

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SUSAN RIZZITIELLO

Plaintiff,

v.

C.A. No. 00C-12-027 CLS

**McDONALD’S CORP., a California
Corporation, and McDONALD’S
RESTAURANT OF DELAWARE, INC.
a Delaware corporation,**

Defendants.

Submitted: October 6, 2003

Decided: February 11, 2004

On Defendants’ Motion for Summary Judgment.
GRANTED.

MEMORANDUM OPINION

John R. Weaver, Esquire, Wilmington, Delaware, Attorney for Plaintiff.

Michael P. Kelly, Esquire, McCarter & English, LLP, Wilmington, Delaware;
Michael L. Banks, Esquire and Sean V. Burke, Esquire, Morgan Lewis & Bockius,
Philadelphia, Pennsylvania, Attorneys for Defendants.

SCOTT, J.

I. INTRODUCTION

On December 5, 2000, plaintiff Susan Rizzitiello (“Rizzitiello”) began this action against defendants alleging various causes of action pertaining to her employment with defendants (“McDonalds”). McDonalds removed the action to federal court where all federal charges were dismissed and the case was remanded to this court for consideration of Rizzitiello’s state law claims. On October 25, 2001, McDonalds filed a motion to dismiss for failure to state a claim. The court found that Rizzitiello’s claims of employment discrimination were maintainable as breaches of the implied covenant of good faith and fair dealing.¹ On May 9, 2003, McDonalds filed a motion for summary judgment. Rizzitiello filed an answer July 10, 2003. Oral argument was heard September 5, 2003. At argument, the court requested additional information and complete copies of Rizzitiello’s and a witness’ depositions which were received by the court October 3, 2003.

II. BACKGROUND

Rizzitiello is a white woman who worked for McDonalds from 1979 until she resigned in January 1998. Rizzitiello first became a store manager in 1987. She later worked in training positions, returning to work as store manager in the

¹ *Rizzitiello v. McDonald’s Corp.*, Del. Super., C.A. No. 00C-12-027, Herlihy, J. (Oct. 24, 2002) (allowing two theories for breach of the covenant: (1) based on racial discrimination and (2) based on falsification of records).

Price's Corner store in January 1997. Some time in the early 1990's, animosity developed between Rizzitiello and another McDonalds employee ("Jane Doe").² At the time Rizzitiello resigned, Jane Doe was Rizzitiello's supervisor. Rizzitiello alleges that prior to becoming her supervisor, Jane Doe made statements that if she became Rizzitiello's supervisor, she would get Rizzitiello fired. Rizzitiello further alleges she learned Jane Doe and two other employees came into her store and changed computer records while she was on vacation at the end of December 1997. When Rizzitiello returned to work in January 1998, she was informed she was being suspended for food cost issues. She was also told this matter would remain on her record and prevent her from being promoted. Rather than await the outcome of the investigation, she resigned. Rizzitiello alleges this is in contrast to the treatment Jane Doe received in 1995 when Jane Doe was manager of the same store.³

III. STANDARD OF REVIEW

The court will grant summary judgment only if there are no genuine issues of material fact "and the moving party must show he is entitled to judgment as a

² A pseudonym is used to protect the privacy of the person who is no longer an employee of McDonalds and is not a party to this lawsuit. Jane Doe is an African-American woman.

³ Jane Doe was suspended for one week for "food cost issues." Rizzitiello was sent by McDonalds' management to supervise the store while Jane Doe was suspended.

matter of law.”⁴ In determining whether there is a genuine issue of material fact, the evidence must be viewed in the light most favorable to the non-moving party.⁵ Summary judgment, therefore, is appropriate only if, after viewing the evidence in the light most favorable to the non-moving party, the court finds no genuine issue of material fact.⁶

IV. DISCUSSION

There are two claims remaining in Rizzitiello’s cause of action. Both involve breaches of the covenant of good faith and fair dealing. The first is based on a claim of racial discrimination and the second is based on alleged falsification of records leading to termination.

A. Racial discrimination

Rizzitiello claimed racial discrimination was the basis for her termination by McDonalds. She charged that Jane Doe, who is African American, caused her to be fired and points to the fact that she is white. Rizzitiello raised the issue of

⁴ *Deakyne v. Selective Insurance Co.*, 728 A.2d 569, 570 (Del. Super. 1997) (internal citation omitted).

⁵ *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

⁶ *Guy v. Judicial Nominating Com’n.*, 659 A.2d 777, 780 (Del. Super. 1995); *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. 1994).

disparate treatment based on race⁷ for the first time in her answering brief to McDonalds' Motion for Summary Judgment. McDonalds counters there is no evidence that the animosity of Jane Doe towards Rizzitiello was motivated by racial considerations. At oral argument, McDonalds requested an opportunity to address the disparate treatment claim as it had not previously been raised or addressed.

