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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 22-1949

[Filed March 27, 2023]

Nicolas Tashman
Plaintiff - Appellant

v.

Advance Auto Parts, Inc.
Defendant - Appellee

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: January 12, 2023
Filed: March 27, 2023

Before GRUENDER, BENTON, and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

Nicolas A. Tashman sued Advance Auto Parts, claiming unlawful discrimination under 42 U.S.C.

§ 1981, assault, and intentional infliction of emotional distress. The district court[1] granted Advance Auto's motion for summary judgment. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

On September 19, 2019, Tashman visited Advance Auto Parts, intending to purchase a vehicle part and test his car battery. Kevin L. Doe, an Advance Auto employee, told Tashman to fill out two forms. When Tashman did not sign his name on a form, Doe became angry, saying, among other things, "Go back to your damn country, go to your camel country"; "you don't belong in this country"; and "I'll kick your ass." The incident was recorded.

Within minutes, Tashman called Advance Auto's corporate office, which contacted the store manager and district manager. The district manager did not view the video, create an incident report, discipline Doe, or "escalate" the incident to the regional Human Resources manager. Instead, the store manager and the district manager told Doe they did not want to fire him. Six weeks later, the regional HR manager learned of the incident after an Advance Auto attorney received a litigation letter from Tashman's attorney. The regional HR manager immediately investigated and ordered the district manager to fire Doe. The district manager, after delaying for 11 days, fired him on November 12, 2019—two months after the incident.

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[1] The Honorable Henry E. Autrey, United States District Judge for the Eastern District of Missouri.

Tashman sued Advance Auto for unlawful discrimination under 42 U.S.C. § 1981 and, under Missouri law, for assault and intentional infliction of emotional distress. The district court granted Advance Auto's motion for summary judgment, finding no § 1981 violation because Advance Auto did not have the requisite discriminatory intent, and no state tort violations because Doe's conduct was not within the scope of employment. The delay in terminating Doe, the district court concluded, did not amount to ratification.

This court reviews de novo the grant of summary judgment and the district court's conclusions of law. ***Torgerson v. City of Rochester***, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). This court affirms if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." **Fed. R. Civ. P. 56(a)**. On summary judgment, this court views all evidence and reasonable inferences most favorably to the non-moving party. ***Torgerson***, 643 F.3d at 1042.

II.

Section 1981(a) guarantees that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." **42 U.S.C. § 1981(a)**. Congress defines "make and enforce contracts" as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." **§ 1981(b)**. "To establish a prima facie case of discrimination in the

retail context, a § 1981 plaintiff must show (1) membership in a protected class, (2) discriminatory intent on the part of the defendant, and (3) interference by the defendant with an activity protected under the statute." ***Green v. Dillard's, Inc.***, 483 F.3d 533, 538 (8th Cir. 2007). "Section 1981 'does not provide a general cause of action for race discrimination.'" ***Id.***, *citing* ***Youngblood v. Hy-Vee Food Stores, Inc.***, 266 F.3d 851, 855 (8th Cir. 2001). A § 1981 plaintiff "must show they had a protected contractual relationship or interest." ***Id.***

Tashman claims that by Doe's conduct, Advance Auto wrongfully interfered with his right to contract because of his Arab/Middle Eastern ethnicity. It is undisputed that Tashman is a member of a protected class. *See* ***Torgerson***, 643 F.3d at 1052 ("Section 1981 protects 'identifiable classes of persons who are subject to intentional discrimination solely because of their ancestry or ethnic characteristics.'"), *citing* ***St. Francis Coll. v. Al-Khazraji***, 481 U.S. 604, 613 (1987). He thus had a protected right under § 1981 to be free from racial discrimination in contracting. *See* ***Runyon v. McCrary***, 427 U.S. 160, 168 (1976) ("It is now well established that . . . 42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcement of private contracts."). By entering the store, requesting a battery test, and considering a purchase, Tashman was engaged in making a contract. *See* ***Green***, 483 F.3d at 539 (stating that "statutory protections [under § 1981] are triggered once a customer has made 'some tangible attempt to contract' by selecting particular items for sale"), *citing* ***Morris v. Dillard Dept. Stores, Inc.***, 277 F.3d 743, 752 (5th Cir. 2001).

Tashman satisfies the first and third elements of a § 1981 claim.

To prevail, he must establish Advance Auto had the requisite discriminatory intent under § 1981. The parties agree the decision in *Green v. Dillard's, Inc.*, 483 F.3d 533 (8th Cir. 2007) controls. They disagree how it applies here. Tashman argues that the *Green* decision left open alternative theories for an employer's liability under § 1981, such as when the employee is acting within the scope of employment. *See* ***Green***, 483 F.3d at 540, *citing* ***Arguello v. Conoco, Inc.***, 207 F.3d 803, 810 (5th Cir. 2000), *citing* **Restatement (Second) of Agency** § 219 (Am. L. Inst. 1958). However, *Green's* statements about the scope of employment are dicta discussing out-of-circuit cases. This court immediately said that "our court has never had occasion to adopt a liability standard for a retail employer whose employees are alleged to have violated § 1981 because in our past cases the plaintiffs failed to establish a prima facie case." ***Id.*** The *Green* decision does adopt the *Restatement (Second) of Agency* § 213 (Am. L. Inst. 1958) as the standard for proving an employer's discriminatory intent under § 1981. ***Id.*** at 540-41. *See generally* ***Mader v. United States***, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.").

"[A]n employer is directly liable for harm resulting from his own negligent or reckless conduct." ***Green***, 483 F.3d at 540. Section 213 states: "A person conducting an activity through servants or other agents

is subject to liability for harm resulting from his conduct if he is negligent or reckless":

> (a) in giving improper or ambiguous orders or in failing to make proper regulations; or
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:
> (c) in the supervision of the activity; or
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Restatement (Second) of Agency § 213.

Applying § 213, the *Green* court denied summary judgment due to a genuine dispute of material fact whether Dillard's was negligent. ***Green***, 483 F.3d at 541. In *Green*, a Dillard's employee followed an African American couple around the store glaring at them and questioning their ability to pay. ***Id.*** at 535. When they asked the employee to be more polite, she yelled a racial slur and stalked off. ***Id***. The employee had been disciplined for similar incidents and also had "unexplained anomalies" in her employment history that Dillard's failed to investigate. ***Id.*** at 541. This court concluded that "plaintiffs have produced sufficient evidence to raise a jury issue about whether Dillard's knew or should have known of [the employee's] racially hostile propensities and not only failed to take reasonable measures to stop it, but continued to place [her] on the sales floor and authorize her to interact with customers." ***Id.***

Here, unlike *Green*, there is no genuine dispute whether Advance Auto acted negligently or recklessly under § 213. As for § 213(a), Tashman does not allege that Advance Auto made improper orders or regulations. It had a written policy prohibiting discrimination based on any protected status; all employees had to read and familiarize themselves with this policy and complete annual trainings.

As for § 213(b), unlike in *Green*, Tashman cannot show Advance Auto improperly hired or retained someone they knew to harbor racially hostile propensities. Doe had no previous write-ups or misconduct in his employment record. His coworkers confirmed he was a good employee with no prior complaints. *See* **Restatement (Second) of Agency** § 213 cmt. d ("The principal may be negligent because *he has reason to know* that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him.") (emphasis added).

As for § 213(c) and (d), Tashman makes no showing that Advance Auto failed to supervise or to prevent Doe's conduct. For an employer to be liable under § 1981 for inadequate disciplinary procedures, these failures must have *caused* Tashman's harm. *See* **Restatement (Second) of Agency** § 213 (A principal is "subject to liability for harm *resulting from his conduct* if he is negligent or reckless." (emphasis added)). Tashman does not claim that Advance Auto's supervisory or preventative failures caused Doe to assault him. Without showing causation, Tashman cannot establish Advance Auto was liable for Doe's

conduct under § 1981. *See* **Restatement (Second) of Agency** § 213 cmt. a ("Liability [for a principal] exists only if all the requirements of an action of tort for negligence exist.")

III.

Tashman argues that Advance Auto is liable under *respondeat superior* for assault and intentional infliction of emotional distress. In Missouri, an employer is liable for an employee's conduct under *respondeat superior* if it is "(1) within the scope of employment and (2) done as a means or for the purpose of doing the work assigned by the principal." ***Gibson v. Brewer***, 952 S.W.2d 239, 245-46 (Mo. banc 1997). "[W]here an employer-employee relationship exists, the doctrine of *respondeat superior* holds that the employer is vicariously liable for the injury-causing conduct of an employee done within the course and scope of employment." ***Central Trust and Inv. Co. v. Signalpoint Asset Mgmt., LLC***, 422 S.W.3d 312, 323 (Mo. banc 2014).

To determine whether *respondeat superior* applies, Missouri courts analyze negligent torts differently than intentional torts.

For negligent torts, Missouri courts focus on the employee's course of conduct just before committing the tort: If this conduct furthered the employer's purpose, then the negligent tort was committed within the scope of employment, and *respondeat superior* applies. *See* ***Cluck v. Union Pac. R.R. Co.***, 367 S.W.3d 25, 29 (Mo. banc 2012) (ruling that a railroad was not liable for injury caused by an accidental discharge of

employee's personal pistol because "the acts causing the negligent discharge . . . were outside the course and scope of the co-employee's employment . . . ."). Analyzing *respondeat superior* cases, the Supreme Court of Missouri focuses on the employees' conduct just before committing the tort: When employees were "playing around with" a personal gun, the railroad was not liable when it went off. ***Id.***, *citing* ***Lavender v. Illinois Cent. R.R. Co.***, 219 S.W.2d 353, 358 (Mo. 1949). When employees were "playing around, wrestling and scuffling in a railroad car," the railroad was not liable when someone fell. ***Id.*** at 30, *citing* ***Reeve v. Northern Pacific Ry. Co.***, 144 P. 63, 64 (Wash. 1914). But the employer is liable when the negligent conduct occurred while the employee was doing the employer's work. ***Id.***, *citing* ***Baker v. Chicago, Burlington & Quincy R.R. Co.***, 39 S.W.2d 535, 541-42 (Mo. 1931) (ruling that the railroad was liable for the injury when the foreman "pushed the plaintiff in an effort to get the plaintiff to better perform his work").

Tashman's claims for assault and intentional infliction of emotional distress are intentional torts. *See* ***Devitre v. Orthopedic Ctr. of St. Louis, LLC***, 349 S.W.3d 327, 335 (Mo. banc 2011) (explaining assault requires proof of "defendant's intent to cause bodily harm or offensive contact, or apprehension of either"); ***Gibson***, 860 S.W.2d at 249 ("Intentional infliction of emotional distress requires not only intentional conduct, but conduct that is intended only to cause severe emotional harm.").

