STATE OF VERMONT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 265-12-11 Oecv

LAURIE HOSTETTER,
DAN HOSTETTER,
Plaintiffs

v.

THREE STALLION INN, INC.,
SAM SAMMIS,
Defendants

DECISION

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Before the court are two motions for summary judgment filed by defendants Three Stallion Inn, Inc. and Sam Sammis, represented by Attorney Frank H. Olmstead. Defendants seek judgment in their favor on all claims raised by their former employee, plaintiff Laurie Hostetter, represented by Attorney Kaveh S. Shahi.[1]

BACKGROUND

The factual circumstances applicable to defendants' motions largely involve a written employment contract between the parties, entered into in or about May 2010, by which defendants agreed to hire plaintiff as a manager. The written terms of the agreement are undisputed: plaintiff was to begin her employment on a salaried basis of $45,000 per year, with an increase to $50,000 after six months of employment. The parties also agreed on terms of leave, including: one week of already accrued vacation leave from past hourly work; an additional two weeks of vacation leave per year, which could accumulate from year to year; and one week of sick leave per year, not to accumulate.

The agreement makes no reference to the number of hours plaintiff was expected to work on a weekly basis and is silent as to any policy regarding compensatory time. It is further undisputed that no written policies otherwise existed regarding compensatory time or expectations as to how many hours salaried employees were to work. The parties also agree

[1] The initial complaint lodges two claims on behalf of plaintiff Dan Hostetter, who passed away during the pendency of this action. These two claims, labeled in the complaint as counts "VIII" and "IX," are not addressed in defendants' motions for summary judgment.

that plaintiff was exempt from statutes requiring compensation for overtime. However, plaintiff alleges that defendants engaged in the practice of issuing compensatory time to salaried employees who worked in excess of forty hours per week. As evidence thereof, plaintiff claims she was able to take 3.5 days off by applying excess hours worked, rather than annual leave, and that she is aware of at least one other salaried employee who was able to do the same.

In April 2011, approximately one year after commencing her employment, plaintiff was terminated in the context of a round of layoffs. Plaintiff claims that at the time of her termination, she had accrued over 500 hours of unused compensatory time and that it was incumbent upon defendants to pay her for these excess hours. In her complaint, plaintiff presents four theories of liability, including: breach of contract, violation of wage provisions under 21 V.S.A. § 342(b)(2),[2] breach of the covenant of good faith and fair dealing, and unjust enrichment, which are respectively referred to in the complaint as counts "I," "II," "III," and "IV."

Plaintiff further alleges that at the time of her termination, defendants failed to make payment for unused annual leave in the amount 17.15 days.[3] It is undisputed that prior to the commencement of this action, plaintiff, acting through counsel, requested payment for her annual leave and defendants responded by remitting a check in the amount of $2,635. Plaintiff alleges this amount was incorrect, though, both in the number of days it purported to compensate, as well as the rate at which it was paid. Specifically, plaintiff alleges the correct amount should be $3,298.28 (an additional $663.28), and claims that the improper payment was another breach of contract and violation of the wage provisions of 21 V.S.A. § 342(b)(2). These claims are set forth in the complaint as counts "V" and "VI."

One additional claim, labeled in the complaint as count "VII," sets forth that defendant Sammis exhibited favoritism towards female employees who "flirted with him and were sexually friendly." Plaintiff claims she was terminated because, among other reasons, she "did not flirt or otherwise behave inappropriately with defendant Sammis." Plaintiff alleges her termination was tantamount to gender discrimination, in violation of Vermont's Fair Employment Practices Act ("FEPA"), 21 V.S.A. §§ 495, et seq.

ANALYSIS

Summary judgment is authorized when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). In reviewing a motion for summary judgment, it is well settled that the record evidence must be considered "in the light most favorable to the nonmoving party." *Stone v. Town of Irasburg*, 2014 VT 43, ¶

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[2] 21 V.S.A. § 342(b)(2) provides that an individual discharged from employment "shall be paid [wages] within 72 hours of discharge."

