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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2025-CA-0923-MR

MELISSA MONTGOMERY — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, SPECIAL JUDGE
ACTION NO. 22-CI-00012

FRATERNAL ORDER OF EAGLES AERIE NO. 4168, INC.; JERRY BUSCH; AND RAY MCDANIEL — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, CHIEF JUDGE; MCNEILL AND MOYNAHAN, JUDGES.

MCNEILL, JUDGE: Melissa Montgomery ("Montgomery") appeals from the Daviess Circuit Court's order granting summary judgment in favor of Fraternal Order of Eagles Aerie No. 4168, Inc. ("Eagles") and dismissing her claims. Finding no error, we affirm.

BACKGROUND

For six years, Montgomery was employed as a bartender at Eagles, the Owensboro, Kentucky, chapter of the Fraternal Order of Eagles, an international nonprofit organization. On Thanksgiving Day, 2021, Montgomery's adult children, who are biracial (Montgomery is white and their father is black), visited her at work. Shortly after their arrival, Jerry Busch ("Busch"), an Eagles' trustee, asked Montgomery to speak with him in a back room of the bar. They were joined by Ray McDaniel ("McDaniel") and Mike Baldwin ("Baldwin"), two other Eagles' trustees. Busch told Montgomery he had watched her give away eight free drinks, to which Montgomery became upset, claiming Busch was accusing her of stealing. Montgomery told Busch she could not work at a place where she was accused of stealing and promptly quit.

Montgomery subsequently filed a lawsuit in Daviess Circuit Court against Eagles, its organizational head, the Grand Aerie of the Fraternal Order of Eagles, Busch, McDaniel, and Baldwin. Montgomery alleged that during her employment at Eagles, it "fostered a culture of racial discrimination" in which members and trustees frequently used racial slurs around her, despite knowing her children's father is black. She further claimed that she was accused of stealing because Busch and Baldwin did not want her biracial children in the bar. The complaint stated claims for defamation/slander per se, invasion of privacy,

constructive discharge, outrageous conduct, hostile work environment-racial discrimination, negligent supervision, and negligent failure to control.

Subsequently, Eagles, Busch, and McDaniel moved for summary judgment, and the circuit court granted their motion on all claims.[1] On appeal, Montgomery only challenges the circuit court's grant of summary judgment to Eagles on her claims for wrongful discharge, hostile work environment-racial discrimination, and negligent supervision.[2]

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citation omitted). "Because summary judgments involve no fact finding, this Court will review the circuit

[1] Montgomery's claims against Grand Aerie and Baldwin are still pending in circuit court.

[2] Montgomery's only claim against Busch and McDaniel was for outrageous conduct, which she conceded was preempted by her claim under the Kentucky Civil Rights Act, Kentucky Revised Statutes § 344.310 *et seq*. It is unclear why they were named as appellees on appeal.

court's decision *de novo*." *Metzger v. Auto-Owners Insurance Company*, 607 S.W.3d 695, 698 (Ky. 2020) (citation omitted).

ANALYSIS

Montgomery argues the circuit court erred in granting Eagles' motion for summary judgment on her claims for wrongful discharge, hostile work environment-racial discrimination, and negligent supervision. We disagree.

As to wrongful discharge, the circuit court found that Montgomery had failed to produce sufficient evidence in support of her claim. "The commonly accepted standard for constructive discharge is whether, based upon objective criteria, the conditions created by the employer's action are so intolerable that a reasonable person would feel compelled to resign." *Brooks v. Lexington-Fayette Urban Cnty. Housing Authority*, 132 S.W.3d 790, 807 (Ky. 2004), *as modified on denial of reh'g* (May 20, 2004) (citation omitted). "A finding of constructive discharge requires an inquiry into both the objective feelings of an employee, and the intent of the employer." *Id.* (citation omitted). "The latter requires the plaintiff to show that the employer intended and could reasonably have foreseen the impact of its conduct on the employee." *Id.* (internal quotation marks and citation omitted).

Montgomery's claim for constructive discharge is based upon two instances of alleged misconduct: (1) false allegations by Eagles that she was

stealing drinks and (2) a "culture of racial discrimination" at Eagles, specifically, hearing racial slurs "pretty much every time she worked." We agree with the circuit court that these allegations are insufficient as a matter of law to support a constructive discharge claim. Viewing the evidence in the light most favorable to Montgomery, being accused of stealing is simply not a condition so intolerable that a reasonable person would feel compelled to resign, especially considering there is no evidence that Montgomery had ever been reprimanded at Eagles before. Busch testified that he had confronted other bartenders similarly and they had simply given an explanation.

As to the "culture of racial discrimination," there is no evidence that Eagles created such a condition. Montgomery testified that it was patrons, not her superiors, who were using racial slurs. Montgomery did mention one instance several years earlier, when Baldwin directed a racial slur at another employee while he was the Eagles' President. The employee filed a formal complaint, and Baldwin was suspended. However, this was apparently an isolated incident. Montgomery testified she did not hear Baldwin use racial slurs after he was disciplined.[3]

[3] Montgomery's testimony on this point is somewhat contradictory. When questioned whether she had ever reported patrons' use of racial slurs to a trustee, she replied that she had mentioned it to Baldwin, saying, "don't say that," suggesting she had heard Baldwin use a racial slur. However, she later says that she did not hear Baldwin use racial slurs after his suspension.

And while Montgomery claims she told an officer about the use of racial slurs, there is no evidence that she ever filed a written complaint. Thus, it is unclear if Eagles was even aware of any alleged "culture of racial discrimination." Three of the trustees (Busch, McDaniel, and Baldwin) all testified that they had never heard racial slurs at Eagles. And in response to the one reported instance of such conduct, Eagles took disciplinary action. Therefore, it cannot be said that Eagles intended to foster a "culture of racial discrimination" or could have reasonably foreseen Montgomery would resign because of it. The court did not err in granting summary judgment on this claim.

The circuit court similarly found that Montgomery could not satisfy the elements of her hostile work environment-racial discrimination claim. To make a prima facie showing of a hostile work environment and racial discrimination, an employee must demonstrate that she (1) belongs to a protected group; (2) was subject to unwelcome harassment; (3) the harassment was based on race; (4) the harassment affected a term, condition, or privilege of employment; and (5) defendant knew or should have known about the harassment and failed to take action. *Moore v. KUKA Welding Systems & Robot Corp.*, 171 F.3d 1073, 1078–79 (6th Cir. 1999). The circuit court held that Montgomery is not a member

of a protected class under the Kentucky Civil Rights Act ("KCRA"), KRS[4] § 344.310 *et seq.*, and therefore summary judgment was proper. We agree.

KRS 344.040(1)(a) makes it unlawful for an employer "to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race . . . ." Montgomery does not allege that she was discriminated against because of *her* race (she is white). Instead, she claims that she was discriminated against because of her biracial children. However, Kentucky does not recognize associational discrimination claims under the KCRA. *See Barnett v. Central Kentucky Hauling, LLC*, 617 S.W.3d 339, 343 (Ky. 2021) (holding that the KCRA does not create a cause of action for associational discrimination). Therefore, Montgomery cannot satisfy this element of her racial discrimination claim, and the circuit court did not err in granting summary judgment on this claim.

Finally, the circuit court found that Montgomery's negligent supervision claim was precluded by the exclusive remedy provision of the Kentucky Workers' Compensation Act ("KWCA"), KRS 342.690(1). That provision provides in relevant part:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal

[4] Kentucky Revised Statutes.

> representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

"Essentially, the exclusive remedy provision grants immunity for liability arising from common law and statutory claims, meaning such claims cannot be pursued in the courts of this Commonwealth." *Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 13 (Ky. 2007).

"In order to prove the affirmative defense that [a defendant is] entitled to protection of the Workers' Compensation Act's exclusivity provisions, KRS 342.690(1), [a defendant is] required to prove that it complied with KRS 342.340(1)." *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 283 (Ky. App. 2009). "A certification of coverage from the Department of Workers' Claims or an uncontroverted affidavit from the employer's insurer is prima facie proof that a company has secured payment of compensation for the purposes of KRS 342.690(1)." *General Elec. Co. v. Cain*, 236 S.W.3d 579, 605 (Ky. 2007), *as corrected* (Aug. 30, 2007), *as modified on denial of reh'g* (Nov. 21, 2007). Along with its motion for summary judgment, Eagles tendered a copy of its workers' compensation insurance policy for the period of September 19, 2021, to September 16, 2022, along with an affidavit from Eagles' Secretary Robert Cochrum stating that Eagles had workers' compensation insurance during 2021. Montgomery

argues that this is insufficient because her allegations are not limited to the period of the purported policy.[5]

The only harm alleged in Montgomery's complaint, due to "false accusations, which stemmed from racism against non-white patrons of Eagles," is that she was forced to resign from her job. This occurred on November 25, 2021. The policy covers this period and provides sufficient proof that Eagles complied with KRS 342.690(1) to invoke the statute's protection.

Further, even if the KWCA does not preclude Montgomery's negligent supervision claim, her claim fails as a matter of law. "[A]n employer may be held liable for the negligent supervision of its employees only if he or she knew or had reason to know of the risk that the employment created." *Carberry v. Golden Hawk Transp. Co.*, 402 S.W.3d 556, 564 (Ky. App. 2013) (internal quotation marks omitted) (citing *Booker v. GTE.net LLC*, 350 F.3d 515, 517 (6th Cir. 2003)). Put another way, "the plaintiff must allege that the defendant knew or had reason to know of the employee's harmful propensities; that the employee injured the plaintiff; and that the hiring, supervision, or retention of such an

[5] Montgomery also argues the circuit court erred in considering the policy because Eagles did not produce it until it filed its motion for summary judgment. She makes a vague claim of prejudice but does not identify how specifically she was prejudiced beyond the obvious dismissal of her claim due to the KWCA's exclusive remedy provision. We decline to address this argument further.

employee proximately caused the plaintiff's injuries." *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 844 (Ky. 2005) (citation omitted).

Montgomery's complaint alleges that Eagles owed her a duty as her employer and breached that duty "through the negligent supervision of Eagles' Trustees, including through the negligent appointment, retention, supervision, and training of [Baldwin, Busch, and McDaniel]." However, she fails to identify any alleged "harmful propensities" of Busch and McDaniel, much less that Eagles knew of those propensities. Her only complaint about Busch specifically is that he accused her of giving away free drinks. She asserts that this was because he disapproved of her biracial children being in the bar that evening. But there is no evidence that Busch even knew they were present. Busch testified in his deposition that he could not identify her children because he had never seen them and was not aware that they were in the bar that night.

As to Baldwin, she claims, "Eagles was certainly aware of [Baldwin]'s harmful propensities, since while previously acting as the chapter president, Eagles suspended [him] from social room privileges for sixty (60) days for using a racial slur (the "n word") against another bartender." However, this was a single instance, several years prior, for which he was disciplined. While inappropriate and distasteful, that one comment is insufficient to support her claim for negligent supervision, without evidence of additional impropriety. Baldwin

testified that he was intoxicated, that it was a "one-time incident," and that he apologized to the bartender, whom he considered a friend. And Montgomery testified that she did not hear him use any racial slurs after the incident. So, while Eagles knew Baldwin had used a racial slur in the past, there is no evidence of a pattern of such conduct by Baldwin or that Eagles knew of any risk going forward that his employment created. From its perspective, its disciplinary measures were successful.

CONCLUSION

Based on the foregoing, the order of the Daviess Circuit Court granting summary judgment in favor of Eagles is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
Christopher W. Riccio Owensboro, Kentucky	R. Michael Sullivan Owensboro, Kentucky