For intentional torts to trigger *respondeat superior*, Missouri courts focus on the employee's conduct at the time of the tort. When the tortfeasor acts to harm the victim, not to benefit the employer, intentional torts are not within the scope of employment. *See* ***Milazzo v. Kansas City Gas Co.***, 180 S.W.2d 1, 6 (Mo. 1944) (determining that an employee's assault was not within the scope of employment because the act was not intended to accomplish the employer's business); ***State ex rel. Gosselin v. Trimble***, 41 S.W.2d 801, 804 (Mo. 1931) (ruling that the employer was not liable for an assault by a driver because the assault was not in furtherance of the cab company's business); ***Noah v. Ziehl***, 759 S.W.2d 905, 913 (Mo. App. 1988) (ruling that the employer was not liable when the employee-bouncer attacked the patron after removing him from the saloon because, once outside, the conduct was no longer "in furtherance of his employer's business"); ***Tockstein v. P. J. Hamill Transfer Co.***, 291 S.W.2d 624, 628 (Mo. App. 1956) (concluding that the employee's assault was not within the scope of employment because it was not intended to promote the employer's business in any way).

True, as Tashman argues, intentional torts can be within the scope of employment if the action is of the "same general nature as that authorized, or incidental to the conduct authorized." ***Carter v. Willert Home Prod., Inc.***, 714 S.W.2d 506, 512 (Mo. banc 1986), *abrogated on other grounds by* ***Nazeri v. Missouri Valley Coll.***, 860 S.W.2d 303, 312 (Mo. banc 1993). *See* ***Linham v. Murphy***, 232 S.W.2d 937, 942 (Mo. 1950) (ruling that the flight instructor was still "acting within . . . the scope of his employment when he

continued to operate the plane [for his own enjoyment] after he had ordered plaintiff to release the controls" because operating the plane was part of his job duties); ***Daughtery v. Allee's Sports Bar and Grill***, 260 S.W.3d 869, 874 (Mo. App. 2008) (denying summary judgment, finding a genuine factual dispute whether the employee-bartender's act of placing a toothpick in the customer's drink was within the scope of employment); ***Doe by Doe v. B.P.S Guard Servs., Inc.***, 945 F.2d 1422, 1426 (8th Cir. 1991) (determining a reasonable jury could conclude that, by practicing taping with the VCR as the employer ordered, the guards were acting within the scope of employment, despite receiving personal enjoyment from the conduct) (applying Missouri law).

Tashman emphasizes *Carter v. Willert Home Products, Inc.* The Missouri Supreme Court there determined that an employer was liable for the employee's defamatory statements about the plaintiff's credit risk because the statements were incidental to her job duties to verify applicants' employment. ***Carter***, 714 S.W.2d at 512. Unlike the statements in *Carter*, which were "incidental to employment verification," Doe's conduct was prohibited by Advance Auto's policy and unrelated to his job duties as a sales representative. *See, e.g.*, ***Gibson***, 952 S.W.2d at 246 (ruling that the employer is not liable under agency theory for intentional infliction of emotional distress when the acts are not within scope of employment, and in fact forbidden).

Tashman argues that Advance Auto is liable because it placed Doe in a position of responsibility

where he harmed Tashman—regardless of whether the conduct was intended to further Advance Auto's business. Tashman cites one case—now overruled—upholding liability for an intentional tort where the tort itself was not meant to benefit the employer. *See* ***Doyle v. Scott's Cleaning Co.***, 31 S.W.2d 242, 245 (Mo. App. 1930) (ruling that a cleaning company was liable when its deliveryman punched a homeowner after a delivery), *overruled by* ***Tockstein***, 291 S.W.2d at 627 (concluding that "the *Doyle* case should no longer be followed"). However, the decision overruling *Doyle* noted the lack of evidence there to show "that the employee was attempting to advance the employer's interest." ***Tockstein***, 291 S.W.2d at 627. Tashman thus must show that Doe's committing the tort was intended to benefit Advance Auto. *See* ***Doe by Doe***, 945 F.2d at 1425 ("Under Missouri law, there can be no respondeat superior liability if the employee was acting entirely for his own purposes."); ***Haehl v. Wabash R. Co.***, 24 S.W. 737, 740 (Mo. 1893) ("The principal is responsible, not because the servant has acted in his name or under color of his employment, but because the servant was actually engaged in and about his business, and carrying out his purposes."); ***Maniaci v. Interurban Express Co.***, 182 S.W. 981, 985 (Mo. 1916) (ruling that the plaintiff stated "a good cause of action" that the employer was liable when an employee injured the plaintiff while attempting to have him sign a receipt for the employer's delivery of fruit).

Doe's "outrageous" conduct toward Tashman was not within the scope of employment. *See* ***Doe by Doe***, 945 F.2d at 1427 ("[A]n act is deemed to be outside the scope of employment if it is so outrageous 'as to be

totally without reason or responsibility.'"), *citing* ***Wellman v. Pacer Oil Co.***, 504 S.W.2d 55, 58 (Mo. banc 1973) (concluding the employee's "outrageous" actions conducted "without reason or responsibility" fell outside the scope of employment); ***Henderson v. Laclede Radio, Inc.***, 506 S.W.2d 434, 437 (Mo. 1974) (determining that the employer was not liable when an employee knocked the plaintiff to the ground and demanded money because such an "outrageous and unforeseeable act" was not within the scope of employment). Doe acted due to personal feelings of animosity, without any purpose to further Advance Auto's business. *Compare* ***P.S. and R.S. v. Psychiatric Coverage***, 887 S.W.2d 622, 625 (Mo App. 1994) (ruling that the employer was not liable for damages from an agent-psychologist's sexual relations with a patient because they were motivated by personal desires), *with* ***Carter***, 714 S.W.2d at 512 (affirming the denial of employer's motion for directed verdict because a jury could reasonably find the employee's "statements were intended to be in furtherance of the discharge of her assigned tasks, and not a means of requiting any personal feelings of antipathy toward plaintiff.").

Generally, "whether or not the act was one designed to further the employer's business is a jury question," but where "there is no evidence upon which a jury may find that the assault was made for the purpose, then it is the duty of the court to direct a verdict for the defendant." ***Tockstein***, 291 S.W.2d at 628. Here, no evidence shows that Doe's conduct was within the scope of employment and done to benefit Advance Auto, as required for liability under *respondeat superior*.

IV.

Tashman argues that Advance Auto impliedly ratified Doe's conduct when the store manager and district manager told Doe they did not want to fire him and delayed firing him. Learning of the incident, the regional HR manager promptly investigated and ordered Doe to be terminated—all within the same day. He was fired two months after the incident for violating Advance Auto's policy on discrimination.

"Under Missouri law ratification is an express or implied adoption or confirmation by one person, with knowledge of all material matters, of an act performed on his behalf by another who lacked the authority to do so." ***Newman v. Schiff***, 778 F.2d 460, 467 (8th Cir. 1985). "Ratification relates back and is the equivalent of authority at the commencement of the act." ***Id.*** "Even an unauthorized act of an agent may be affirmed by a principal who fails to repudiate the act after learning of it." ***Sooter v. Magic Lantern, Inc.***, 771 S.W.2d 359, 363 (Mo. App. 1989).

No specific length of time determines when an employer's delay amounts to implied ratification. Tashman believes that any delay amounts to ratification, citing dicta from a Missouri appellate court case. *See* ***Egnatic v. Nguyen***, 113 S.W.3d 659, 676 (Mo. App. 2003) (applying Kansas law) ("Once a principal receives notice of an unauthorized act performed by an agent, the principal must immediately repudiate the agent's action or it is presumed that the principal ratified the act.") (but holding that the principal did not ratify the agent's unauthorized conduct because it was unaware of the agent's behavior

at the time it accepted payment). *Cf.* ***BE&K Const. Co. v. NLRB***, 23 F.3d 1459, 1467 (8th Cir. 1994) (determining a union ratified the unfair labor practices by "condoning and failing to disavow the unlawful acts of its members.").

According to the Missouri Supreme Court, implied ratification requires that the principal receive a benefit from the agent's conduct. *See* ***State ex. Inf. McKittrick v. Koon***, 201 S.W.2d 446, 456 (Mo. banc 1947) ("Where a principal with knowledge of the material facts of the unauthorized acts of another who assumes to act for him, receives and retains the benefits thereof, he thereby ratifies the same."); ***Rider v. Julian***, 282 S.W.2d 484, 496 (Mo. banc 1955) (determining the company ratified the driver's negligence when it received and retained income derived from its operation); ***Compton v. Vaughan***, 222 S.W.2d 81, 83 (Mo. 1949) (holding that the principal ratified the agent's unauthorized conduct by accepting payment); ***St. Louis Mut. Life Ins. Co. v. Walter***, 46 S.W.2d 166, 171 (Mo. 1931) (ruling that the principal ratified the agent's conduct by receiving and retaining payment from the unauthorized transaction).

Here, Advance Auto did not impliedly ratify Doe's behavior. *See* ***Gaar v. Gaar's Inc.***, 994 S.W.2d 612, 621 (Mo. App. 1999) (ruling that the plaintiff could not establish ratification because there was no evidence that the principal "engaged in any conduct manifesting ratification" of the agent's conduct). The two-month delay here is insufficient to show that Advance Auto ratified Doe's conduct. *See* ***Long's Marine, Inc. v. Boyland***, 899 S.W.2d 945, 948 (Mo. App. 1995) ("An

individual who acquiesces for a considerable time after entering into a contract and accepts its benefit is deemed to have ratified it.") (holding that the principal ratified the agent's unauthorized agreement when the arrangement was in force for six months). Advance Auto did not ratify Doe's behavior.

V.

Advance Auto is not liable under § 1981 for discrimination based on its employee's conduct. Tashman's claims for assault and intentional infliction of emotional distress fail under *respondeat superior* and ratification. The district court properly granted summary judgment.

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The judgment is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4-20-cv-00943-HEA

[Filed April 8, 2022]

NICOLAS TASHMAN,
Plaintiff,

vs.

ADVANCE AUTO PARTS, INC.,
Defendant.

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on Defendant's Motion for Summary Judgment, [Doc. No. 29]. Plaintiff opposes the Motion and has filed a Memorandum in Opposition, to which Defendant has filed a Reply. For the reasons set forth below, the Motion is granted.

Facts and Background

Plaintiff filed this action in this Court on July 21, 2020, alleging unlawful racial discrimination in contracting under the provisions of 42 U.S.C. § 1981 and common law causes of action for assault, intentional infliction of emotional distress, negligent

hiring and retention, and negligent supervision. Plaintiff's Complaint alleges the following:

Plaintiff, a United States citizen of Arab/Middle Eastern descent, entered the Defendant's Advance Auto Parts store on September 19, 2019. Plaintiff claims that he entered Defendant's store with the "specific intent of purchasing a MAP sensor for his vehicle and to test a car battery to determine if he needed to additionally purchase a new battery." According to Plaintiff, the Defendant's sales representative—Kevin Doe—immediately glared at him upon entry to the store. When Plaintiff requested help, Doe gave Plaintiff two blank pieces of paper, and, upon request for clarification by Plaintiff, he told Plaintiff to put his name on it.

When Plaintiff put his name on only one of the pieces of paper, Doe allegedly told Plaintiff "words to the effect of: '*God damn it, fill out the other paper. Put your damn name on there.*'" When Plaintiff responded with "*Excuse me?*," Doe allegedly shouted at Plaintiff to "take his piece of shit battery and '*go back to your camel country, you motherfucker. You don't belong in this country.*'"

Plaintiff claimed he was confused and thus asked, "*what he was talking about*." Doe allegedly replied by "threatening to physically beat Plaintiff, stating words to the effect of '*I'm going to beat your ass right here, right now.*'" Another employee of the Defendant came out and grabbed Doe to purportedly restrain him.

Because Plaintiff was allegedly "still intending to purchase the MAP sensor and to test his battery to

determine if he needed to purchase a new one," he remained standing in the store. Plaintiff then claimed that "the Defendant's sales representative broke free from the other employee and again moved towards Plaintiff in an aggressive, threatening and hostile manner," of which then a second employee became involved. Plaintiff further claimed that Doe continued "to shout derogatory and racist statements at Plaintiff, threatening him and his family with great physical harm."

Count I alleges a 42 U.S.C. § 1981 violation, where Defendant, through its sales representative, interfered with Plaintiff's engagement in a protected activity based on his Arab/Middle Eastern descent. Count II claims Defendant, through its sales representative, assaulted him—in other words, intentionally threatened and attempted to inflict bodily injury on Plaintiff and had the apparent ability to cause Plaintiff harm or create a reasonable apprehension of bodily harm. Count III claims that Defendant acted recklessly and, through its sales representative, intentionally caused Plaintiff emotional distress while a customer at Defendant's store. The conduct of Defendant's sales representative was claimed to be extreme and outrageous beyond all possible bounds of decency. Count IV alleges Defendant knew or should have known of its sales representative's dangerous proclivities and was negligent in hiring and retaining its employee by failing to take further action (e.g., investigation, discipline, counseling, discharge). Similarly, Count V alleges Defendant knew or should have known of its sales representative's dangerous proclivities and was negligent in supervising its

employee, even though Defendant knew or should have known that it had the ability and duty to control its sales representative.

Defendant moves for summary judgment. Plaintiff, in response, filed a Memorandum in Opposition and a Statement of Additional Uncontroverted Materials Facts.

The parties' Statements of Uncontroverted Facts are:

Plaintiff is a United States Citizen of Arab/Middle Eastern descent.

On September 19, 2019, Plaintiff entered Defendant's store located in Florissant, Missouri. Defendant provides free testing and charging of batteries as a benefit to all of its customers. Plaintiff entered the store to purchase a MAP sensor for his vehicle and to test a car battery to determine if he needed to purchase a new battery.

Plaintiff informed Advance Auto Parts, Inc. employee and sales representative, Doe, that he wanted to charge and test his battery to determine if he needed to purchase a new one. Without saying anything, Doe gave Plaintiff two blank pieces of paper and Plaintiff asked Doe what he was supposed to do with the paper and was told to put his name on it.

Plaintiff put his name on one of the pieces of paper and handed it back to Doe. Doe then told Plaintiff words to the effect of: "*God damn it, fill out the other paper. Put your damn name on there.*" Doe also stated

to Plaintiff words to the effect of: "*I'm going to beat your [or] kick your ass right here, right now*."

Another Advance Auto Parts, Inc. employee grabbed Doe to restrain him. Plaintiff remained standing near the battery testing area when Doe broke free from that other employee and moved towards Plaintiff. Another employee attempted to drag Doe to the back of the store. But Doe continued to shout derogatory and racist statements at Plaintiff. The General Manager and an employee both asked Plaintiff leave the store and so he did.

Advance Auto Parts, Inc. has a written policy that states discrimination on the basis of any legally protected status is prohibited. This policy against discrimination is part of the Advance Auto Parts, Inc. code of ethics and every employee is required to read and familiarize him or herself with it. Violations of these policies are not tolerated and can be cause for termination.

Advance Auto Parts strictly prohibits discrimination "on the basis of race, color, religion, gender, pregnancy, age, national origin, ancestry, ethnicity, citizenship status, disability, marital status, sexual orientation, gender identity or expression, including transgender status, or any other legally protected status." This policy also applies to customers who enter the store.

During Doe's employment, Louis Hogan served as a senior regional human resources manager for the Midwest region of Advance Auto Parts, Inc. The Midwest region encompassed the Florissant store at issue in this case. Doe became an employee of Advance

Auto Part, Inc., as part of its integration with Carquest. Doe has nothing in his employee file showing previous write-ups or misconduct.

When Hogan learned of the misconduct of Doe alleged by Plaintiff, he conducted an investigation, where he determined that Doe violated company policy prohibiting obscenities at a customer. Hogan's investigation found that Doe chose to use language and statements that violated company policy which resulted in his termination. Hogan thus recommended Doe's termination for violating company policy against employees using obscenities at customers. Hogan further recommended Doe's termination because he violated company policy requiring that employees treat all customers with dignity and respect.

The employees Hogan spoke with about Doe described Doe as never having any issues with them. Hogan testified in his deposition that the District Manager, Dante Maranan, made the decision to terminate Doe based on Hogan's recommendation.

Employee Terri Forster testified that she had never heard Doe say that he was going to beat a customer's ass before. Forster, however, did recount an incident wherein she heard and observed Doe threaten to beat someone's ass outside the back of the store after his termination. Forster then testified that she is unaware of any other incidents involving Doe where he either lost his temper or in any way threatened anyone.

Employee Doreen Mesick testified in her deposition that Doe was a good employee, and she was not aware of any complaints about him. William Maddox testified

in his deposition that "From what little contact I had with him, I thought he was a great employee." Employee Thomas Renfroe testified that Doe was "easygoing." Renfroe also stated that no other coworkers made any complaints to him about Doe. In his deposition, Maranan testified that prior to this incident, he never had any customer complaints towards Doe. But Maranan did testify that Doe admitted that he told Plaintiff he would "*kick his ass*" during the incident.

Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure 56(a), a district court may grant a motion for summary judgment if the evidence available to the court demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden is on the moving party. *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988). After the moving party meets this burden, the nonmoving party must do more than show that there is some doubt as to the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The nonmoving party bears the burden of setting forth affirmative evidence and specific facts by affidavit and other evidence showing that there is a genuine dispute of a material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex,* 477 U.S. at 324. "Simply referencing the complaint, or alleging that a fact is otherwise, is insufficient to show there is a genuine issue for trial."

Kountze ex rel. Hitchcock Found. v. Gaines, 536 F.3d 813, 818 (8th Cir. 2008).

Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. *Anderson*, 477 U.S. at 248. "[A] dispute about a material fact is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Herring v. Canada Life Assur. Co.*, 207 F.3d 1026, 1030 (8th Cir. 2000) (quoting *Anderson*, 477 U.S. at 248).

In ruling on a motion for summary judgment, the Court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. *Matsushita*, 475 U.S. at 587; *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005). The Court may not weigh the evidence in the summary judgment record, determine credibility, or decide the truth of any factual issue. *Anderson*, 477 U.S. at 242–43.

Discussion

Count I: 42 U.S.C. § 1981

Section 1981 states that all persons within the jurisdiction of the United States shall have "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). To establish a prima face case under § 1981, plaintiff must meet these four elements: (1) membership in a protected class, (2) discriminatory intent on the part of the defendant, (3) engagement in a protected activity, and (4) interference with that activity by the

defendant. *Gregory v. Dillard's, Inc.*, 565 F.3d 464, 469 (8th Cir. 2009).

Plaintiff is of Arab/Middle Eastern descent. There is no dispute that Plaintiff is a member of a protected class under § 1981 [Doc No. 29-1].

To demonstrate interference under § 1981, a plaintiff must show that the retailer "thwarted" the shopper's attempt to make a contract. *Gregory*, 565 F.3d at 471. "By 'thwart,' we mean that interference is established where a merchant 'blocks' the creation of a contractual relationship." *Id.* This element is satisfied, for example, "where a retailer asks a customer to leave a retail establishment in order to prevent the customer from making a purchase." *Id.* Here, Doe told Plaintiff to "*get the fuck out*" of the store during their altercation. This may be interpreted in two ways. First, the purpose of Doe's statement was to prevent Plaintiff from making a purchase. Second, the purpose of Doe's statement was not to prevent Plaintiff from making a purchase, but rather was the incidental result of the heated exchange.

Stemming from the encounter with Doe, Defendant's General Manager and an employee both asked Plaintiff to leave the shop several times. Such action by Defendant demonstrates a purpose to deescalate the altercation, rather than prevent Plaintiff from making a purchase. As a result, there may be a genuine dispute as to a material fact on whether Defendant asking Plaintiff to leave in this context constitutes interference.

To show protected activity in the retail context, "§ 1981 plaintiffs are required to demonstrate that they actively sought to enter into a contract with the retailer. There must have been some tangible attempt to contract." *Withers v. Dick's Sporting Goods, Inc.*, 636 F.3d 958, 963 (8th Cir. 2011) (quoting *Green*, 483 F.3d at 538 (internal quotation omitted)). In the retail shopping context, a shopper must show an attempt to purchase, involving a specific intent to purchase an item, and a step toward completing that purchase. *Withers*, 636 F.3d at 963. A fact-based determination is by definition "whether a shopper has taken the step toward completing a purchase, or at what point a shopper's interactions with a merchant ripen into a protected tangible attempt to contract." *Id.* (internal quotation omitted). It is the shopping experience that a court focuses on, regardless of the form of payment used by the shopper. *Id.* at 965.

Although Plaintiff states his intent to purchase a MAP sensor, he made no attempt to purchase such an item. He did not communicate this intent to purchase to Defendant's sales representative, Doe, nor did he select the desired sensor to purchase. Therefore, there was no attempt to contract the MAP sensor. Plaintiff did, however, communicate his intent to test a car battery to determine if he needed to purchase a new battery. Defendant conceded that they advertise free battery testing and charging at its stores as an inducement to getting customers into the store and to generate sales. Plaintiff argues that the first step in completing the purchase of a battery is to determine if one is needed by participating in the free testing service offered by Defendant. It is unclear in binding

precedent whether a free service constitutes a step toward completing a purchase. As a result, there may be a genuine dispute as to a material fact on whether a contractual relationship existed.

In order to establish a "discriminatory intent" by an employer related to an employee's misconduct, Plaintiff must show that the employer knew or should have known of the employee's racially hostile propensities. *Green v. Dillard's, Inc.*, 483 F.3d 533, 541 (8th Cir. 2007). Under agency law, an employer is directly liable for harm resulting from his or her own negligent or reckless conduct. *Id.* at 540.

Here, Defendant argued that while Doe admitted he may have cursed the Plaintiff, he explicitly denied referring to Plaintiff's ethnicity or country of origin. But Doe testified: "*I did not say any ethnic. I did not say anything religious.*" This referenced testimony, however, does not state that Doe denied referring to Plaintiff's country of origin. Countering Doe, Plaintiff testified and provided a transcript of an audio recording with a third party that Doe did, in fact, make derogatory statements referring to ethnicity and/or country of origin such as, "*take your piece of shit battery and go back to your camel country you motherfucker.*"

There may be a genuine dispute as to whether discriminatory language was used. But more significantly, there is *no* material dispute as to whether the employer knew or should have known of Doe's racially hostile propensities. Even though Plaintiff testified that Doe said, "*What are they going to do to me this time, fire me?*," Doe has nothing in his employee file showing previous write-ups or misconduct. In fact,

several of his co-workers and district manager testified that they have neither heard complaints against Doe nor saw any misconduct by Doe. Unlike *Green*, where the Court found the employer could be liable because the employee had been disciplined for similar past conduct, here, Plaintiff fails to provide evidence of any *prior* discriminatory conduct by Doe. As a result, Plaintiff fails to meet his burden on the second prong.

Even though there may be a genuine issue of material fact under some § 1981 elements, Plaintiff fails to meet its burden on *all* the elements. Defendant is therefore entitled to summary judgment as to Count I.

Count II: Assault

Under the doctrine of *respondeat superior*, a principal is liable for its agent's acts that are within the scope of employment and are done as a means or for the purpose of doing work assigned by principal. *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. 1997).

The case is for the jury when there is any evidence to justify finding that assault by agent of a defendant was incident to an attempt by defendant's employee to do his employer's business. *Simmons v. Kroger Grocery & Baking Co.*, 340 Mo. 1118, 1122, 104 S.W.2d 357, 359 (Mo. 1937). But if the departure from the employer's business is of a "marked and decided character the decision of the question may be within the province of the court." *State ex rel. Gosselin v. Trimble*, 328 Mo. 760, 768, 41 S.W.2d 801, 805 (Mo. 1931).

Whether an act was committed within the scope and course of employment is not measured "by the time or

motive of the conduct," but whether it was done "by virtue of the employment and in furtherance of the business or interest of the employer." *P.S. v. Psychiatric Coverage, Ltd.*, 887 S.W.2d 622, 624 (Mo. Ct. App. 1994). "If the act is fairly and naturally incident to the employer's business, although mistakenly or ill advisedly done, and did not arise wholly from some external, independent or personal motive," it is done while engaged in the employer's business. *Id.*

The question here is whether Doe's alleged threats to beat up Plaintiff and discriminatory statements fall within the scope of employment and done as a means or for purpose of doing work assigned by Defendant. Defendant's employees are expected to service potential customers, not commit assault. Plaintiff provided no evidence that Doe was following directions by the Defendant. Rather, Doe appeared to have been acting on his own, personal accord. Indeed, this type of activity is prohibited by Defendant's policy.

Additionally, committing assault is not inherent to the employment of a sales representative, as compared to a bouncer or guard. *See Noah v. Ziehl*, 759 S.W.2d 905, 912 (Mo. Ct. App. 1988) (discussing that if specific instructions are given by the employer, a "doorman," "guard," "bouncer," or other such employee may well bind the employer vicariously when, in furtherance of the employer's business he exceeds certain proprieties). Unlike a bouncer, no reasonable juror could find that a sales representative is tasked with violently threatening his or her employer's customers. Such

conduct is not in the interest of the employer nor in furtherance of the business.

Assuming *arguendo* that Doe's alleged misconduct fell within the course and scope of his employment with Defendant, Plaintiff still fails to demonstrate that the alleged assault was done as a means for doing work for the Defendant. Plaintiff did not provide evidence that this type of conduct is implicitly permitted (*e.g.*, not disciplining prior abusive or violent conduct) or ratified by the Defendant (*e.g.*, not sanctioning or addressing the conduct). In fact, Defendant conducted an investigation against Doe and found that he violated company policy, which was the basis for the recommendation to terminate and, ultimately, termination.

The evidence presented by Plaintiff is insufficient to show that Doe was acting in the course and within the scope of his employment and for the purpose of performing his assigned job duties when he allegedly assaulted Plaintiff. Defendant is therefore entitled to summary judgment as to Count II.

Count III: Intentional Infliction of Emotional Distress

Under the doctrine of *respondeat superior*, a principal is liable for its agent's acts that are within the scope of employment and are done as a means or for the purpose of doing work assigned by the principal. *Gibson*, 952 S.W.2d at 246.

An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment. *Burlington Indus., Inc.*

v. Ellerth, 524 U.S. 742, 756 (1998). In applying scope of employment principles to intentional torts, it is accepted that "it is less likely that a willful tort will properly be held to be in the course of employment and that the liability of the master for such torts will naturally be more limited." *Id.*

The Restatement defines conduct, including an intentional tort, to be within the scope of employment when "actuated, at least in part, by a purpose to serve the [employer]," even when it is forbidden by the employer. *Id.* (citing Restatement §§ 228(1)(c), 230). For example, when a salesperson lies to a customer in order to make a sale, the tortious conduct is "within the scope of employment because it benefits the employer by increasing sales, even though it may violate the employer's policies." *Id.*

The Supreme Court's example in *Burlington* is informative. Here, the evidence presented by Plaintiff is insufficient to show that Doe's alleged conduct benefitted the employer by, for example, increasing sales. While a violation of the employer's policies provides context to the employee's action, it is not determinative of the outcome. Rather, the question is whether the purpose of Doe's tortious conduct was to serve Defendant, his employer. No reasonable juror could find in the affirmative. On the contrary, his alleged conduct negatively impacts Defendant. Poor customer services results in diminished customer relationships and thus diminished profits. A business exists, in part, to generate profits. An employee's tortious action that disrupts this purpose is therefore outside the scope of employment. Defendant is

therefore entitled to summary judgment as to Count III.

Count IV: Negligent Hiring and Retention

An employer may be liable for negligent hiring "if the employer knew or should have known of the employee's dangerous proclivities and the employer's negligence was the proximate cause of plaintiff's injury." *Reed v. Kelly*, 37 S.W.3d 274, 277 (Mo. App. E.D. 2000). Negligence exists when a "reasonably prudent person would have anticipated danger and provided against it." *Id.* The test for proximate cause is "whether an injury is the natural and probable consequence of the defendant's negligence." *Id.* For a plaintiff to prevail on a negligent hiring action, the employee misconduct must be "consistent with the employee's particular dangerous proclivity exhibited by prior acts of misconduct." *Id.* If the prior acts are not consistent, there is no probable cause. *Id.* The elements of negligent retention are the same as for negligent hiring. *Id.* (citing *Gibson*, 952 S.W.2d at 246).

Unlike *Reed v. Kelly*, where the court assumed the employer knew or should have known of the employee's prior acts of misconduct, this Court cannot make such an assumption given that Plaintiff failed to provide any prior acts of misconduct by Doe. First, Plaintiff did not provide any evidence that Doe has discriminated against a customer before or during his employment with Defendant. Second, Plaintiff did not provide any evidence that Doe had ever assaulted or attempted to assault a customer before or during his employment with Defendant. Third, Plaintiff did not provide any evidence that Doe had intentionally inflicted emotional

distress against a customer before or during his employment with Defendant.

On the contrary, Doe's co-workers testified that he was a good employee and that they had not heard any complaints against him during his employment. Even though Plaintiff alleges that Doe made the following statement: "What are they going to do to me *this time*, fire me?," there is no evidence that previous misconduct occurred prior to this encounter. Moreover, Plaintiff argues that testimony of Doe's "grumpy" demeaner is evidence that he had a propensity for the alleged misconduct. There is no merit for such a conclusion as being "grumpy" is not consistent with discriminatory conduct nor assault and intentional infliction of emotional distress. No testimony or other evidence was provided of any prior acts of misconduct by Doe.

Lastly, Doe was not retained following this incident with Plaintiff. Upon learning of Doe's alleged conduct, Defendant conducted an investigation, which found that Doe chose to behave and use language and statements that violated company policy. Hence, it was recommended that Doe be terminated. And he was indeed terminated from his position as a sales representative with Defendant. Defendant is therefore entitled to summary judgment as to Count IV.

Count V: Negligent Supervision

"A master is under the duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily

harm to them *if* (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, *and* (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control." *Reed*, 37 S.W.3d at 278 (emphasis added). In short, to prevail on this cause of action, there must be evidence that would "cause the employer to foresee that the employee would create an unreasonable risk of harm outside the scope of his employment." *Id.*

Plaintiff provides no evidence that demonstrates Doe's propensity to be discriminatory, commit assault, and intentional inflict emotional distress toward customers. Plaintiff could not cite to any prior acts of misconduct by Doe that would have alerted Defendant of a potential risk of harm. As a result of such insufficient evidence, Plaintiff fails to show that Defendant, as the employer, was put on notice that Doe, as the employee, would behave in accordance with the alleged propensities during employment. Defendant is therefore entitled to summary judgment as to Count V.

Conclusion

Based upon the foregoing analysis, Defendant's Motion for Summary Judgment will be granted on all counts.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment, [Doc. No. 29], is **GRANTED**.

Dated this 8th day of April, 2022.

/s/ Henry Edward Autrey
HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4-20-cv-00943-HEA

[Filed April 8, 2022]

NICOLAS TASHMAN,	)
Plaintiff,	)
	)
v.	)
	)
ADVANCE AUTO PARTS, INC.,	)
Defendant.	)
	)

JUDGMENT

In accordance with the Opinion, Memorandum and Order entered this same date,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Summary Judgment is entered in favor of Defendant.

Dated this 8th day of April, 2022.

/s/ Henry Edward Autrey
HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE