

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 KAISER SAID ELMI, *et al.*,

10 Plaintiffs,

11 v.

12 SSA MARINE, INC., *et al.*,

13 Defendants.
14

CASE NO. C13-1703-JCC

ORDER GRANTING IN PART AND
DENYING IN PART SSA
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

15 This matter comes before the Court on the motion for summary judgment filed by
16 Defendants SSA Marine, Inc. and SSA Terminals, LLC ("SSA") and its employees John Bell,
17 Tom Hsue, William Kendall, and Brandon Brent (collectively "SSA Defendants") (Dkt. No. 40).
18 Having thoroughly considered the parties' briefing and the relevant record, the Court hereby
19 GRANTS the motion in part and DENIES the motion in part for the reasons discussed below.

20 **I. BACKGROUND**

21 Plaintiffs Kaiser Said Elmi, Tesfarghabar Berhane, and Mohamed Muhiddin are all short-
22 haul truck drivers of East African descent who work at the Port of Seattle. Plaintiffs are self-
23 employed and contract with various trucking companies that dispatch them. (Dkt. No. 73 at 6.)
24 Plaintiffs and the trucking companies they contract with have no contractual relationship with
25 SSA. (Dkt. No. 45 at 7.) As short-haul truck drivers, Plaintiffs' jobs are to pick-up and haul
26 shipping containers "between terminals at the Port of Seattle and the rail yards" as well as other

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1 nearby locations. (Dkt. No. 65 at 2.)

2 SSA operates a stevedoring business and leases land from the Port of Seattle for its
3 operation. SSA's business involves the loading and unloading of vessels by longshore workers.
4 (Dkt. No. 40 at 2.) SSA Defendants Bell, Hsue, Kendall, and Brent are or were foremen or
5 superintendents employed by SSA.

6 The events giving rise to this lawsuit primarily occurred at Terminal 30, which SSA
7 operates. Short-haul truck drivers receive their loads from various trucking companies and wait
8 in line at Terminal 30 for their loads to be removed by longshoremen operating a mobile piece of
9 machinery known as a picker.

10 On May 30, 2012 Plaintiff Elmi was waiting in line to drop off his load when a picker
11 operated by Defendant Michael Cabbacang struck the chassis of his truck. (Dkt. No. 45 at 9.) It
12 is disputed whether the act was intentional and whether the picker struck the chassis once or
13 multiple times. (*Id.*; Dkt. No. 40 at 4.) Elmi got out of his truck to see what was happening and
14 Cabbacang approached him while swearing and pushed and bumped Elmi with his chest. Elmi
15 called the Port of Seattle Police Department ("POSPD") and Officer Jack Myers arrived at the
16 scene. Officer Myers was unable to determine whether an assault had occurred and did not cite
17 Cabbacang. (Dkt. No. 66, Ex. 1 at 3.) SSA Superintendent Hsue was called to the scene and
18 banned Elmi from Terminal 30 for "life" for violating SSA's terminal rule against unauthorized
19 foot traffic in Terminal 30 and for refusal to move his truck so that work could continue. (Dkt.
20 No. 45 at 10; Dkt. No. 40 at 4.) SSA took no disciplinary action against Cabbacang.

21 On June 27, 2012 Plaintiff Berhane attempted to use the restroom at Terminal 30 while
22 activity in the terminal ceased for a break period. (Dkt. No. 40 at 5.) Drivers had routinely used
23 the restroom at Terminal 30 for years during break periods. (Dkt. No. 65 at 7.) Defendant Chad
24 Rivers, a longshoreman employed by SSA, confronted Berhane and demanded that he not use the
25 restroom. (Dkt. No. 40 at 5.) When Berhane entered the restroom to urinate, Rivers grabbed him
26 by the neck and collar, choked Berhane, drug him from the restroom, and threw him to the floor

1 causing an injury to his shoulder and significant blood flow. Berhane called the POSPD to the
2 scene and Officer Walter Wesson responded. *Id.* Officer Wesson interviewed witnesses at the
3 scene and initiated an investigation which resulted in assault charges against Rivers for which he
4 was ultimately convicted. *Id.* In response to this incident, SSA Foreman John Bell placed sign
5 stating “Employees Only” on the restroom in an effort to institute a policy restricting restroom
6 use to longshoremen and SSA employees. (Dkt. No. 41 at 3.) It is unclear when the sign was
7 placed upon the door and whether Bell’s policy was ever communicated to Plaintiffs. SSA took
8 no disciplinary actions against Rivers.