While the claim for racial discrimination has been brought as a breach of the covenant of good faith and fair dealing, the court holds that the analysis should proceed under the same considerations as a claim under Title VII.⁸ Title VII⁹ has been held to “cover white men and white women and all Americans.”¹⁰ Title VII thus “prohibits racial discrimination against [a white plaintiff] upon the same standards as would be applicable were they [African American].”¹¹

⁷ Rizzitiello argues she, as a white person, was treated differently after her “food cost issues” from Jane Doe, who is African American.

⁸ See *Giles v. Family Court*, 411 A.2d 599, 601 (Del. 1980) (holding that violations of 19 Del. C. § 711 are analyzed under the same test as Title VII claims).

⁹ Title VII of the Civil Rights Act of 1964 provides in pertinent part: “[i]t shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual’s race, color” 42 U.S.C. § 2000e-2.

¹⁰ *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273, 280 (1976).

¹¹ *Id.*

In order to sustain a disparate treatment claim, plaintiff must show that a similarly situated person of a different race was treated differently from plaintiff.¹² While the circumstances need not be exactly identical, they must be similar enough to give rise to an inference of unlawful discrimination.¹³ Merely alleging race was the reason for the different treatment does not make it so.¹⁴

In the case at bar, the court has thoroughly reviewed the record and concludes there is no evidence that the animosity between Jane Doe and Rizzitiello was racially based. Therefore, there is no basis to support the allegation that Rizzitiello's termination was motivated by racial discrimination.

The court further finds the disparate treatment claim must also fall. Rizzitiello resigned before McDonalds took any action against her, other than she was told to leave the store pending an investigation. She therefore cannot, under any circumstances, show that she was treated differently after the investigation into her food cost issues than Jane Doe was treated after the investigation into her food cost issues. The court finds it unnecessary, given these facts, to require discovery to determine whether the food cost issues were in fact the same for both Rizzitiello and Jane Doe and whether their subsequent treatments were in fact different.

¹² *Boykins v. Lucent Technologies, Inc.*, 78 F. Supp. 402, 409 (E.D. Pa. 2000).

¹³ *Jones v. School Dist. Of Philadelphia*, 198 F.3d 402, 409 (3d Cir. 1999).

¹⁴ *Boykins*, 78 F. Supp. at 413.

B. Falsification of records.

Rizzitiello provided the deposition testimony of a former McDonalds' employee who stated she saw Jane Doe and others changing computer records in Rizzitiello's store while she was away on vacation. Rizzitiello acknowledges she resigned and was not terminated by McDonalds, but argues, nevertheless, she was constructively discharged and thus able to bring a claim for breach of the covenant of good faith and fair dealing. McDonalds counters there is no concrete evidence of any falsification of records as Rizzitiello cannot point to any specific changes made to the records. McDonalds further argues that Delaware case law requires that an employee actually be terminated before the claim for breach of the covenant of good faith and fair dealing can be brought.

In *E.I. duPont de Nemours & Co. v. Pressman*, the Delaware Supreme Court held that "the covenant [of good faith and fair dealing] permits a cause of action against an employer for the deceitful acts of its agent in manufacturing materially false grounds to cause an employee's dismissal."¹⁵ In that case, the Court focused on the creation of false grounds for termination in describing the harm, recognizing that there was no legally cognizable harm from the termination itself.¹⁶ It is clear that both a falsification and a termination must be present to support a claim for

¹⁵ 679 A.2d 436, 437 (Del. 1996).

¹⁶ *Id.* at 444.

breach of the covenant.¹⁷ The court in *Pressman* makes clear, however, that the doctrine of at-will employment is broad and the covenant is a narrowly construed exception.¹⁸

An employee who resigns rather than being terminated may have a claim for constructive discharge. To show constructive discharge, however, an employee must show the work environment was so intolerable that she had no choice but to resign.¹⁹ Other courts have held that denials of future promotions do not give rise to a claim for constructive discharge.²⁰

The court finds there is a genuine issue of material fact as to whether records were falsified. The court holds this issue is moot, because there is no constructive discharge in the case at bar, let alone termination. The court agrees with the analysis in cases in other jurisdictions holding that denials of possible future promotions is insufficient as a matter of law to support a claim for constructive

¹⁷ *Id.*

¹⁸ *Id.* at 438.

¹⁹ *Lipson v. Anesthesia Servs., P.A.*, 790 A.2d 1261, 1280 (Del. Super. 2001) (internal citation omitted).

²⁰ See *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001); *Bennett v. Watson Wyatt & Co.*, 136 F. Supp.2d 236, 251 (S.D.N.Y. 2001); *Ternullo v. Reno*, 8 F. Supp.2d 186, 193 (N.D.N.Y. 1998); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175, 1192 (E.D. Pa. 1990).

discharge. Rizzitiello's resignation for the stated reason that she would not be promoted in the future precludes a finding of constructive discharge. The fact that Rizzitiello resigned rather than await the outcome of the investigation by McDonalds bars her from bringing a charge of wrongful termination or constructive discharge resulting from alleged falsification of records.

V. CONCLUSION

For all of the above reasons, the court has determined that McDonalds' Motion for Summary Judgment should be **GRANTED**.

Calvin L. Scott, Jr.
Superior Court Judge