UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CINDY GARRY, Plaintiff	:	
v.	:	3:00CV395 (EBB)
BERTUCCI'S RESTAURANT CORP., Defendant	:	

Ruling on Motion for Summary Judgment

Plaintiff Cindy Garry ("Garry") instituted this action against Defendant Bertucci's Restaurant Corporation ("Bertucci's") alleging claims of wrongful discharge, breach of contract and the implied covenant of good faith and fair dealing, negligent infliction of emotional distress, and violation of Connecticut General Statutes Section 31-72. Ms. Garry seeks unpaid wages, damages, and reinstatement, as well as double damages and attorney's fees pursuant to Connecticut General Statutes 31-72.

I. BACKGROUND

A. Statement of Facts

The Court sets forth only those facts deemed necessary to an understanding of the issues in, and decision rendered on, this Motion. The facts are culled from Plaintiffs' complaint, the moving papers and exhibits thereto filed with this Motion and the parties' Local Rule 9(c) Statements.

Bertucci's hired Ms. Garry in 1992 as a server in Bertucci's Newington restaurant. Over the next five years, Ms. Garry held a variety of positions in a number of Bertucci's restaurants in Connecticut. In August 1997, Bertucci's promoted Ms. Garry to the position of general manager in Bertucci's Waterbury restaurant.

While employed by Bertucci's, Ms. Garry attended multiple training sessions at which she received employee handbooks. Each time she received an employee handbook Ms. Garry signed an "Orientation Sign-Off Sheet" that acknowledged her understanding that her employment and compensation could be terminated at any time and for any reason at either the option of herself or Bertucci's. In 1998, NE Restaurant Company, Inc. acquired Bertucci's and sent a letter to Ms. Garry informing her that any manager agreements had been terminated and that she would continue to be employed as an at-will employee. During the seven years that Ms. Garry worked at Bertucci's, she competently performed her duties. Her attendance was consistent and she received only one written employment warning, several years prior to her discharge when the Newington restaurant where she worked ran out of cheese.

In the summer of 1999, an incident arose between two employees, Chuck Cook and Ryan Anderson, at the Bertucci's Waterbury restaurant. During the closing of the restaurant, Cook placed a laundry bag over Anderson's head, used duct tape to

secure the bag to Anderson's waist, and then spun Anderson around. Another Bertucci's employee took a picture of Anderson in the bag and later placed it on the door of Ms. Garry's office.

Ms. Garry was not present when the incident occurred, but Anderson informed her about it the next day. Anderson indicated that he thought the incident was "hysterical." Ms. Garry then discussed the matter with her assistant manager, Chris Bowles. Ms. Garry took no further action on the matter. Ms. Garry did not counsel, warn, or otherwise discipline Cook, Bowles or any other employee involved in the incident. Ms. Garry also failed to report the incident to her superiors, the human resources department, or the in-house legal department. She permitted the picture of Anderson in the bag to remain on her office door for several days in plain view of all employees until Bowles ultimately removed it.

On October 3, 1999, Ms. Garry terminated Ryan Anderson and his twin brother, Matthew, for issues related to their work performance. Ms. Garry had hired the brothers in early 1999 to be servers at the Waterbury restaurant. The Andersen twins soon after began experiencing problems with other workers and did not adequately perform their assigned tasks. Ryan and Matthew often made inappropriate sexual and racial comments to co-workers, took advantage of cigarette breaks, and were the subjects of customer complaints. After about six months and numerous warnings, Ms. Garry decided to terminate the Andersen twins. After learning of

their dismissal, the Andersen twins yelled at Ms. Garry that "this wasn't over" and they "would get her job." Ryan Anderson then reported the bag incident to Bertucci's management.

After investigating the matter and learning that Ms. Garry failed to take any action with respect to a serious incident of assault and harassment, Bertucci's decided to terminate Ms. Garry's employment. On October 26, 1999, Bonnie Berger, a representative from Bertucci's human resources department, Bill Donato, Ms. Garry's regional manager, and Stuart Haverlack, a representative from Bertucci's quality assurance department, came to the Waterbury restaurant and advised Ms. Garry of her termination. The stated reason for her termination was "manager inability to address discipline and document critical incidence of harassment resulting in a hostile work environment."