[3] The complaint seeks compensation for "14.44 hours" of annual leave but, in opposition to defendants' motions for summary judgment, plaintiff indicates this was a "typographical error."

25 (citing *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356 (the "nonmoving party receives the benefit of all reasonable doubts and inferences").

"Summary judgment is not a substitute for a determination on the merits, so long as evidence has been presented which creates an issue of material fact, no matter what view the court may take of the relative weight of that evidence." *Vt. Envtl. Bd. v. Chickering*, 155 Vt. 308, 319 (1990). The court's determination is limited to whether the facts alleged are "sufficient for a reasonable jury to find in favor of the nonmoving party." *Estate of Alden v. Dee*, 190 Vt. 401, 409 (2011).

In reviewing defendants' motions for summary judgment, it is prudent to categorize plaintiff's claims into three general subject areas, including: (1) claims related to alleged compensatory time; (2) claims addressing compensation for annual leave; and (3) the claim of gender discrimination.

Compensatory Time

Plaintiff first alleges that defendants' failure to make payment for unused compensatory time was a breach of the parties' employment contract. As above, though, it is indisputable that the plain terms of the contract make no reference to any compensatory time policy or limitation on the number of hours plaintiff was expected to work. The evidence plaintiff presents as proof of the compensatory time policy is extrinsic in nature and, in the context of reviewing contractual terms, the presentation of extrinsic evidence generally gives rise to questions regarding the limitations of the "parol evidence rule." In sum, this rule "prohibits evidence that would 'add to' the terms of a contract." *Breslauer v. Fayston School Dist.*, 163 Vt. 416, 425 (1995). Only when a contract is ambiguous may extrinsic evidence "be relied upon to construe it, without running afoul of the parol evidence rule." *Id.* In determining whether an ambiguity exists, courts may consider "the circumstances surrounding the making of the agreement," and "[a]mbiguity will be found where a writing in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable." *Isbrandtsen v. North Branch Corp.*, 150 Vt. 575, 579 (1988).

Here, there is no ambiguity in the contract. Plaintiff admits that it neither provides for compensatory time nor limits the hours she was expected to work. Effectively, plaintiff is attempting to add terms to a contract that speaks for itself. While the court accepts as true all allegations made in opposition to a motion for summary judgment, this principle applies only so long as the facts are "supported by *admissible* evidence." *Fritzeen v. Gravel*, 2003 VT 54, ¶ 7, 175 Vt. 537 (emphasis added). The evidence cited by plaintiff is clearly precluded by the parol evidence rule and, therefore, she has failed to set forth sufficient facts that defendants breached the terms of the parties' written contract.[4]

[4] At the hearing on defendants' motions for summary judgment, plaintiff's counsel raised the issue of whether defendants waived any reliance on the parol evidence rule by not raising it as an affirmative defense in their

Plaintiff correctly notes, though, that employment contracts may be modified by the conduct of the parties, regardless of whether the modification is memorialized in writing. This general principle of contract law was observed in the matter of *Gamache v. Smurro*, 2006 VT 67, 180 Vt. 113, where the court, quoting from a leading contracts treatise, stated that:

> Even when the terms of a contract are clear and unambiguous, the subsequent conduct of the parties may evidence a modification of their contract. Accordingly, while their conduct may not be used to support an interpretation contrary to the plain meaning of the contract, it may nonetheless be used to prove the existence of a modification of the original contract terms.

Id. at ¶ 16 (quoting 11 S. Williston & R. Lord, A Treatise on the Law of Contracts § 32:14, at 503 (4th ed. 1999)). Under this standard, a modification to an existing contract "must be shown by conduct of one party which expressly or inferentially establishes a modification which is expressly or inferentially accepted by the other party." *Globe Transport & Trading (U.K.) Ltd. v. Guthrie Latex, Inc.*, 722 F.Supp. 40, 44 (S.D.N.Y. 1989) (citing *Portsmouth Baseball Corp. v. Frick*, 278 F.2d 395, 401 (2d Cir. 1960)). As with any contract, "there must be mutual manifestations of assent or a 'meeting of the minds' on all essential particulars. The parties must agree to the same thing in the same sense." *Evarts v. Forte*, 135 Vt. 306, 309 (1977); see also *Starr Farm Beach Campowners Ass'n v. Boylan*, 174 Vt. 503, 505 (2002) (mem.) ("An enforceable contract must demonstrate a meeting of the minds of the parties: an offer by one of them and an acceptance of such offer by the other.").

Among the cases cited by plaintiff in defense of her claim are *Logan v. Bennington College Corp.*, 72 F.3d 1017 (2d Cir. 1995) and *E.L. Stoddard & Son v. Village of North Troy*, 102 Vt. 462 (1930). In *Logan*, the court considered whether the express policies of a defendant employer's handbook could be read as establishing a contract between a college and its faculty. See *Logan*, 72 F.3d at 1022. In *E.L. Stoddard & Son*, the question was whether the defendant village's verbal request for a contractor to perform additional work could be deemed a modification of the parties' contract. See *E.L. Stoddard & Son*, 102 Vt. at 468.

Here, there is no evidence of defendants expressly offering employees compensatory time or requiring that those on salary work at least forty hours per week. Plaintiff's evidence of these policies is essentially limited to her taking time away from work without it being charged to her annual leave, and a colleague's statement that he was going to take an unspecified day off after working more than forty hours in a particular week. Whereas plaintiff cites to the fact that she kept a detailed timesheet, she has not presented any evidence demonstrating that defendants required salaried employees to report their time. Moreover, the record is deplete

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answer to the complaint. However, the parol evidence rule is not an affirmative defense—it is a matter of substantive law that defines what evidence is admissible in the context of contract interpretation. See *Bancroft v. Granite Sav. Bank & Trust Co.*, 114 Vt. 336, 343-344 (1945).

of any indication that defendants' employees were paid out the value of unused compensatory time at the end of employment. Plaintiff contends that what should be inferred from these facts is a contract, the terms of which were that salaried employees had to work a minimum of forty hours per week, that any time worked in excess thereof was compensated as leave on an hour-by-hour basis, that this compensatory time could be applied in lieu of annual leave, and that any compensatory time unused at the end of employment was to be paid out in a lump sum to the departing employee. Such an inference would be more than a step too far. Even in the light most favorable to the plaintiff, no reasonable juror could determine that the facts demonstrate a meeting of the minds on the terms defined by plaintiff. Accordingly, summary judgment must be granted in favor of defendants on the breach of contract claim.

Because there are no facts demonstrating the existence of a contract between the parties that required plaintiff to be paid for unused compensatory time, there can be no violation of the wage provisions encompassed in 21 V.S.A. § 342(b)(2). Similarly, the implied covenant of good faith and fair dealing only "arises out of a contractual relationship between the parties and creates duties under the contract." *Harsch Properties, Inc. v. Nicholas*, 2007 VT 70, ¶ 17, 182 Vt. 196. "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." Restatement (Second) of Contracts § 205 cmt. a. As applied here, without a contract, plaintiff did not have "justified expectations" to receive compensation for each and every hour worked in excess of a forty hour week.

However, plaintiff also stakes her claim for compensatory time on the equitable doctrine of quasi-contract, or unjust enrichment, which "rests upon the principle that a person should not be allowed to enrich himself unjustly at the expense of another." *Morrisville Lumber Co., Inc. v. Okcuoglu*, 148 Vt. 180, 184 (1987). "Examining whether defendants were unjustly enriched entails determining whether the defendants received a benefit for which plaintiff should be compensated." *Id.* (citing E. Farnsworth, Contracts § 2.20, at 100 (1982)). "[A] party who receives a benefit must return the [benefit] if retention would be inequitable. Unjust enrichment applies if 'in light of the totality of the circumstances, equity and good conscience demand' that the benefitted party return that which was given." *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 41, 178 Vt. 244 (quoting *Brookside Mem'ls, Inc. v. Barre City*, 167 Vt. 558, 560 (1997) (mem.)).

