaintiffs Meng L. Ji (Ji) and Ying Zhu (Zhu)(collectively, Plaintiffs) that defendants Belle World Beauty, Inc. (Belle World), its owner Kok Lim Tsun (Tsun), and his wife Pui F. Chang (Chang) violated provisions of the New York Labor Law (Labor Law) and the Federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 200 et seq. By order to show cause, Plaintiffs move for permission to take a trial deposition of Ji. They also seek to amend the complaint based on recent changes in the law.

Plaintiffs were employees at Belle World, a beauty salon on 125th Street in Manhattan. Ji was a nail technician from March through October 2007. Zhu was a nail technician from July through September 2007. Plaintiff's allege that: they worked six days a week from 10 A.M. to 8 P.M., though they often arrived half an hour early to set up and stayed half an hour late to clean up; they were paid $100 per day, regardless of the amount of time they worked; they were not allowed breaks; and, Defendants did not have a conspicuous posting regarding minimum wages and overtime pay. In August 2007, Zhu complained to Tsun

about the long hours and lack of overtime pay. Also in August, Ji complained to non-party Nancy Lu, Belle World's manager. Zhu was terminated one month later. Ji was terminated approximately two weeks after that. This lawsuit followed, seeking back pay, front pay and attorney's fees.

Ji is a citizen of China and resides in America by way of a work visa. That visa has expired, and Ji is required to return to China. Having filed the note of issue in December 2010, Plaintiffs request, pursuant to CPLR 3117(a)(3)(v), that they be allowed to take a trial deposition of Ji in order to preserve her testimony in the event that she leaves and is unable to return.

Defendants argue that Plaintiffs have not shown that exceptional circumstances exist to justify the use of a deposition at trial in place of live testimony. This argument does not address Plaintiffs' request. Plaintiffs are not now asking to use the deposition at trial; they only want leave to conduct one to preserve her testimony in the event that she is unable to return for trial. Whether circumstances exist to allow use of the deposition at trial is a question to be raised at the time of trial (CPLR 3117[a][3]), and is not grounds to deny Plaintiffs' request.

Next, Plaintiffs seek to amend the complaint to include a new cause of action for unlawful retaliation under FLSA § 215(a)(3). This request arises from a recent United States

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Supreme Court decision.

Section 215(a)(3) of FLSA makes it unlawful for an employer to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint." In 1993, the Second Circuit defined "complaint" as "filing formal complaints, instituting a proceeding, or testifying, but . . . [not] complaints made to a supervisor" (*Lambert v. Genesee Hosp.*, 10 F3d 46, 55 [2nd Cir.(NY), 1993]).

Recently, on March 22, 2011, the Supreme Court held that the FLSA protects employees from retaliation for oral complaints (*Kasten v. Saint-Gobain Performance Plastics Corp.*, ___ U.S. ____, 131 S.Ct. 1325, 1330 [2011]). Shortly thereafter, the Second Circuit noted that the *Kasten* decision "abrogate[s] our precedent in this area" (*Keubel v. Black & Decker, Inc.*, 643 F.3d 352, 358, fn 3 [2nd Circ. 2011])--i.e., the holding in *Lambert*. In its *Kasten* decision the Supreme Court emphasized that the "enforcement needs of [the FLSA] argue for an interpretation of the word 'complaint' that would provide 'broad rather than narrow protection to the employee'" (*Kasten*, 131 S.Ct. at 1335). The Court stated that an employee is deemed to have filed a complaint when "a reasonable, objective person would have understood the employee to have put the employer on notice that the employee is asserting statutory rights under the [Act]" (*Kasten*, 131 S.Ct. at 1335 [internal quotation marks omitted]). As indicated above, the complaint here has allegations that fit

this description.

Defendants are unpersuasive when they argue that the proposed amendment should be denied because the *Kasten* and *Keubel* decisions "are mere speculation as to whether a cause of action will be inferred from the facts" herein, and the claim "is not ripe." Moreover, adding the claim will not prejudice the Defendants, nor will it require further discovery, as all the facts and evidence are disclosed in connection with the existing Labor Law claim.

Defendants' arguments that the New York State Supreme Court is not a proper venue to bring an FLSA claim is incorrect, as is their argument that Plaintiffs had the opportunity to plead this claim in the original complaint, but chose not to do so.

Finally, Plaintiffs seek to amend the complaint to reflect recent amendments to the Labor Law. On April 9, 2011, the Wage Theft Prevention Act (WTPA) became effective, which, as relevant, amends the Labor Law to provide that a prevailing employee may receive:

> the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the [CPLR], and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due

(Labor Law § 198[1-a]; changes found at L.2010, c.564, §§ 7, 16). Previously, liquidated damages were capped at twenty five percent of the wages due.

Plaintiffs argue that the amended language must be applied retroactively. Defendants argue that to allow the amended damages claim would be "analogous to altering the punishment of a shoplifter from the proverbial slap on the wrist, to the death penalty" (Opposition, ¶ 16). Hyperbole aside, they contend that the substantial increase in the severity of the remedy makes retroactive application of the WTPA unfair and improper.

The general rule is that a statute should be construed as prospective unless the language of the statute, either expressly or by direct implication, requires a retroactive construction. However, remedial statutes are given retroactive construction to the extent that they do not impair vested rights or create new rights (see, McKinney's Statutes §§ 54[a], 321; *Kriegel Assocs. v. Lahm Knitting Mill*, 179 AD2d 539 [2nd Dept., 1992], *lv dismissed* 80 NY2d 893 [1993]; *see e.g., Shielcrawt v. Moffett*, 294 NY 180, 188 [1945][changes to a remedial statute are "given retrospective effect insofar as the statute provides a change in the form of remedy . . ."]).

Defendants do not contest that Labor Law § 198(1-a) is a remedial statute. The new language in the statute does not affect any vested interest of the Defendants. It also does not create a new right of recovery. Accordingly, the changes made to Labor Law 198(1-a) by the WTPA may be applied retroactively, and Plaintiffs' request to amend the complaint to reflect the changes

is granted.

In light of the foregoing, it hereby is

ORDERED that Plaintiffs are granted leave to conduct a deposition to preserve the testimony of plaintiff Meng L. Ji, provided that, at Plaintiffs' expense, it is video taped and properly translated; said deposition to be completed by October 3, 2011; and it further is

ORDERED that the branch of Plaintiffs' motion for leave to amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers, Ex. H, shall be deemed served upon service of a copy of this order with notice of entry thereof; and it further is

ORDERED that Defendants shall serve an answer to the amended complaint within 20 days from the date of service; and it further is

ORDERED that counsel are directed to appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, on October 17, 2011 at 2 PM.

Dated: August 22 2011

Enter:

J.S.C.

ARLENE S. SOLOMON

FILED

AUG 24 2011

NEW YORK
COUNTY CLERK'S OFFICE