Ms. Garry was due to receive her third quarter bonus payment of $2,291 on October 28, 1999, two days after her termination. Bertucci's offered a bonus plan comprised of three components that could be earned by the management team of a particular restaurant. First, there was the quarterly "mystery guest" bonus whereby Bertucci's would anonymously send an individual to the restaurant for evaluation purposes. If the restaurant received certain scores from the mystery guest, it was eligible for a quarterly bonus to be shared by all members of management. Receiving the mystery guest bonus was a prerequisite to receiving the other two bonuses. If a restaurant achieved the mystery

guest bonus, the management team was eligible for the second bonus, a quarterly bonus based on that restaurant's profits. Finally, the restaurant's management team was eligible for the annual year-end bonus if the restaurant received a specified mystery guest score average and achieved profits above those specified in the bonus plan.

Bertucci's fired Ms. Garry on Tuesday and paid out bonuses on Thursday. The Bertucci's bonus plan provides that an "individual must be an active employee during the week in which bonuses are distributed to receive any earned bonus." Bertucci's refused to pay Ms. Garry her third-quarter bonus, claiming that Ms. Garry was not actively employed during the week in which the bonuses were distributed. Bertucci's also refused to pay an additional $626.00 of a "hold-back" bonus that was not scheduled to be paid until the end of the year. This year-end dispersal was intended to serve as the retention component of the bonus plan. Bertucci's did pay Ms. Garry her remaining salary and overpaid her for unused vacation time.

B. Procedural History

Ms. Garry filed her complaint against Bertucci's on January 21, 2000, in the Superior Court of Connecticut in Waterbury. The complaint alleged public policy wrongful termination, breach of an implied employment contract and negligent infliction of emotional distress. On March 1, 2000, Bertucci's filed a notice of removal of a civil action in the United States District Court

for the District of Connecticut. On November 29, 2000, Ms. Garry filed an amended complaint, which added a claim pursuant to Connecticut General Statutes Section 31-72. Bertucci's then moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on May 31, 2001.

II. SUMMARY JUDGMENT

In a motion for summary judgment the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). See also Anderson v. Liberty Lobby, 477 U.S. 242, 256 (1986)(plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment).

If the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof at trial, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 322-23. Accord, Goenaga v. March of Dimes Birth Defects Foundation, 51 F.3d 14, 18 (2d. Cir. 1995)(movant's burden satisfied if it can point to an absence of evidence to support an essential element of

nonmoving party's claim).

The court is mandated to "resolve all ambiguities and draw all inferences in favor of the nonmoving party. . . ." Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d. 520, 523 (2d Cir.), *cert. denied*, 506 U.S. 965 (1992). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849 (1991). If the nonmoving party submits evidence which is "merely colorable", or is not "significantly probative," summary judgment may be granted. Anderson, 477 U.S. at 249-50.

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 247-48 (emphasis in original).

III. DISCUSSION

A. At Will Employment

Under Connecticut law, "contracts of permanent employment,

or for an indefinite term, are terminable at will." Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 474 (1980). Neither party disputes that Ms. Garry's relationship with Bertucci's was that of an at will employee. Thus, Bertucci's was free to terminate Ms. Garry's employment at any time and for any reason, as long as that reason did not violate an important public policy.

The Supreme Court of the State of Connecticut has recognized "the principle that public policy imposes some limits on unbridled discretion to terminate the employment of someone hired at will." Id. at 476. That Court also has stated that "when there is a relevant state statute we should not ignore the statement of public policy that it represents." Id. at 480. Ms. Garry claims that Bertucci's termination of her employment and the withholding of her bonus violated the public policy embodied in the Connecticut Wage Act against the withholding of wages by employers. For Ms. Garry to succeed with this claim, it must be established that Ms. Garry's bonus qualifies as "wages" under the definition in the Connecticut Wage Act.

B. Bonus as "Wages"

General Statutes Section 31-71c(b) states that "[w]henever an employer discharges an employee, the employer shall pay the employee's wages in full not later than the business day next succeeding the date of such discharge." General Statutes Section 31-71e states, in pertinent part, "[n]o employer may withhold or

divert any portion of an employee's wages..." "Wages" is defined in General Statutes Section 31-71a(3) as "compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation."

"Statutory construction is a question of law." See Davis v. Norwich, 232 Conn. 311, 317 (1995). There are no Connecticut Appellate Court cases to date that discuss whether a bonus qualifies as "wages" as contemplated by the Act. Ms. Garry and Bertucci's cite numerous Connecticut Superior Court and U.S. District Court opinions in their respective briefs; however, many of these opinions deal with stock options and severance payments, not with bonus payments. The cases that do deal with bonus payments provide no clear guidelines for determining whether a bonus qualifies as "wages."

At least three courts, including this one, have ruled that a bonus *may* constitute wages under section 31-71a(3). See Butler v. Cadbury Beverages, Inc., No. 3:97-CV-2241 (EBB), 1999 WL 464527, at *2 (D. Conn. June 30, 1999); Wuerth v. Schott Elec., Inc., No. CV91036406S, 1992 WL 65351, at *2 (Conn. Super. Ct. Mar. 13, 1992); Cook v. Alexander and Alexander of Conn. Inc., 40 Conn. Supp. 246, 248 (Conn. Super. Ct. 1985). By no means do these decisions stand for the proposition that a bonus automatically qualifies as wages.

The particular requirements of the respective bonus plans in each case dictated the outcomes. In Wuerth, the court ruled that "while the word 'bonus' in its common meaning may not rise to the level of wages," the disputed bonus was promised in exchange for the plaintiff's additional services and thus could qualify as wages. See Wuerth, 1992 WL 65351, at *2. The courts in Butler and Cook ruled that the bonus payments at issue could qualify as wages because they were determined according to an employee's individual performance. See Butler, 1999 WL 464527, at *1; Cook, 40 Conn. Supp. at 1296.

Bertucci's bonus plan differs from the bonus plans at issue in the above mentioned cases in that the Bertucci's bonus is not promised in exchange for additional services or based on an employee's individual performance. Rather, the performance of Bertucci's Waterbury restaurant as a whole determined whether or not Ms. Garry received a bonus. The details of Bertucci's bonus plan more closely resemble the details of the disputed bonus plan in Ziotas v. The Reardon Law Firm, No. 550776, 2001 WL 128904, at *1. In Ziotas, a law firm determined bonuses based on (1) each attorney's performance in the calendar year; (2) the length of each attorney's association with the firm; and (3) the firm's overall success rate. See id. Judge Corradino ruled that such requirements do not "describe a bonus that accrued as a result of the plaintiff's personal efforts alone; in simplest terms it was not as the statute requires 'compensation for labor or services

rendered' by this plaintiff employee of the firm...In other words...it is apparent that the amount of the bonus did not depend on the efforts of the plaintiff alone." Id.

Likewise, Ms. Garry's bonus did not depend on her efforts alone. Bertucci's determined the amount of the bonus according to the overall performance of the Waterbury restaurant. In addition, any bonus paid by Bertucci's was not distributed solely to Ms. Garry but was divided between the entire management team. While Ms. Garry's efforts as General Manager helped ensure that the Waterbury restaurant produced profits, she would not have been eligible for a bonus without the work of other members of the restaurant staff. In particular, the "mystery guest" rating, which determined whether a restaurant would be eligible for any bonus at all, depended on the performance of hosts, servers, and cooks.

Because Bertucci's awarded bonuses based on the performance of the entire staff and the profitability of the restaurant as a whole, the bonus was not as the statute requires 'compensation for labor or services rendered' by Ms. Garry. Consequently, Ms. Garry's claim under Connecticut General Statutes Section 31-72 fails as a matter of law. As a result, Ms. Garry's claims of wrongful discharge and breach of the implied covenant of good faith and fair dealing also fail as a matter of law because Ms. Garry's termination does not violate any clearly defined public

policy.[1]

IV. CONCLUSION

In summary, and for the reasons set forth above, Bertucci's Motion for Summary Judgment [Doc. No. 23] is GRANTED. The Clerk is ordered to close this case.

SO ORDERED.

ELLEN BREE BURNS,
SENIOR DISTRICT JUDGE

Dated at New Haven, Connecticut, this ___ day of September, 2001.

[1] The court deems Ms. Garry's claims for negligent infliction of emotional distress and for accrued vacation benefits abandoned as those claims were not addressed in the plaintiff's "Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment."