Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-203

JANUARY TERM, 2005

Judith N. Robbins v. Old Tavern at Grafton, Inc.	}	APPEALED FROM: Windsor Superior Court DOCKET NO. 595-11-02 Wrcv Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Plaintiff Judith N. Robbins appeals from the trial court' s order granting summary judgment to defendant Old Tavern at Grafton, Inc., on her claims arising from an employment dispute. She argues that the court erred in granting summary judgment because disputed issues of material fact exist. We affirm.

Plaintiff was employed by the Old Tavern as a waitress. In November 2002, she filed a complaint against the Old Tavern, raising claims of wrongful termination, breach of the covenant of good faith and fair dealing, wrongful retaliatory discharge, age discrimination, and intentional infliction of emotional distress. The Old Tavern moved for summary judgment, which the court granted. In reaching its conclusion, the court relied on the following undisputed facts. Plaintiff was employed by the Old Tavern between May 2000 and November 2001. She primarily worked the morning shift, serving breakfast and lunch. In October 2001, plaintiff informed the Old Tavern that she could work only two shifts per week for medical reasons, a request granted by the Old Tavern. The Old Tavern stopped serving lunch by the fall of 2001, which meant that the morning shift employees served breakfast only, although they were also eligible to work dinner shifts. During her employment, plaintiff had an " off and on" relationship with the restaurant's chef. On October 22, 2001, plaintiff reported to the assistant innkeeper that ten days earlier, the chef had grabbed her arm, leaving a bruise. The Old Tavern conducted an investigation and its president counseled the chef on improving his management style, and ordered him to attend anger management therapy.

The hospitality industry in Vermont is seasonal, and the " busy season" at the Old Tavern is between mid-May and October. Business drops significantly during the remainder of the year. During the " down season," the Old Tavern reduces its staff. Generally, the employees receive unemployment benefits and seek re-employment in the spring. The Old Tavern also closes for approximately six weeks per year, generally between April and early May. When the Old Tavern closes in the spring, it tells its employees who are then working when the restaurant will be reopening. The Old Tavern also calls these employees or otherwise notifies them of when the restaurant will reopen.

In November 2001, the Old Tavern laid off seven employees, including plaintiff. Plaintiff was not working full-time when she was laid off, and because the Old Tavern had stopped serving lunch, many of the hours she had previously worked were no longer available to her. Because November marked the beginning of the slow season, remaining shifts were sparse. When working shifts are sparse, the Old Tavern gives priority to full time employees. All of the employees who were laid off, except plaintiff, filed for unemployment benefits. After November 2001, plaintiff did not attempt to contact her supervisor or the innkeeper concerning re-employment. She did call the front desk at some point to ask if she was on the schedule, and was informed that she was not. She did not inquire about available shifts because she was considering filing a lawsuit against the Old Tavern. After the November 2001 layoff, plaintiff worked as a server for another restaurant, working an average of two to three shifts per week.

Based on these facts, the court granted summary judgment to the Old Tavern on plaintiff' s claims. The court first concluded that plaintiff failed to demonstrate that she had an implied contractual relationship with the Old Tavern that had modified her at-will employment status. Plaintiff had argued that the Old Tavern had a uniform practice of rehiring seasonal employees who were laid off during the slow season. Even accepting plaintiff' s premise that a seasonal employer could modify an at-will employment agreement unilaterally by consistently and uniformly rehiring all laid-off workers when the company reopens for the following season, the court found no evidence that the Old Tavern followed a practice of calling back all employees, including part-time employees, who were laid off when business slowed down in November. The court explained that there were no facts showing that any of the employees who had been laid off in November 2001 were called back in May 2002. The court thus found that plaintiff had failed to present prima facie evidence of her claim, and granted summary judgment for the Old Tavern on this claim, as well as on plaintiff' s related claim that the Old Tavern had breached the covenant of good faith and fair dealing.

The court similarly found no evidence to support plaintiff' s wrongful retaliatory discharge claim. Plaintiff had alleged that the Old Tavern had retaliated against her by laying her off, and not rehiring her in the spring, because she had reported that the chef had abused her. The court found that Old Tavern had presented legitimate reasons for its actions, and plaintiff had not submitted evidence to show that Old Tavern' s reasons were a pretext for discrimination. The court thus granted summary judgment for the Old Tavern on this claim, as well as on plaintiff' s age discrimination claim, which she had not pursued.* This appeal followed.

Plaintiff first argues that the trial court erred in finding an absence of disputed material facts regarding her breach-of-implied-contract claim. She asserts that the Old Tavern's practice of recalling employees at the end of the slow season was a standard practice that modified her at-will employment status, and became part of her enforceable implied contract of employment. She argues that the trial court recognized that the Old Tavern had a standard practice in place, but it erroneously excluded her and other part-time employees from the at-will modification. Plaintiff maintains that evidence existed to show that part-time employees were included in the modification.

We review the trial court' s summary judgment decision using the same standard as the trial court. In re Carter, 2004 VT 21, ¶ 6, 848 A.2d 281. Summary judgment is appropriate if there are no genuine issues of material fact, and viewing the evidence in the light most favorable to the moving party, the moving party is entitled to judgment as a matter of law. Id.; V.R.C.P. 56(c). Summary judgment was properly granted here.

An at-will employment agreement is terminable at any time, " for any reason or for none at all." Ross v. Times Mirror, Inc., 164 Vt. 13, 18, 665 A.2d 580, 583 (1995) (internal quotation marks, citation, and brackets omitted). The presumption of at-will employment may be overcome by evidence of a clearly established, company-wide, personnel policy that is consistently applied throughout the company. 164 Vt. at 19, 22, 665 A.2d at 584-85. While an employee' s own experience may be relevant in this analysis, " it does not, by itself, suggest a definitive company-wide practice." 164 Vt. at 22, 665 A.2d at 585.

In this case, plaintiff failed to present evidence to show that she had an implied contract with the Old Tavern that modified her at-will employment status. Indeed, plaintiff misconstrues the trial court' s order, and mischaracterizes both the evidence and the law. The court' s analysis did not hinge on her status as a part-time employee. As the trial court explained, although the undisputed facts indicated that the Old Tavern followed a practice of contacting and calling back full-time employees when the business closed down completely for six weeks in the spring, there was no evidence to show that the Old Tavern followed a practice of calling back all employees, including part-time employees, when the business slowed down in November. There was no evidence to show that any of the employees who were laid off in November 2001 were called back in May 2002. Plaintiff points to testimony in the record that she asserts demonstrates the existence of disputed material facts on this issue. The cited testimony plainly refers to procedures followed by the Old Tavern after the spring closing, and it does not demonstrate the existence of disputed material facts. Because plaintiff failed to present prima facie evidence to support her claim of breach of an implied contract, summary judgment was properly granted for the Old Tavern. Plaintiff concedes that her claim of a breach of the covenant of good faith and fair dealing depends on the existence of a contractual relationship. Given our conclusion above, we need not address this claim.

Plaintiff next argues that the court erred in granting summary judgment on her retaliatory discharge claim. She

maintains that she was not recalled at the end of the slow season, and thus " essentially fired" by Old Tavern. She suggests that she was terminated because she reported being abused by the chef, in violation of public policy. Somewhat confusingly, plaintiff also asserts that the Old Tavern' s " actions in perpetrating a stealth termination breached the public policy supporting reasonable treatment for employees." According to plaintiff, the Old Tavern' s failure to notify her regarding the return-to-work date, and its failure to put her on the work schedule, aggregates into clear violations of her rights under the Old Tavern' s established return-to-work policy. Plaintiff maintains that in analyzing the merits of her claim, the trial court ignored the key factor regarding her retaliation claim, which was the Old Tavern' s failure to recall her after the slow season concluded.

We find these arguments without merit. An at-will employee may be terminated for any reason, unless there is a clear and compelling public policy against the reason advanced for the discharge. Adams v. Green Mountain R.R., Co., 2004 VT 75, ¶ 5, 862 A.2d 233 (mem.). To support a claim of retaliatory discharge in violation of public policy, plaintiff needed to show that: (1) she was engaged in an activity protected by public policy; (2) defendant knew of the protected activity; (3) defendant fired her; and (4) the sole or principal reason for her discharge was that she had engaged in the protected activity. See id. ¶ 7. If a plaintiff establishes a prima facie case of retaliation, the employer must proffer a legitimate nondiscriminatory reason for its actions. Plaintiff must then prove by a preponderance of the evidence that the employer' s reasons for its actions are a pretext for discrimination. Mellin v. Flood Brook Union Sch. Dist., 173 Vt. 202, 211, 790 A.2d 408, 418 (2001). Even assuming that plaintiff presented a prima facie case to support her claim, she failed to present evidence to show that the Old Tavern' s proffered reason in support of her discharge was a pretext.

As the trial court explained, the undisputed evidence showed that the Old Tavern laid off employees in November each year. In November 2001, plaintiff was one of seven employees laid off because Old Tavern gives priority to full-time employees. The Old Tavern' s decision to lay plaintiff off was consistent with its policy of cutting back for the slow season, while retaining full-time employees until the restaurant closes in the spring for six weeks. Plaintiff did not present any evidence to show that these proffered reasons were pretextual. Her statement that she had a " feeling" that these reasons were pretextual does not suffice, nor does the fact that she was not rehired in the spring. As discussed above, the Old Tavern was under no obligation to recall plaintiff in the spring. Summary judgment was properly granted to the Old Tavern on this claim.

During the pendency of this appeal, defendant filed a motion to strike plaintiff' s reply brief and her supplemental printed case. We deny the motion.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned

Footnote

* Plaintiff's intentional infliction of emotional distress claim was dismissed with prejudice pursuant to a stipulation between the parties.