9 On September 25, 2012 Plaintiff Muhiddin attempted to use the restroom at Terminal 30
10 during a lunch break when he was confronted by Rivers. Rivers shoved Muhiddin saying “this is
11 a longshoreman’s lunchroom.” (Dkt. No. 45 at 12.) Muhiddin called the POSPD and Officer Jose
12 Santiago responded and was assisted by SSA employed Security Officer Terence Kwan. (Dkt.
13 No. 66, Ex. 4 at 1.) After Officer Santiago arrived, Defendant Brandon Brent, a SSA
14 superintendent, banned Muhiddin from Terminal 30 for seven days for violating SSA’s rule
15 against walking across the terminal. (Dkt. No. 40 at 7.) After receiving the citation, Muhiddin
16 attempted to drop off his load before leaving Terminal 30 when he was cited for an additional
17 seven days for refusing to leave the terminal. It is disputed whether Brent or Bell issued the
18 citation for the additional seven days. (Dkt. No. 40 at 7; Dkt. No. 67, Ex. 12 at 17–19; Dkt. No.
19 67, Ex. 15 at 18–19.) Officer Santiago issued a citation to Rivers for an investigation of Assault
20 4. (Dkt. No. 66, Ex. 4 at 2.) No disciplinary actions were taken against Rivers by SSA.

21 **II. DISCUSSION**

22 **A. Standard for Summary Judgment**

23 “The court shall grant summary judgment if the movant shows that there is no genuine
24 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
25 Civ. P. 56(a). “A fact issue is genuine ‘if the evidence is such that a reasonable jury could return
26 a verdict for the nonmoving party.’” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1060

1 (9th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 248 (1986)). The moving
2 party is entitled to judgment as a matter of law when the nonmoving party fails to make a
3 sufficient showing on an essential element of a claim in the case on which the nonmoving party
4 has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). The nonmoving
5 party must rely exclusively on admissible evidence to establish such specific facts in opposition
6 to the moving party’s motion. *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002). The
7 Plaintiff “must do more than simply show that there is some metaphysical doubt as to the
8 material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

9 **B. Assault and Battery**

10 Plaintiffs claim that SSA Defendants were directly responsible for the alleged batteries
11 and assaults against them. (Dkt. No. 45 at 22–23.) Plaintiffs argue that SSA Defendants ratified
12 Cabaccang and Rivers’ conduct by failing to supervise or discipline either, verbally supporting
13 the batteries, and using the violence to justify retaliation against Plaintiffs. *Id.* The parties dispute
14 two theories of liability for this claim: respondeat superior and negligent supervision. (*Id.*; Dkt.
15 No. 40 at 13.)

16 **I. Respondeat Superior**

17 Employers may be held vicariously liable for the tortious acts of their employees when it
18 has been established that “the employee was acting in furtherance of the employer’s business and
19 that he or she was acting within the course and scope of employment when the tortious act was
20 committed.” *Thompson v. Everett Clinic*, 71 Wash. App. 548, 551 (1993). However “where an
21 employee commits an assault in order to effect a purpose of his or her own, the employer is not
22 liable.” *Id.* at 551–552. A determination of “whether an employee’s conduct is within the scope
23 of the employment is ordinarily for the jury, but certain fact patterns may, as a matter of law,
24 relieve the employer of liability.” *Id.* Conduct may be within the scope of employment if “the
25 employee was, at the time, engaged in the performance of the duties required of him by his
26 contract of employment; *or* by specific direction of his employer; *or*, as sometimes stated,

1 *whether he was engaged at the time in the furtherance of the employer's interest.” Id. at 552*
2 (emphasis in original). If the tortious conduct was done solely to gratify the personal desires of
3 the employee, it cannot be fairly attributed to the employer. *Id. at 553.*

4 The central issue for this claim is whether Cabbacang and Rivers’ alleged intentional
5 torts were conducted within the scope of employment. This case presents facts giving rise to a
6 genuine dispute over whether the alleged assaults were personally motivated or done in an effort
7 to enforce SSA’s safety policies concerning unauthorized pedestrian traffic in Terminal 30 and
8 restrictions on access to the restroom facilities located in the terminal. If the alleged assaults
9 were conducted to enforce SSA’s policies, this raises the further question of whether such
10 enforcement was conducted within the scope of employment.

11 Defendants argue that that Cabbacang and Rivers alleged assaults were conducted
12 “outside of the scope of employment as daily workers” and that the longshore workers were not
13 acting in furtherance of SSA’s business because they were not tasked with enforcing SSA
14 terminal rules. (Dkt. No. 40 at 13–14; Dkt. No. 41 at 2.) There is some dispute over what SSA’s
15 terminal rules were when the alleged assaults occurred. SSA’s General Terminal Safety Rules
16 state, in relevant part, that: “Drivers must not get out of their vehicles when cargo handling
17 equipment, or other trucks are moving in the area.” (Dkt. No. 41 at 15.) The rules further state
18 that:

19 No unauthorized pedestrian traffic is allowed on the terminal. Drivers
20 must stay close to their vehicles while in the yard and should be out of
21 their vehicle only for actual operating needs, e.g.
connecting/disconnecting chassis, locking/unlocking twistlocks.

22 *Id.* The rules as they are posted outside of Terminal 30 also state that: “No unauthorized
23 pedestrian traffic is allowed on the terminal.” (Dkt. No. 41 at 14.) SSA Defendant John Bell
24 claimed that “[f]or safety reasons, SSA Terminals adopted and published a rule that prohibits all
25 individuals not directly involved in loading and unloading cargo ships from walking across
26 Terminal 30.” (Dkt. No. 41 at 2.) The policy prohibiting unauthorized pedestrian foot traffic

1 conflicts with the permissive rule directing truckers not to get out of their vehicles when cargo
2 equipment is moving. In both Rivers' assault on Berhane and alleged assault on Muhiddin,
3 Plaintiffs attempted to use the bathroom during break periods when all activity in Terminal 30
4 had ceased. The conflict between these two rules is compounded by the fact that Plaintiffs
5 regularly used the restroom in Terminal 30 until Berhane was assaulted in June 2012. (Dkt. No.
6 45 at 10–11.) According to Berhane, he and other truckers had been using the restroom facilities
7 at Terminal 30 for years. (Dkt. No. 65 at 7). At the time of Rivers' assault on Berhane, truckers
8 were not restricted from using the restrooms at Terminal 30. (Dkt. No. 67, Ex. 13 at 8; Dkt. No.
9 40 at 5.) In response to the Berhane assault, Bell stated that he restricted access to the restrooms
10 to SSA employees and longshore workers by placing an "Employee's Only" sign on the restroom
11 door. (Dkt. No. 41 at 3). However, Bell never explained the new policy to the drivers or
12 informed the drivers that they were not employees within the meaning of the sign. (Dkt. No. Dkt.
13 No. 12 at 17, 21.)

14 In sum, SSA's policies relevant to this case are as follows: SSA had a rule which
15 categorically prohibited all unauthorized walking in the terminal; it also had a rule that applied
16 specifically to drivers, directing them to remain within their trucks only when loading machinery
17 was moving; prior to Berhane's assault SSA also had a longstanding practice of allowing
18 truckers to use the restrooms at Terminal 30; after Berhane's assault an unwritten restriction on
19 access to the restroom was effectuated by an "Employees Only" sign which was never explained
20 to Plaintiffs. Defendants state that "SSA had not restricted the use of that restroom at that time.
21 Berhane was not banned from the terminal." (Dkt. No. 40 at 5.) When asked whether the rule
22 against unauthorized pedestrian traffic was ever used to prevent drivers from using the bathroom
23 Bell stated that "[t]hat has always been a terminal rule that there's no walking in the terminal."
24 (Dkt. No. 67, Ex. 12 at 21.)

25 Plaintiff has produced facts sufficient to show that Rivers' assault on Berhane and alleged
26 assault against Muhiddin may have been done in an effort to enforce SSA's prohibition on

1 unauthorized foot traffic and Bell’s restriction on bathroom access. Before Rivers assaulted
2 Berhane he claimed that the bathroom “was full of the road truck drivers and I asked them nicely
3 not to use the bathroom, and I stated that you Guys are not supposed to be out of the trucks.”
4 (Dkt. No. 66, Ex. 3 at 11.) When Rivers allegedly assaulted Muhiddin he said that “[t]his is a
5 Longshoreman’s lunchroom” and allegedly pushed Muhiddin away from the rest room. (Dkt.
6 No. 45 at 12.) While Rivers was not charged with the enforcement of SSA’s terminal rules, the
7 Court finds that there is a genuine issue of material fact as to whether the assaults were done in
8 furtherance of SSA’s business and within the scope of employment. The Court therefore
9 concludes that denying summary judgment on this claim is appropriate.

10 **2. Negligent Supervision**

11 Plaintiffs also claim that SSA Defendants may be liable for the intentional torts of
12 Cabbacang and Rivers on the theory that they neglected their duty to supervise and adequately
13 deter their employees from assaulting Plaintiffs. (Dkt No. 45 at 22–23.) Unlike respondeat
14 superior, under negligent supervision, an employer may be liable for the conduct of an employee
15 that is outside of the scope of employment if “the employer knew, or in the exercise of
16 reasonable care, should have known the employee presented a risk of danger to others.
17 *Thompson v. Everett Clinic*, 71 Wash. App. 548, 555 (1993); *see also S.H.C. v. Lu*, 113 Wash.
18 App. 511, 517 (2002) (“Negligent supervision creates a limited duty to control an employee for
19 the protection of a third person, even when the employee is acting outside the scope of
20 employment.”). If the employer had knowledge of the employee’s dangerous tendencies, it may
21 be held liable for the employee’s acts. *Thompson*, 71 Wash. App. at 555. Given that Rivers was
22 the assailant in both instances involving Berhane and Muhiddin, that the assaults may have been
23 done for similar reasons, took place close in time and in the same area, and that they were both
24 against drivers of East African descent, Plaintiff has produced facts sufficient to show a genuine
25 issue of material fact as to whether SSA Defendants either knew, or should have known that
26 Rivers posed a danger to others. The Court therefore concludes that summary judgment must

1 also be denied on these grounds.

2 **C. 42 U.S.C. § 1983**

3 Plaintiffs allege that SSA Defendants acted under color of state law to deprive Plaintiffs
4 of their constitutionally protected rights and that they are entitled to relief under 42 U.S.C. §
5 1983. (Dkt. No. 45 at 18–20.) Under the state action doctrine Plaintiffs argue that SSA
6 Defendants conspired with the Port of Seattle, or used their position as operators of the public
7 port to pass arbitrary rules used to discriminate against and penalize Plaintiffs on the basis of
8 their race and national origin. Plaintiffs also argue that SSA used the POSPD to victimize
9 Plaintiffs and to enforce SSA’s discriminatory rules. (Dkt. No. 45 at 19–20.)

10 “To state a claim under § 1983, a plaintiff must allege the violation of a right secured by
11 the Constitution and laws of the United States, and must show that the alleged deprivation was
12 committed by a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (U.S.
13 1988). SSA Defendants cannot be liable unless they conspired with or acted jointly with state
14 actors to deprive Plaintiffs of their constitutional rights. *See Radcliffe v. Rainbow Const. Co.*, 254
15 F.3d 772, 783 (9th Cir. 2001). To prove a conspiracy between SSA Defendants, the Port of
16 Seattle, and/or the POSPD, Plaintiffs must show that there was a meeting of the minds between
17 SSA Defendants and the state actors to violate Plaintiffs’ constitutional rights and that they
18 shared common objectives of the conspiracy. *See Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir.
19 2002); *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540–41 (9th
20 Cir.1989).

21 The Ninth Circuit recognizes four tests for identifying state action, the satisfaction of any
22 test is sufficient to find state action notwithstanding countervailing factors. *Kirtley v. Rainey*, 326
23 F.3d 1088, 1092 (9th Cir. 2003). The tests used to identify state action are: “(1) public function;
24 (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus.” *Sutton*
25 *v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835–36 (9th Cir. 1999). Plaintiffs appear to
26 assert their claim using the public function, joint action, and governmental nexus tests. (Dkt. No.

1 65 at 22–23.) The Court will discuss each test in turn.

2 **1. Public Function**

3 “Under the public function test, when private individuals or groups are endowed by the
4 State with powers or functions governmental in nature, they become agencies or
5 instrumentalities of the State and subject to its constitutional limitations.” *Lee v. Katz*, 276 F.3d
6 550, 554–55 (9th Cir. 2002) (internal quotations omitted). “To satisfy the public function test, the
7 function at issue must be both traditionally and exclusively governmental.” *Id.* at 555.

8 Plaintiffs allege that SSA Defendants are “operating a traditional public facility,
9 performing the traditional function of international trade” in a discriminatory manner. (Dkt. No.
10 65 at 22.) SSA Defendants characterize their operation as a “private stevedoring business,
11 serving private vessels, in a limited number of marine terminals.” (Dkt. No. 73 at 2.) Plaintiffs
12 produce no facts showing that the operation of a stevedoring business has been both traditionally
13 and exclusively a governmental function. Plaintiffs’ conclusion that SSA Defendants engage in
14 international trade, and are therefore state actors, is unsupported by the record. While
15 stevedoring could arguably be characterized as a component of international trade, this Court
16 agrees with Defendants’ contention that mere participation in international trade cannot, by itself,
17 constitute acting under color of state law. Otherwise the boundaries of § 1983 would be vastly
18 expanded.

19 **2. Joint Action**

20 Under the joint action test, when a private party engages in a prohibited activity in
21 concert with state actors, the private party is acting under the color of state law. *See Lugar v.*
22 *Edmondson Oil Co.*, 457 U.S. 922, 941 (1982); *Florer v. Congregation Pidyon Shevuyim, N.A.*,
23 639 F.3d 916, 926 (9th Cir. 2011). Courts consider whether “the state has so far insinuated itself
24 into a position of interdependence with the private entity that it must be recognized as a joint
25 participant in the challenged activity. This occurs when the state knowingly accepts the benefits
26 derived from unconstitutional behavior.” *Kirtley*, 326 F.3d at 1093 (quoting *Parks Sch. of Bus.*,

1 *Inc. v. Symington*, 51 F.3d 1480, 1486 (9th Cir.1995)). The Ninth Circuit requires a “substantial
2 degree of cooperation before imposing civil liability for actions by private individuals that
3 impinge on civil rights.” *Franklin*, 312 F.3d at 445.

4 Plaintiffs present no evidence that the Port of Seattle was involved in the promulgation of
5 SSA’s terminal rules, or in the enforcement of those rules. Further, Plaintiffs have not shown that
6 temporarily banning Elmi and Muhiddin from Terminal 30 was an unconstitutional activity that
7 the Port of Seattle somehow benefitted from. Plaintiffs’ argument that SSA worked in concert
8 with the POSPD is unpersuasive: as SSA Defendants correctly noted, in each instance it was
9 Plaintiffs and not Defendants who called the police. Further, police filed charges on behalf of
10 Muhiddin and Berhane against Rivers for which he was ultimately convicted. The Court
11 concludes that Plaintiffs’ claim that SSA Defendants conspired with the Port of Seattle and the
12 POSPD to deprive Plaintiffs of their constitutional rights is speculative and unsupported by the
13 record.

14 **3. Governmental Nexus**

15 Under the governmental nexus test for a private party to act under color of state law there
16 must be “such a close nexus between the State and the challenged action that the seemingly
17 private behavior may be fairly treated as that of the State itself.” *Kirtley*, 326 F.3d at 1095
18 (internal quotations omitted) (quoting *Brentwood Academy v. Tennessee Secondary Sch. Athletic*
19 *Ass’n.*, 531 U.S. 288, 295 (2001)). As discussed above, Plaintiffs have not shown that either the
20 Port of Seattle or the POSPD were sufficiently entwined with SSA Defendants’ activity to form a
21 governmental nexus. The extent of the Port of Seattle’s involvement presented in the record
22 includes their having leased the land that SSA operates its business upon. Similarly, Plaintiffs
23 allege that SSA Defendants used the POSPD to enforce their discriminatory policies but the
24 record reflects that Plaintiffs called the POSPD who then conducted interviews with the parties
25 involved in each incident, filed reports, and ultimately charged Rivers of assault. Plaintiffs have
26 not produced evidence indicating that there is a genuine dispute of material fact as to whether the

1 Port of Seattle or POSPD were so involved in SSA Defendants’ activities to have formed a
2 governmental nexus.

3 Given that Plaintiffs’ § 1983 claim cannot survive under any of the tests considered by
4 the Court, summary judgment dismissal is appropriate for this claim.

5 **D. Racial/National Origin Discrimination Under Title VII**

6 Plaintiffs allege that SSA Defendants have implemented a racially discriminatory policy
7 with respect to usage of the restrooms at Terminal 30. (Dkt. No. 45 at 21.) As Defendants
8 correctly point out, Plaintiffs have not properly exhausted their administrative remedies under
9 Title VII and have produced no evidence to show that they first filed a charge with the Equal
10 Employment Opportunity Commission (“EEOC”) before bringing this lawsuit. (Dkt. No. 40 at
11 13); *see also Blank v. Donovan*, 780 F.2d 808, 809 (9th Cir. 1986) (holding that the plaintiff
12 must first exhaust administrative remedies with the EEOC under Title VII). Title VII requires
13 that a plaintiff shall file a charge “within one hundred and eighty days after the alleged unlawful
14 employment practice occurred.” 42 U.S.C. § 2000e-5(e)(1). Accordingly, this Court concludes
15 that granting summary judgment on this claim is appropriate.

16 **E. Intentional Infliction of Emotional Distress (IIED)**

17 Plaintiffs also bring an IIED claim, alleging that SSA Defendants intended to cause
18 severe emotional distress through violence, intimidations, economic deprivation, and by carrying
19 out their discriminatory policies. (Dkt. No. 45 at 24.) To prevail on a claim of IIED, a plaintiff
20 must prove three elements: “(1) extreme and outrageous conduct, (2) intentional or reckless
21 infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress.”
22 *Kloepfel v. Bokor*, 149 Wash. 2d. 192, 195 (2003). Further, the conduct must be “so outrageous
23 in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be
24 regarded as atrocious, and utterly intolerable in a civilized community.” *Id.* at 196. IIED does not
25 include “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. In
26 this area plaintiffs must necessarily be hardened to a certain degree of rough language,

1 unkindness and lack of consideration.” *Id.* (quoting *Grimsby v. Samson*, 85 Wash. 2d 52, 59
2 (1975)) (citation and internal quotations omitted).

3 SSA Defendants’ conduct consisted of banning Elmi and Muhiddin from accessing
4 Terminal 30 for varying lengths of time following each incident. After Cabbacang allegedly
5 assaulted Elmi on May 30, 2012, SSA Foreman William Kendall banned Elmi from Terminal 30
6 for “life.” (Dkt. No. 45 at 10.) Elmi was allowed to return to Terminal 30 in December 2014.
7 (Dkt. No. 67, Ex. 14 at 22.) SSA Superintendent, Defendant Brandon Brent, banned Muhiddin
8 from Terminal 30 for seven days for walking across the terminal in violation of SSA’s rules, and
9 either Bell or Brent sanctioned Muhiddin for an additional seven days for attempting to drop off
10 his container immediately after the first citation was issued. (Dkt. No. 40 at 7; Dkt. No. 67, Ex.
11 15 at 18–19.) Muhiddin returned to work shortly after the two week ban period.

12 Banning Elmi and Muhiddin from accessing Terminal 30 falls short of satisfying IIED’s
13 first requirement that the conduct be extreme and outrageous as to be utterly intolerable in a
14 civilized community. SSA Defendants’ bans in themselves were not extreme and outrageous, and
15 the severe emotional distress that Plaintiffs claim stems from Cabbacang and Rivers’ alleged
16 assaults. As previously discussed, however, there is a genuine dispute of material fact as to
17 whether Cabbacang and Rivers were acting within the scope of employment, and in turn whether
18 SSA Defendants may be held vicariously liable for their intentional torts. Under the doctrine of
19 respondeat superior, and employer may be liable for the intentional torts of its employees and
20 IIED is within the ambit of this rule.

21 Plaintiffs have produced facts sufficient to show that Cabbacang and Rivers’ Conduct
22 may have intentionally or recklessly inflicted emotional distress and that Plaintiffs suffered
23 actual severe distress. It is disputed whether Cabbacang struck Elmi’s chassis with the picker
24 intentionally and how many times. Elmi stated that the picker struck the chassis so hard that the
25 truck nearly tipped over. (Dkt. No. 65 at 6.) Plaintiffs allege that after striking the chassis with
26 the picker, Cabbacang bumped his chest into Elmi’s and screamed “You Mother Fucker, you

1 don't belong here.” (Dkt. No. 45 at 9–10.) As a result, Hsu banned Elmi from the terminal for
2 “life” and Cabbacang was not cited. (Dkt. No. 40 at 4; Dkt. No. 45 at 10.) Afterwards Elmi
3 claimed that he could not sleep, suffered from nightmares and flashbacks, and was very stressed
4 for more than a year. (Dkt. No. 16, Ex. 14 at 12, 26, 28–29.)

5 Berhane was physically and verbally assaulted by Rivers while attempting to urinate in
6 the restroom in Terminal 30. Rivers grabbed Berhane by the neck and collar, choking him, and
7 proceeded to drag him from the restroom and throw Berhane to the floor. (Dkt. No. 45 at 10–11.)
8 Berhane sought medical attention for a bloody injury to his arm and was diagnosed with a
9 contusion on his right shoulder. (Dkt. No. 67, Ex. 13 at 16.) As a result of the assault Berhane
10 received psychological treatment from a counselor. (Dkt. No. 67, Ex. 13 at 13–14.) Berhane
11 claims that he had nightmares, headaches, lost face before his family, and has never fully
12 recovered. (Dkt. No. 67, Ex. 13 at 21.) Berhane also stated that he was so afraid because of what
13 had happened that once he returned to Terminal 30 he resorted to urinating into a bottle in his
14 truck. (Dkt. No. 67, Ex. 13 at 22–23.)

15 The Court concludes that there is a genuine dispute of material facts as to whether there
16 was outrageous conduct and whether SSA Defendants ratified the conduct of Cabbacang and
17 Rivers.

18 **F. Racial/National Origin Discrimination Under RCW 49.60.030**

19 Plaintiffs bring their disparate treatment claim of race and national origin discrimination
20 under the Washington law Against Discrimination (“WLAD”) which provides for the rights to
21 “obtain and hold employment without discrimination” and to the “enjoyment of any of the
22 accommodations, advantages, facilities, or privileges of any place of public resort,
23 accommodation, assemblage, or amusement.” RCW 49.60.030(1)(a)–(b). Plaintiffs contend that
24 the WLAD protects the rights of independent contractors in addition to employees and that they are
25 therefore entitled to relief. (Dkt. No. 65 at 32–33.) To establish a prima facie case of employment
26 discrimination alleging disparate treatment under the WLAD the plaintiff must show that: “(1)

1 the employee is a member of a protected class, (2) the employee is qualified for the employment
2 position or performing substantially equal work, (3) the employee suffered an adverse
3 employment action, and (4) similarly situated employees not in plaintiff's protected class
4 received more favorable treatment. *Matson v. United Parcel Serv., Inc.*, 872 F. Supp. 2d 1131,
5 1137 (W.D. Wash. 2012). The Washington Supreme Court held that RCW 49.60.030 provides
6 broad protection and that an "independent contractor may bring an action for discrimination in
7 the making or performance of a contract for personal services where the alleged discrimination is
8 based on sex, race, creed, color, national origin or disability." *Marquis v. City of Spokane*, 130
9 Wash. 2d 97, 100-01 (1996).

10 Both parties agree that the WLAD safeguards the rights of independent contractors to be
11 free from discrimination, however, SSA Defendants contend that Plaintiffs are not independent
12 contractors with them:

13 [P]laintiffs are not independent contractors for SSA. They do not
14 have contracts with SSA; and they are not paid by SSA. Rather, the
15 self-employed plaintiffs contract with a trucking company who
16 dispatches them Thus, SSA has no contractual relationship
17 whatsoever with either the plaintiff truck drivers or the trucking
18 companies with whom the plaintiffs contract.

19 (Dkt. No. 73 at 6.) Plaintiffs concede that they are not independent contractors with SSA.
20 (Dkt. No. 65 at 3.) Given the absence of any employment or contractual relationship between the
21 parties, Plaintiffs do not fall within the protected classes under the WLAD.

22 The elements for discrimination in public accommodations under the WLAD are similar
23 to the ones used for employment discrimination. A plaintiff must show that: "(1) he is a member
24 of a protected class; (2) the defendant's establishment is a place of public accommodation; (3) the
25 defendant discriminated against plaintiff by not treating him in a manner comparable to the
26 treatment it provides to persons outside that class; and (4) the protected status was a substantial
factor causing the discrimination." *Ross v. Snohomish Cnty.*, No. C13-1467-JLR, 2014 WL
1320125, at *7 (W.D. Wash. Mar. 28, 2014) (citing *Demelash v. Ross Stores, Inc.*, 105 Wash.

1 App. 508 (Wash. Ct. App. 2001)). SSA operates Terminal 30 as a private business, does not offer
2 any services to the public, and has the right to limit who enters the premises. (Dkt. No. 41 at 2.)
3 Plaintiffs have not produced facts indicating that there is a genuine issue of material fact as to
4 whether Terminal 30 is a public accommodation. For this reason, the Court grants summary
5 judgment to SSA Defendants.

6 **G. Negligence**

7 Plaintiffs allege that they were business invitees of SSA to whom SSA Defendants owed
8 a duty of care that was breached by failing to protect Plaintiffs from foreseeable threats of harm,
9 including criminal violence. (Dkt. No. 65 at 33–34.)

10 As a threshold matter the Court must determine whether Plaintiffs were business invitees.
11 “A business [invitee] is [one] who is invited to enter or remain on land for [the] purpose directly
12 or indirectly connected with business dealings with the possessor of the land.” *Fuentes v. Port of*
13 *Seattle*, 119 Wash. App. 864, 869 (2003) (internal quotations omitted). While Plaintiffs are not
14 independent contractors with SSA Defendants, the service they provide is integral to SSA’s
15 operation and it is undisputed that SSA benefits from their dealings with the truck drivers. SSA
16 Defendants argue that when Plaintiffs walked across Terminal 30 or attempted to use the
17 restroom, that they were in violation of SSA terminal rules and exceeded the scope of their
18 invitation. (Dkt. No. 73 at 7.) The Court finds, however, that given SSA’s longstanding policy of
19 allowing drivers to use the restrooms, and the ambiguity of the “Employees Only” sign posted
20 after Rivers’ assault on Berhane, that there is a genuine dispute of material fact as to whether
21 Plaintiffs exceeded the scope of their invitation. Accordingly, the Court finds that Plaintiffs have
22 produced sufficient facts to show a genuine issue of material fact as to whether Plaintiffs were
23 SSA’s business invitees.

24 Now the Court must determine whether there is a genuine issue of material fact as to
25 whether SSA Defendants breached their duty to Plaintiffs as business invitees and whether the
26 harm Plaintiffs suffered was reasonably foreseeable. “It is the special relationship between a

1 business and its business invitee that under Washington law may lead to the duty to protect the
2 invitee from the criminal acts of third persons.” *McKown v. Simon Prop. Grp., Inc.*, 344 P.3d
3 661, 666 (Wash. 2015). “In order to establish a genuine issue of material fact concerning a
4 landowner's obligation to protect business invitees from third party criminal conduct under the
5 prior similar incidents test, a plaintiff must generally show a history of prior similar incidents on
6 the business premises within the prior experience of the possessor of the land.” *McKown v.*
7 *Simon Prop. Grp., Inc.*, 344 P.3d 661, 669 (Wash. 2015). “The prior acts of violence on the
8 business premises must have been sufficiently similar in nature and location to the criminal act
9 that injured the plaintiff, sufficiently close in time to the act in question, and sufficiently
10 numerous to have put the business on notice that such an act was likely to occur.” *Id.* at 662.

11 As the Court noted above in its discussion of negligent supervision, Plaintiffs have made
12 a strong case that Rivers’ alleged assault on Muhiddin was reasonably foreseeable to SSA
13 Defendants. The similarities between Rivers’ assault on Berhane and his subsequent alleged
14 assault on Muhiddin, create a genuine issue of material fact under the similar incidents test as to
15 whether Rivers’ assault on Muhiddin was reasonably foreseeable. As previously stated, both the
16 first assault and the alleged second assault were perpetrated by Rivers, both were against truck
17 drivers of East African descent, both happened in or near the restroom at Terminal 30, both may
18 have been done as part of an effort to enforce SSA terminal rules, and both took place between
19 June and September of 2012. Accordingly, the Court concludes that Plaintiffs have raised a
20 genuine issue of material fact as to whether SSA Defendants met their duty of care to Plaintiffs.

21 **G. Motion to Strike**

22 Pursuant to Local Rule 7(g), SSA Defendants filed a motion to strike included within
23 their reply in support of the motion for summary judgment. (Dkt. No. 73.) Defendants move this
24 Court to strike several of Plaintiffs’ exhibits and claims made within their reply to the motion for
25 summary judgment. This Court denies the motion to strike as moot, given that the Court did not
26 rely upon the evidence at issue with the exception of the challenged exhibits at Dkt. No. 73:8 21–

1 23. With respect to the statements of police officers based on their personal observations
2 contained within police reports that the Court considered, those documents are relevant, fall
3 within an exception to hearsay, and are admissible as public records under Federal Rule of
4 Evidence 803(8)(ii)–(iii). The Court also considered Rivers’ written and signed statement (Dkt.
5 No. 66, Ex. 3 at 11) and concludes that it is admissible as an opposing party statement under
6 Rule 801(2). SSA Defendants’ motion to strike is therefore DENIED.

7 **III. CONCLUSION**

8 For the foregoing reasons, SSA Defendants’ motion for summary judgment (Dkt. No. 40)
9 is GRANTED with respect to Plaintiffs § 1983 claims against SSA Defendants and Plaintiffs’
10 racial and national origin discrimination claims in violation of Title VII and RCW 49.60.030.
11 The Court hereby ORDERS that those claims are DISMISSED. SSA Defendants’ motion is
12 DENIED in part with respect to Plaintiffs’ assault and battery, IIED, and negligence claims. SSA
13 Defendants’ motion to strike (Dkt. No. 73) is DENIED.

14 DATED this 18th day of May 2015.

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21 John C. Coughenour
UNITED STATES DISTRICT JUDGE