Generally, an at-will, salaried employee would have no reasonable expectation to receive additional compensation for hours worked in excess of a particular amount per week. However, the court accepts as true the allegations that under certain circumstances, plaintiff and other employees were provided paid time off beyond that allowed by their employment contracts. Whereas these facts do not show any meeting of the minds to form the contractual relationship alleged by plaintiff, they may have given rise to a reasonable expectation on the part of plaintiff that if she worked a certain number of hours, she would receive some form of additional compensation. This is not to say that plaintiff is *entitled* to receive additional

compensation—indeed, even if plaintiff's expectations were reasonable, a jury may find that she already received a more than fair benefit in the form of the above-referenced 3.5 days of paid leave. These are questions for a jury, though, and as such, defendants' motion for summary judgment on plaintiff's unjust enrichment claim is denied.

Annual Leave

Plaintiff claims that defendants also breached the parties' contract and violated the wage provisions of 21 V.S.A. § 342(b)(2) by not paying her a proper amount for unused annual leave. Unlike the allegations regarding compensatory time, there is no dispute here that the parties' employment contract provided plaintiff with annual leave and that she was entitled to payment for any unused leave at the time she was discharged from employment. The parties' disagree, though, on the number of days plaintiff was afforded under the employment contract and the amount of leave she used during the course of her employment. These issues of fact are not for the court to determine on summary judgment.

Moreover, the parties disagree on the rate at which plaintiff's unused leave should be paid: defendants allege it should be paid at whatever rate plaintiff was earning at the time the leave accrued; while plaintiff claims it should be paid at the rate she was earning when discharged. At this time, it is unnecessary for the court to consider whether this issue is a question of fact or law. Nonetheless, the court notes that the one case cited by defendants in support of its calculations, from an intermediate appellate court in Pennsylvania, is not on point. See *Eljer Industries v. W.C.A.B. (Johnson)*, 670 A.2d 203, 206-207 (Pa. Commw. Ct. 1996) (determining that vacation pay would be prorated over an entire year, rather than a part of the year, in calculating an employee's average weekly wage for the purposes of workers' compensation).

The court also notes that defendants are incorrect in alleging that 21 V.S.A. § 342(b)(2) is inapplicable here as a matter of law. The term "wages," as used in § 342 and other sections of that subchapter, is referred to as including "'every form of remuneration payable for a given period to an individual for personal services, including ... vacation pay.'" *Stowell v. Action Moving & Storage, Inc.*, 2007 VT 46, ¶ 10, 182 Vt. 98 (quoting Black's Law Dictionary 1610 (8th ed. 2004)). Whereas plaintiff has already accepted defendants' payment of $2,635, she may still pursue a violation of § 342 if "wages remain unpaid or *improperly* paid." 21 V.S.A. § 347 (emphasis added). Accordingly, defendants' motion for summary judgment is denied as to both of plaintiff's claims related to unpaid annual leave.

Gender Discrimination

Plaintiff finally alleges that her termination was both a result of defendants not wanting to pay her compensatory time, as well as the consequence of "not flirting" with her supervisor, defendant Sammis. Plaintiff claims that defendant Sammis exhibited favoritism towards other female employees who were "sexually friendly" with him and that, in this context, her

termination was in violation of FEPA and its prohibition of gender-based discrimination. See 21 V.S.A. § 495(a)(1).

When, as here, the alleged evidence of sex discrimination is circumstantial, courts analyze claims under the oft-cited three-step burden shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). See *Robertson v. Mylan Laboratories, Inc.*, 2004 VT 15, ¶ 18, 176 Vt. 356 (citing *Hodgdon v. Mt. Mansfield Co.*, 160 Vt. 150, 162 (1992)). The *McDonnell Douglas* framework places the initial burden on plaintiff to demonstrate a prima facie case of discrimination, including by demonstrating that: "(1) she was a member of a protected group; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) the circumstances surrounding this adverse employment action permit an inference of discrimination." *Robertson*, 2004 VT at ¶ 18 (citing *McDonnell Douglas Corp.*, 411 U.S. at 802). Without delving into a detailed analysis of each of these factors, the court notes that here, in order for plaintiff to establish her prima facie case, it is necessary to set forth facts demonstrating that she was terminated "because of her gender." *Robertson*, 2004 VT at ¶ 28.

"FEPA is patterned after Title VII of the Civil Rights Act," and, as such, "'we look to federal case law for guidance in construing' identical provisions." *Lavalley v. E.B. & A.C. Whiting Co.*, 166 Vt. 205, 210 (1997) (quoting *Hodgon*, 160 Vt. at 165). In her opposition to defendants' motions for summary judgment, plaintiff cites to a federal district court case in which an employee's refusal to flirt with their boss was deemed to be gender-based discrimination. See *Messer v. Fhanestock & Co. Inc.*, No. 03 Civ. 04989, 2008 WL 4934608, at *13 n. 5 (E.D.N.Y. Nov. 18, 2008) ("a reasonable juror could conclude that [supervisor]'s alleged attempts to flirt and his verbal abuse of [employee] were examples of gender discrimination."). However, this case and others like it are clearly distinguishable from that here in that plaintiff does not allege defendant Sammis ever attempted to flirt with her or that he otherwise made any sexual overtures towards her. The record is silent as to plaintiff ever being sexually harassed in any way and her so-called "refusal" to flirt with defendant Sammis appears to have been a refusal in her mind only.

Plaintiff's claim of discrimination, based on alleged favoritism towards other employees, can be classified as a "paramour preference" claim, which the Second Circuit Court of Appeals has "long since rejected." *Kelly v. Howard I. Shapiro & Associates Consulting Engineers, P.C.*, 716 F.3d 10, 14 (2d Cir. 2013). These claims "depend on the proposition that 'discrimination on the basis of sex encompasses disparate treatment premised not on one's gender, but rather on a romantic relationship between an employer and a person preferentially [treated].'" *Id.* (quoting *DeCintio v. Westchester Cnty. Med. Ctr.*, 807 F.2d 304, 306 (2d Cir.1986)). In the *DeCintio* case, the court determined that a group of male employees were not prejudiced because of their gender; "rather, they were discriminated against because [their supervisor] preferred his paramour." *DeCintio*, 807 F.2d at 308. Here, the claim alleged by plaintiff is no different than that which could be alleged by a male colleague, presenting circumstances that run contrary to the axiom set forth in the above-cited Vermont cases, as well as those of the Second Circuit: "a plaintiff must demonstrate that the conduct occurred because of her sex." *Kelly*, 716 F.3d at 14 (quotation omitted).

"Plaintiff's failure to establish a prima facie case of discrimination renders it unnecessary for the Court to consider whether defendants' reasons for [terminating] her [employment] were legitimate or a mere pretext for discrimination." *Glidden v. County of Monroe*, 950 F.Supp. 73, 77 (W.D.N.Y. 1997). For the reasons set forth above, defendants' motion for summary judgment on plaintiff's gender discrimination claim is granted.

ORDER

Defendants' motions for summary judgment are **GRANTED** on counts "I," "II," "III," and "VII," as set forth in plaintiff's complaint.

Defendants' motions for summary judgment are **DENIED** on counts "IV," "V," and "VI."

Dated this 19 day of August, 2014.

Harold E. Eaton, Jr.
Superior Court Judge