STATE OF MINNESOTA
IN COURT OF APPEALS
A10-431

Michael Paul Udofot,
Appellant,

vs.

Seven Eights Liquor,
Respondent.

Filed December 14, 2010
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 27-CV-08-13358

Stephen W. Cooper, Stacey R. Everson, The Cooper Law Firm, Chrtd., Minneapolis, Minnesota (for appellant)

Paul E.D. Darsow, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Wright, Judge.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

The district court granted summary judgment dismissing Michael Udofot's common-law negligence claims and an action under 42 U.S.C. § 1981 arising out of his alleged physical assault by an employee of Seven Eights Liquor. On appeal, Udofot argues that genuine issues of material fact preclude summary judgment. Because we conclude that the record does not present genuine issues of material fact on the common-law negligence claims or the section 1981 action, we affirm.

F A C T S

Michael Udofot alleges the following facts, which we accept as true for purposes of reviewing an appeal from summary judgment. Udofot, an African American, entered Seven Eights Liquor, a retail liquor store located in Bloomington, to purchase beer on November 2, 2005. Udofot selected the beer that he wanted and proceeded to the check-out counter to pay. Jason Clark, an assistant store manager, was at the check-out counter. Clark had worked at the store for more than two years and had been promoted to the position of assistant store manager in May, 2005. Udofot paid Clark cash for the beer, received his change, and left the store.

After leaving the store and walking to his car in Seven Eights' parking lot, Udofot realized that he had not received a receipt for his purchase. Udofot wanted a receipt for his tax and expense records. He walked back into the store, went to the counter, and asked Clark for a receipt. Following an exchange of comments between Clark and Udofot, Clark uttered a racial epithet directed at Udofot and told him to leave the store.

Udofot's testimony varies slightly on whether the comment that included the epithet was made before, after, or simultaneously with Clark's handing him the receipt. According to Udofot, Clark then came out from behind the counter and pushed Udofot toward the door to the parking lot. At or just outside the door, Clark punched Udofot once in the eye, twice in the forehead, and kicked him in his groin area. Clark then went back inside the store, and Udofot drove out of the parking lot.

Udofot's complaint alleges three counts: (1) that Seven Eights was negligent in its hiring, supervision, and retention of Clark; (2) that Seven Eights was negligent under a premises-liability theory; and (3) that Clark's actions denied Udofot the opportunity to contract with Seven Eights on the same basis as Caucasian customers in violation of 42 U.S.C. § 1981.

Seven Eights moved for summary judgment. The district court granted Seven Eights summary judgment on Udofot's section 1981 claim, concluding that Udofot had failed to establish a prima facie case of discrimination in a retail context because the evidence failed to show that Clark's alleged conduct came within the framework of a contractual benefit or right protected under section 1981.

The district court initially denied Seven Eights' summary-judgment motion on the common-law negligence claims. But on the morning of trial, after a more thorough review of the file and the applicable law, the district court orally granted summary judgment on all of the remaining claims. The district court concluded that Udofot had failed to establish a necessary element common to all of the negligence claims—that Seven Eights knew or should have known that Clark had a propensity for violence. In an

on-the-record explanation of the reason for the ruling, the district court stated that Udofot "failed to elicit during discovery any evidence that the employee, Jason Clark, had known propensities [that posed a threat of violence to others] or propensities which should have been discovered by reasonable investigation."

Udofot appeals the summary-judgment dismissal of the three counts. He contends that sufficient evidence to withstand summary judgment supports his claim that he suffered a foreseeable injury as a result of Seven Eights' negligence in "hiring, supervision, retention, and training"; that he has provided an adequate basis for his premises-liability claim because he was a business invitee who sustained injury from the business's employee; and that Clark's alleged conduct comes within the purview of section 1981 because it interfered with the benefits and privileges of an uncompleted retail transaction.

D E C I S I O N

On appeal from summary judgment, we determine whether the evidence, "viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). If the nonmoving party fails to present evidence that would raise a material-fact issue on any element essential to establishing its case, summary judgment is appropriate. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom

summary judgment was granted. *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 564 (Minn. 2008).

I

In his complaint Udofot alleged that Seven Eights was negligent in its hiring, supervision, and retention of Clark. He also asserted a negligence claim against Seven Eights under a theory of premises liability. Summary judgment for the defendant is appropriate in a negligence action "when the record reflects a complete lack of proof on any of the four essential elements of the negligence claim: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) [that] the breach of the duty [was] the proximate cause of the injury." *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001). The existence of a duty of care in a negligence action is a legal question. *Id.* On the issue of duty, the district court determined that the first prong—the existence of a special relationship—was met, but not the second prong—the foreseeable risk of harm. Because of the absence of evidence to support the second prong of the duty requirement, the district court determined, as a matter of law, that Seven Eights was entitled to summary judgment on the negligence claims.

Generally, a person does not have a duty to protect others from harm caused by a third party's conduct. *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007). A person does owe a duty to protect another from third parties, however, if there is a special relationship between the parties and the risk of harm is foreseeable. *Id*. It is undisputed that the employer-employee relationship between Seven Eights and Clark created a special relationship. *See id.* (identifying master-servant as special relationship). "The

test of foreseeability," in the determination of duty, "is whether a defendant was aware of facts suggesting that a plaintiff was being exposed to an unreasonable risk of harm." *Stuedemann v. Nose*, 713 N.W.2d 79, 84 (Minn. App. 2006), *review denied* (Minn. July 19, 2006).

The foreseeability prong of the duty element on a claim of negligent hiring, negligent supervision, or negligent retention requires evidence "that the employer knew or should have known that the employee was violent or aggressive and might engage in injurious conduct." *Johnson v. Peterson*, 734 N.W.2d 275, 277-78 (Minn. App. 2007) (stating common-law elements of negligent hiring and supervision); *see Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. App. 1993) (stating common-law elements of negligent retention), *review denied* (Minn. Apr. 20, 1993). Similarly, a claim of negligence based on premises liability requires a finding that the harm was reasonably "anticipated in the normal course of events." *Bisher v. Homart Dev. Co.*, 328 N.W.2d 731, 733 (Minn. 1983) (stating landowner's common-law duty to protect invitees).

The district court concluded that Udofot failed to produce any evidence showing that Seven Eights had any knowledge, actual or constructive, that Clark possessed a propensity for violence or was likely to engage in injurious conduct in dealing with a customer. The record supports the district court's conclusion.

The record reflects a complete lack of evidence that Seven Eights knew or should have known about a propensity for violence or that Clark has ever demonstrated a propensity for violence before the events alleged in this litigation. The evidence indicates that Clark was known and well-liked in the community and had never engaged in a

confrontation with a customer. When he was hired in May 2003, Clark had a juvenile petty offense of underage consumption and an offense of fishing without a license. During the time that he worked at Seven Eights he had an alcohol-related driving offense. As the district court concluded, none of these offenses indicates a propensity for violence. Nothing in the record would have given Seven Eights any reason to suspect Clark of violence or aggression.

Udofot makes two other arguments on appeal that we briefly address. First he argues that his negligent hiring, supervision, and retention count also encompasses a negligent-training theory. This theory was not included in the complaint, and Minnesota does not recognize a cause of action against employers for negligent failure to train. *See Johnson*, 734 N.W.2d at 277. He also contends that the common law should apply a higher standard of care for liquor-retail employers who hire employees who deal with the public. He analogizes this employment to the employer-employee relationship of the owner and the resident manager in *Ponticas v. KMS Invs.*, 331 N.W.2d 907, 909 (Minn. 1983). We cannot equate the risk involved in retail-liquor-store sales to the risk in *Ponticas* of providing an employee with a passkey to the residents' apartments. Furthermore, Udofot has not produced evidence that Seven Eights failed to discover anything in Clark's past conduct that would make him unfit for his employment. *See Ponticas*, 331 N.W.2d at 912 (stating that cause of action must be based on evidence that "employee was in fact unfit").

Because the record could not support a finding that Seven Eights knew that Clark had any propensity for violence or that he was likely to engage in injurious conduct in

dealing with a customer, the risk of harm to Udofot was not foreseeable or reasonably anticipated. Because Udofot has failed to present evidence on the foreseeability prong of the duty element, as a matter of law, he has failed to establish that Seven Eights owed a duty to protect Udofot from Clark. We affirm the district court's grant of summary judgment on Udofot's negligence claims.

II

The remaining count in Udofot's complaint is his section 1981 claim against Seven Eights. Section 1981 provides relief from racial discrimination that "blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476, 126 S. Ct. 1246, 1250 (2006). In relevant part, section 1981 states the purpose and the scope of the protection to make and enforce contracts:

> (a) Statement of equal rights
>
> 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 . . . .
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1981 (2000).

A claim brought under section 1981 must "identify an impaired contractual relationship . . . under which the plaintiff has rights." *Domino's Pizza*, 546 U.S. at 476, 126 S. Ct. at 1249. To establish a prima facie case, the plaintiff must show "(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." *Gregory v. Dillard's, Inc.*, 565 F.3d 464, 469, (8th Cir. 2009), *cert. denied*, 130 S. Ct. 628 (2009). It is the third requirement that is in dispute in this appeal.

The district court granted Seven Eights summary judgment based on its analysis that the contractual relationship between Udofot and Seven Eights ended when Udofot purchased the beer or when Clark gave Udofot the receipt for his purchase, both of which occurred before the confrontation that included the racial epithet and the physical altercation. Udofot disputes that he received the receipt prior to the racial epithet. He also contends that the contractual relationship did not end after his purchase because his attempt to obtain a receipt should be viewed as an act to enforce a benefit, privilege, term or condition of his contractual relationship with Seven Eights. The question as it applies to our review is whether the facts of this case, viewed in the light most favorable to Udofot, are sufficient to show that, at the time of the confrontation, Udofot was engaging in a protected activity, and that Clark's conduct interfered with the protected activity.

The terms "contract" and "contractual relationship" are not defined in section 1981. To determine what constitutes a "contract" or "contractual relationship" for the purposes of a section 1981 claim involving a retail transaction, we look to Minnesota law. *See* 42 U.S.C. § 1988(a) (2006) (providing that state law applies when federal law is

deficient); *Garrett v. Tandy Corp.*, 295 F.3d 94, 100-01 (1st Cir. 2002) (applying state law to define "contractual relationship" for purposes of section 1981).

Article 2 of the Uniform Commercial Code (UCC), which applies to transactions in goods, has been officially adopted in Minnesota and codified at Minn. Stat. §§ 336.2–101 to 725 (2008). The UCC defines a "contract for sale" as including both a present sale of goods and a contract to sell in the future. Minn. Stat. § 336.2-106(1) (2008). A "sale" occurs when title passes from seller to buyer for a price. *Id.* This definition was applied by the Minnesota Supreme Court in *Hy-Vee Food Stores, Inc. v. Minn. Dep't of Health* when it defined a sales contract as "the mutually-assented-to transfer of title from seller to buyer for a price." 705 N.W.2d 181, 185-186 (Minn. 2005). Thus, under Minnesota law, a sales contract was formed when Udofot paid for and received the beer.

In determining that the contractual relationship ended once Udofot made his purchase, the district court relied on *Youngblood v. Hy-Vee Food Stores, Inc.* for the proposition that "once the purchase is completed, no contractual relationship remains." 266 F.3d 851, 854 (8th Cir. 2001). Although *Youngblood* was not decided under Minnesota law and the claim under section 1981 in that case did not involve the issue of whether obtaining a receipt is part of the contractual relationship, this statement comports with Minnesota's definition of a sales contract and appears to represent other jurisdictions' interpretation of the "contractual relationship" in the context of a section 1981 claim involving a retail transaction. *See Garrett*, 295 F.3d 94, 101 (stating that purchase of goods while in store fully consummated the contract); *Morris v. Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir. 1996) (concluding that discrimination occurring after

initial purchase was not violation of section 1981 because claimants did not attempt to make further purchases).

Neither our research, nor Udofot, has provided us with any Minnesota statutory or caselaw that would support his assertion that obtaining a receipt is a benefit, privilege, term or condition of a retail-sales contract. Courts that have addressed section 1981 claims involving retail transactions and receipts have not recognized a receipt as a benefit, privilege, term or condition of a retail-sales contract. *See Drayton v. Toys "R" Us Inc.*, 645 F. Supp. 2d 149, 157-58 (S.D.N.Y. 2009) (holding inspection of receipts while customers were leaving store was not violation of section 1981 because contractual relationship ended once purchase was complete); *Bishop v. Toys "R" Us-NY LLC*, 414 F. Supp. 2d 385, 393 (S.D.N.Y. 2006) (holding that possibility of returning items with receipt does not create privilege or benefit under contractual relationship).

Although we find no general statutory authority requiring a seller to give a purchaser of retail goods a receipt, we recognize that Minn. Stat. § 295.75, subd. 4 (2008), requires a liquor retailer to provide a purchaser of liquor a receipt to show the tax paid. Even if we were to conclude that this statute creates a benefit or privilege under a retail liquor sales contract, it does not apply to the facts of this case because it was not effective at the time Udofot made his purchase on November 2, 2005. *See* 2005 Minn. Laws 1st Spec. Sess. ch. 3, art. 6, § 9 at 2391-92 (stating effective date of January 1, 2006).

The compartmentalization of the purchase transaction from the events surrounding Udofot's return to the store to obtain his receipt strikes a discordant note in light of the

gravity of Udofot's allegations and the remedial purposes of section 1981. But the Supreme Court has emphasized that section 1981 was not meant as an "omnibus remedy" and that incidents of "unpunished discrimination would in fact be reachable under [other federal acts] or even under general criminal law." *Domino's Pizza*, 546 U.S. at 479, 126 S. Ct. at 1251-52. In this case, Clark was criminally charged with fifth-degree assault.

For these reasons the district court did not err by relying on *Youngblood* to conclude that Udofot's contractual relationship with Seven Eights ended when he paid Clark and received the beer that he purchased. *See Youngblood*, 266 F.3d at 854 (concluding that "[o]nce Youngblood paid the cashier and received the beef jerky from the cashier, neither party owed the other any duty under the retail-sales contract"). Because there are no genuine issues of material fact on the issue of whether a contractual relationship existed at the time of the confrontation between Clark and Udofot, we affirm the district court's summary-judgment dismissal of Udofot's section 1981 claim.

Affirmed.