

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DANCO, INC. AND)
BENJAMIN GUILIANI,)
)
Plaintiffs)
v.) Civ. No. 97-0054-B
)
WAL-MART STORES, INC.,)
)
Defendant)

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

Plaintiffs, Danco, Inc. (“Danco”) and Benjamin Guiliani, bring this action against Defendant, Wal-Mart Stores, Inc. (“Wal-Mart”), alleging violations of Plaintiffs’ civil rights under 42 U.S.C. § 1981 (Count I), denial of Plaintiffs’ full and equal enjoyment of the public facilities of Defendant (Count II), breach of written and oral contracts (Counts III and IV), unjust enrichment (Count V), negligence (Count VI), intentional and negligent infliction of emotional distress (Counts VII and VIII), and willful and wanton conduct in support of a punitive damages claim (Count IX). Before the Court is Defendant’s Motion for Summary Judgment on all counts of Plaintiffs’ Complaint. For the reasons set forth below, Defendant’s Motion is GRANTED in part and DENIED in part.

BACKGROUND

For the purposes of summary judgment, the Court views the facts in the light most favorable to the nonmoving party. See McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995). Plaintiff Benjamin Guiliani, a Mexican-American of Mexican-Hispanic descent, is the owner and sole shareholder of Plaintiff Danco, a commercial industrial maintenance

company incorporated in 1994.

On or about September 15, 1994, Danco entered into a written contract with the Augusta Wal-Mart store whereby Danco was to provide parking lot cleaning and maintenance services. In a letter dated January 30, 1995, Defendant terminated this contract effective March 2, 1995. Subsequently, however, after discussing the matter, the parties signed a new contract for parking lot maintenance services dated February 21, 1995. Around the same time that Danco entered into its initial contract with the Augusta Wal-Mart, in the fall of 1994, Danco also entered into oral agreements with other Wal-Mart stores in Scarborough, Windham, Auburn, Farmington, Rockland, Waterville, and the Sam's Club in Augusta¹ to provide parking lot cleaning and maintenance services. On March 15, 1995, Danco entered into a written contract for parking lot services with the Augusta Sam's Club.

In October 1994, Mr. Guiliani and his son Daniel observed the words "White Supremacy" spray-painted on the parking lot pavement of the Augusta Wal-Mart. Daniel claims to have observed the Augusta Wal-Mart maintenance manager, Robert Amadei, spray-painting the words on the pavement earlier in the day. Mr. Guiliani immediately reported the incident to the Augusta Wal-Mart store manager, Curtis Scheffe, and informed Mr. Scheffe that he found the words to be highly offensive. Mr. Guiliani offered to remove the words from the parking lot immediately, but Mr. Scheffe assured Plaintiff that he would take care of it. Mr. Scheffe conducted an investigation into who may have spray-painted the words, but the words allegedly remained on the pavement for over two months.

¹ Defendant Wal-Mart is registered and licensed to do business in the State of Maine under the names Wal-Mart and Sam's Club.

On or about October 14, 1994, a few days after the spray-painting incident, a Wal-Mart employee, Scott Hamlin, racially harassed and physically assaulted Mr. Guiliani on the premises of the Augusta Wal-Mart store. Plaintiff Guiliani immediately called the police and reported the incident to Mr. Scheffe. Mr. Scheffe, however, failed to take any disciplinary action against Mr. Hamlin. On or about November 12, 1994, Mr. Hamlin allegedly further subjected Mr. Guiliani to racial harassment, by shouting out a racial slur as he was driving out of the Augusta Wal-Mart and Mr. Guiliani and his son Benjamin were driving in. Mr. Guiliani reported this second incident to Mr. Scheffe. Again, Wal-Mart took no disciplinary action.

In January 1995, James Helterbrake replaced Curtis Scheffe as the Augusta Wal-Mart manager. Mr. Guiliani informed Mr. Helterbrake of the “White Supremacy” incident and the confrontations with Mr. Hamlin, and mentioned that he had contacted the police in response to two of the incidents. Upon learning of Mr. Guiliani’s contact with the police, Mr. Helterbrake allegedly became angry and asked Mr. Guiliani why he had called the police and why the words “White Supremacy” bothered him. Following this conversation, Mr. Helterbrake treated Mr. Guiliani in a hostile manner.

In late March 1995, while Mr. Guiliani and Daniel were completing their cleaning of the Augusta Wal-Mart parking lot, Mr. Guiliani observed a sanding contractor enter the parking lot and begin to sand the ice. Mr. Guiliani also noticed Mr. Helterbrake watching the sanding contractor from in front of the store. The following day Mr. Helterbrake terminated Danco’s contract, on the ground that Danco was unsatisfactorily performing its cleaning duties. Mr. Helterbrake told Mr. Guiliani that Charles Kellogg from the Maine Department of Environmental Protection (“DEP”) had complained the previous night about the sand on the lot and had

threatened Wal-Mart with a \$500,000 fine. Mr. Kellogg has testified that he never threatened the Augusta Wal-Mart with a \$500,000 fine. Mr. Helterbrake also told Mr. Guiliani that he did not wish to see him around the Augusta Wal-Mart store again. Soon after Mr. Helterbrake terminated Danco's contract with the Augusta Wal-Mart, other Wal-Mart stores began terminating their contracts with Danco without proper notice or cause.

SUMMARY JUDGMENT

Summary judgment is appropriate in the absence of a genuine issue of any material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is genuine for summary judgment purposes, if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A material fact is one that has "the potential to affect the outcome of the suit under applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Facts may be drawn from "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." Fed. R. Civ. P. 56(c).

DISCUSSION

A. Count I -- Section 1981

In Count I, Plaintiffs allege that Defendant violated Plaintiffs' civil rights pursuant to 42 U.S.C. § 1981. Specifically, Plaintiffs allege that Defendant failed to prevent or remedy a racially hostile work environment, and ultimately terminated Danco's written contract with the Augusta Wal-Mart for racially discriminatory reasons. The Court is persuaded that summary judgment on Count I of Plaintiffs' Complaint is inappropriate at this stage of the proceedings.

Section 1981(a) provides that "[a]ll persons within the jurisdiction of the United States

shall have the same right . . . to make and enforce contracts” 42 U.S.C. § 1981(a). Section 1981(b) defines the term “make and enforce contracts” as including “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(b). The First Circuit has held that analysis of a section 1981 claim is “substantially identical” to analysis of a Title VII claim. See Villanueva v. Wellesley College, 930 F.2d 124, 127 n.2 (1st Cir. 1991). In both types of claims, “the ultimate issue is whether the defendant intentionally discriminated against the plaintiff” Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 95 (1st Cir. 1996).

The Court first addresses Plaintiffs’ contention that Defendant subjected Plaintiff Guiliani to a hostile working environment. To prevail on a hostile work environment claim, Plaintiffs must establish: (1) unwelcome comments, jokes, acts, and other verbal or physical conduct of a racial nature in the workplace; (2) that such conduct has the purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment; and (3) that the employer, or its agents or supervisory employees, knew or should have known of the conduct. Duplessis v. Training & Dev. Corp., 835 F. Supp. 671, 677 (D. Me. 1993) (setting forth standard for hostile work environment claim under Title VII). Once Plaintiffs have established these factors, Defendant “may rebut a prima facie case by showing it took immediate and appropriate corrective action.” Id.; see also DeGrace v. Rumsfeld, 614 F.2d 796, 805 (1st Cir. 1980) (“employer who has taken reasonable steps under the circumstances to correct and/or prevent racial harassment by its nonsupervisory personnel has not violated Title VII”).

In determining whether harassment is sufficiently severe as to constitute a hostile working

environment, courts “look to the gravity as well as the frequency of the offensive conduct.” DeNovellis v. Shalala, 124 F.3d 298, 311 (1st Cir. 1997) (analyzing Title VII hostile work environment claim). A court’s decision must be based on the totality of the circumstances. Duplessis, 835 F. Supp. at 677.

The Court is satisfied that Plaintiffs have raised genuine issues of fact with respect to each of the elements of their claim alleging a hostile work environment. The spray-painted words “White Supremacy,” as well as both of Mr. Hamlin’s alleged confrontations with Mr. Guiliani constitute unwelcome comments and/or actions of a racial nature in the workplace. Although Mr. Hamlin may have been off-duty when he confronted Mr. Guiliani, the altercations took place on Wal-Mart’s premises, indeed in the very place where Mr. Guiliani performed his duties. Plaintiffs allege that the harassment caused Mr. Guiliani great mental anguish and directly interfered with his work performance, by causing him to perform his duties during the day rather than at night because he feared for the safety of himself and his family. While the incidents of harassment may not have been large in number, the Court is persuaded that their potential severity is sufficient to preclude summary judgment.

Plaintiffs have also presented evidence sufficient to create a question of material fact on the issue of Defendant’s knowledge of the discriminatory conduct. Mr. Guiliani allegedly reported each of the three discriminatory incidents to the Augusta Wal-Mart manager, Mr. Scheffe. Although Mr. Scheffe conducted an investigation into the “White Supremacy” incident and told Mr. Guiliani he would handle removal of the words from the parking lot, Plaintiffs allege that the words remained on the pavement for over two months. Defendant further failed to take any disciplinary action against Mr. Hamlin although Mr. Scheffe was aware that the

confrontations occurred. A reasonable jury could find that Defendant failed to take reasonable steps to prevent or correct a hostile work environment, even though Defendant had knowledge of this offensive atmosphere.

Next, the Court turns to Plaintiffs' argument that Defendant unlawfully terminated Danco's contract with the Augusta Wal-Mart for racially discriminatory reasons. Contrary to Plaintiffs' contentions, the Court finds that Plaintiffs have not presented direct evidence of discrimination. The First Circuit has held that "[d]irect evidence is evidence which, in and of itself, shows a discriminatory animus." Ayala-Gerena, 95 F.3d at 96 (quoting Jackson v. Harvard Univ., 900 F.2d 464, 467 (1st Cir. 1990)). "[A]t a minimum, direct evidence does not include stray remarks in the workplace, particularly those made by nondecision-makers or statements made by decisionmakers unrelated to the decisional process itself." Id. Even assuming, as Plaintiffs allege, that the spray-painting was done by Mr. Amadei and that Mr. Amadei reported to the store manager about Danco's performance, Plaintiffs have not demonstrated that the spray-painting incident was sufficiently related to Mr. Helterbrake's decision to terminate Danco's contract so as to constitute direct evidence of discrimination.

In the absence of direct evidence of race discrimination, courts will apply the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). Plaintiffs bear the initial burden of establishing a prima facie case of discrimination by proving that: (1) Plaintiffs were members of a protected class; (2) Plaintiffs performed their jobs satisfactorily; (3) Plaintiffs' contract was terminated; and (4) Plaintiffs' position remained open and was eventually filled by persons with Plaintiffs' qualifications. Ayala-Gerena, 95 F.3d at 95. This initial burden is not onerous. See Lipsett v. University of Puerto Rico, 864 F.2d 881, 899

(1st Cir. 1988). Once Plaintiffs have established a prima facie case of discrimination “the burden of production shifts to the defendant in order to show a legitimate nondiscriminatory reason” for its action. Ayala-Gerena, 95 F.3d at 96. If Defendant proffers such a reason, the burden shifts back to Plaintiffs to establish that Defendant’s reason is merely a pretext for intentional discrimination. Id.

Defendant contends that Plaintiffs have failed to satisfy the second prong of their prima facie case of discrimination, the requirement that Danco perform its job satisfactorily. Defendant alleges that Mr. Kellogg, a representative from the Maine DEP, criticized Plaintiffs and Wal-Mart for not performing parking lot maintenance as required by DEP regulations, and that Mr. Helterbrake was dissatisfied with Danco’s performance. Plaintiffs respond that Wal-Mart District Manager, J.R. Lee, commented several times on the excellent work Danco was performing at the various Wal-Mart stores and that Mr. Kellogg never recommended that Mr. Helterbrake terminate Danco’s services. The Court is satisfied that Plaintiffs have presented sufficient facts to support their prima facie claim of discrimination.

Turning to the second stage of the McDonnell Douglas analysis, the Court finds that Defendant has proffered a legitimate nondiscriminatory justification for the termination of Danco’s contract, Danco’s poor performance of its duties. The Court is persuaded, however, under the third and final stage of the McDonnell Douglas analysis, that Plaintiffs have put forth sufficient facts from which a reasonable factfinder could conclude that Defendant’s justification was merely a pretext for discrimination. Even though the termination of Danco’s contract with the Augusta Wal-Mart occurred when Mr. Helterbrake was in charge of the store, rather than Mr. Scheffe, the manager at the time the incidents of harassment occurred, Mr. Guiliani told Mr.

Helterbrake of the alleged harassment. Indeed, in response to Mr. Guiliani's disclosure Mr. Helterbrake allegedly became angry, and thereafter treated Mr. Guiliani with hostility. Mr. Guiliani further contends that when Mr. Helterbrake terminated Danco's contract, he told Mr. Guiliani that Mr. Kellogg had threatened Wal-Mart with a \$500,000 fine. Mr. Kellogg has testified that no such fine was ever threatened. The Court is satisfied that genuine issues of material fact exist with respect to the reason behind the Augusta Wal-Mart's termination of Danco's contract. Accordingly, the Court denies Defendant's Motion for Summary Judgment on Count I.

B. Count II -- Public Accommodations Discrimination

Plaintiffs allege in Count II that Defendant discriminated against and denied Mr. Guiliani the full and equal enjoyment of the public facilities of Defendant in violation of the "unlawful public accommodations" provision of the Maine Human Rights Act, 5 M.R.S.A. § 4551 et seq. Section 4592 of the Maine Human Rights Act provides:

It is unlawful public accommodations discrimination, in violation of this Act:

1. Denial of public accommodations. For any public accommodation or any person who is the owner, lessor, lessee, proprietor, operator, manager, superintendent, agent or employee of any place of public accommodation to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color, sex, physical or mental disability, religion, ancestry or national origin, any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms, or conditions upon which access to accommodation, advantages, facilities, goods, services and privileges may depend.

5 M.R.S.A. § 4592.

Plaintiffs allege that when Mr. Helterbrake terminated Danco's contract with the Augusta

Wal-Mart and Mr. Guiliani questioned him about it, Mr. Helterbrake angrily told Mr. Guiliani that he did not want to see him around the Augusta Wal-Mart again. Mr. Guiliani contends that he interpreted Mr. Helterbrake's statement to mean that Mr. Helterbrake did not wish Mr. Guiliani to go back to the property for any reason. Plaintiffs have not, however, presented any evidence that Mr. Guiliani was denied access to Defendant's premises, or denied access to shopping at the Augusta Wal-Mart. The Court is persuaded that Mr. Helterbrake's statement alone does not present a sufficient issue of material fact as to whether Mr. Guiliani was denied the full and equal enjoyment of Defendant's facilities to survive summary judgment. The Court, therefore, grants Defendant's Motion for Summary Judgment on Count II.

C. Count III -- Breach of Written Contract

In Count III, Plaintiffs contend that Defendant breached written contracts with Plaintiffs by failing to pay Plaintiffs for their services provided pursuant to these contracts. Specifically, Plaintiffs allege that Defendant breached two written contracts, the February 21, 1995, contract between Danco and the Augusta Wal-Mart, and the March 15, 1995, contract between Danco and the Augusta Sam's Club.

With respect to the contract between Danco and the Augusta Wal-Mart, Plaintiffs allege by way of background that pursuant to ¶ 3 of the September 15, 1994, contract between the Augusta Wal-Mart and Danco, Danco dumped all "sweeping debris" into Wal-Mart's compactor. In February 1995, however, Mr. Amadei informed Mr. Guiliani that he could no longer dump debris into the compactor because of the weight of the sand. Mr. Guiliani contacted the person who had prepared the contract between Danco and Defendant, Helen Poulin of S.R. Weiner Associates, for guidance. After checking with Mr. Helterbrake, Ms. Poulin told Mr. Guiliani that

he would have to haul the sand off site. In response to Mr. Giuliani's query as to what he should charge for such removal, Ms. Poulin told him that the going rate was \$58.00 per ton.

As a result of this series of events, Plaintiffs contend that when Danco and the Augusta Wal-Mart entered into a new contract for parking lot maintenance on February 21, 1995, the provision allowing for the dumping of debris into Wal-Mart's compactor was absent. Plaintiffs allege that the parties mutually assented to Danco's hauling away of the debris and the subsequent reimbursement of Danco by Defendant. At a minimum, Plaintiffs argue, the ultimate disposition of the debris is an ambiguity in the contract. Defendant responds that since the contract does not expressly provide for the removal of sand off-site, Defendant's refusal to pay for such services does not constitute breach of contract.

Under Maine law:

the paramount principle in the construction of contracts is to give effect to the intention of the parties as gathered from the language of the agreement viewed in the light of all the circumstances under which it was made Such intention must be gathered from the written instrument, construed in respect to the subject matter, the motive and purpose of making the agreement, and the object to be accomplished.

Hodgkins v. New England Telephone Co., 82 F.3d 1226, 1230 (1st Cir. 1996) (quoting Baybutt Constr. Corp. v. Commercial Union Ins. Co., 455 A.2d 914, 919 (Me. 1983)). "Whether contract language is ambiguous is a question of law." Town of Lisbon v. Thayer Corp., 675 A.2d 514, 516 (Me. 1996). A contract is ambiguous "when it is reasonably susceptible to different interpretations." Fitzgerald v. Gamester, 658 A.2d 1065, 1069 (Me. 1995). When contract language is ambiguous, its interpretation is a question of fact, McCarthy v. U.S.I. Corp., 678 A.2d 48, 51-52 (Me. 1996), and "extrinsic evidence may be admitted and considered to show the

intention of the parties.” Fitzgerald, 658 A.2d at 1069 (citation omitted).

Paragraph 1 of the February 21, 1995, contract provides for “[t]he parking lot and roadways . . . [to] be cleaned and sweep/vacuumed two times per week” by Danco. B. Guiliani Dep. Ex. 6. The Court is persuaded that this language is ambiguous as to the ultimate disposition of the sweeping debris. Danco needed to deposit the debris it collected from cleaning the parking lot somewhere, and Mr. Guiliani’s conversation with Mr. Amadei foreclosed the option of the Wal-Mart compactor. Furthermore, Ms. Poulin allegedly checked with Mr. Helderbrake before telling Mr. Guiliani that the sand would have to be hauled off site. The Court is satisfied that an issue of material fact exists regarding the intent of the parties, and that, therefore, summary judgment on Plaintiffs’ claim that Defendant breached the February 21, 1995, contract is inappropriate. See Town of Lisbon, 675 A.2d at 516 (when an issue of fact exists regarding the intent of the parties, summary judgment is inappropriate).

Plaintiffs also contend that Defendant breached its March 15, 1995, contract with Danco for maintenance of the Augusta Sam’s Club parking lot. Pursuant to this contract, Plaintiffs allege, Danco performed services for Defendant until May 31, 1995, when Sam’s Club manager, Eddie Smith, terminated the contract. Danco has billed the Augusta Sam’s Club for its services during the months of April and May, 1995; however, Defendant has refused to pay for these services. The determination of whether there has been a breach of contract is a question of fact. VanVoorhees v. Dodge, 679 A.2d 1077, 1080 (Me. 1996). The Court, therefore, denies Defendant’s Motion for Summary Judgment on Count III.

D. Count IV -- Breach of Oral Contracts

Count IV of Plaintiffs’ Complaint alleges that Defendant breached various oral contracts

it had with Danco by terminating these contracts without cause or sufficient notice. The parties do not dispute that during the fall of 1994, Danco and Defendant entered into oral agreements to provide parking lot maintenance and cleaning services for Wal-Mart stores in Scarborough, Windham, Auburn, Farmington, Rockland, Waterville, and the Sam's Club in Augusta, Maine.² Plaintiffs contend that J.R. Lee, the district manager for Wal-Mart, told Mr. Guiliani that these oral contracts were Danco's to keep as long as Danco performed its job in a satisfactory manner, and further expressly promised Danco the contracts for a significant duration of time. In spite of these representations, soon after Mr. Helterbrake terminated the Augusta Wal-Mart's written contract with Danco, the remaining Wal-Mart stores, with the exception of the Auburn Wal-Mart,³ terminated their oral contracts with Danco for no reason and without notice. Defendant responds that the oral contracts between Danco and these other Wal-Mart stores were "terminable at will."

"While the interpretation of unambiguous language in a written contract falls within the province of the court, . . . questions of fact concerning the terms of an oral agreement are left to the trier of fact." Moulton Cavity & Mold, Inc. v. Lyn-Flex Indus., Inc., 396 A.2d 1024, 1029 (Me. 1979) (citations omitted). The parties dispute whether the oral agreements were intended to be contracts of a specific duration, and whether Defendant was allowed to terminate them

² The Court assumes, however, that Plaintiffs' claim for breach of oral contract does not apply to Danco's oral contract to provide parking lot maintenance to the Augusta Sam's Club, since on or about March 15, 1995, Danco and Wal-Mart entered into a written contract for parking lot maintenance services for this store.

³ Plaintiffs acknowledge that Don Jenkins, manager of the Auburn Wal-Mart, did provide Danco with notice and a reason for termination of their contract, namely the Auburn Wal-Mart's decision to utilize in-house personnel to maintain the lot during the winter months.

without cause or notice. The Court, therefore, is satisfied that Defendant's Motion for Summary Judgment on Count IV should be denied.

E. Count V -- Unjust Enrichment

Plaintiffs allege in Count V that Defendant has been "unjustly enriched" by services provided by Plaintiffs, specifically Danco's hauling away of the sweeping debris from the Augusta Wal-Mart parking lot. "[U]njust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay." Hodgkins, 82 F.3d at 1232 (quoting A.F.A.B., Inc. v. Town of Old Orchard Beach, 639 A.2d 103, 105 n.3 (Me. 1994)). Plaintiffs contend that to the extent the February 21, 1995, written contract between Danco and the Augusta Wal-Mart is found not to cover Danco's removal of sand from the site, Plaintiffs are nevertheless entitled to relief under a theory of unjust enrichment.

In order to establish a claim for unjust enrichment a party must prove: (1) a benefit conferred upon Defendant by Plaintiffs; (2) an appreciation or knowledge by Defendant of the benefit; and (3) the acceptance or retention by Defendant of the benefit under such circumstances as to make it inequitable for Defendant to retain the benefit without payment of its value.

Aladdin Elec. Assoc. v. Town of Old Orchard Beach, 645 A.2d 1142, 1144 (Me. 1994). The Court is persuaded that genuine issues of material fact exist with respect to each of these elements.

First, Danco's removal of sand from the site conferred a benefit upon Defendant. Second, Plaintiffs have put forth evidence suggesting that Defendant knew about this benefit. Mr. Guiliani alleges that Ms. Poulin checked with Mr. Helterbrake before telling Mr. Guiliani to haul

the debris off site, and one of Defendant's employees, Mr. Amadei, was responsible for telling Mr. Guiliani that disposal of sand in the compactor would no longer be allowed. Finally, Danco has not yet received payment for this service. A reasonable factfinder could conclude that it was inequitable for Defendant to receive Danco's services without paying for them. The Court denies Defendant's Motion for Summary Judgment on Count V.

F. Count VI -- Negligence

Count VI of Plaintiffs' Complaint alleges a cause of action for negligence. Specifically, Plaintiffs allege that Defendant had a duty to protect Plaintiffs from racial discrimination while Plaintiffs performed their contractual obligations, and breached this duty by failing to prevent or correct a racially hostile atmosphere. Defendant contends that no such duty exists. Alternatively, Defendant argues that even if such a duty did exist, there is no evidence on the record to support Defendant's breach of that duty.

In order to prevail on a claim for negligence, Plaintiffs must prove: (1) a duty owed Plaintiffs by Defendant; (2) Defendant's breach of that duty; and (3) injury to Plaintiffs from the breach. Parker v. Harriman, 516 A.2d 549, 550 (Me. 1986). The existence of a duty is a question of law for decision by the Court. Fish v. Paul, 574 A.2d 1365, 1366 (Me. 1990).

Plaintiffs argue that Defendant's duty to protect Plaintiffs from racial discrimination arises from the recognized common law duty, under Maine law, on the part of a business owner to exercise reasonable care to prevent injury to business invitees. See Pelletier v. Fort Kent Golf Club, 662 A.2d 220, 221-22 (Me. 1995). While the Court agrees that common law imposes a duty of reasonable care upon a business owner, the traditional application of common law negligence in this area has been to protect business invitees from physical injury. See Isaacson v.

Husson College, 297 A.2d 98, 105 (Me. 1972) (“A possessor of land is subject to liability for physical harm caused to his invitees”) (quoting Restatement (Second) of Torts § 343 (1965)). Plaintiffs have failed to present any legal support for extending this common law duty to cases such as this one, where a plaintiff’s alleged injuries are purely psychological in nature.⁴ The Court is persuaded that Mr. Guiliani’s emotional injuries are more properly addressed by his claim for negligent infliction of emotional distress. As a result, the Court grants Defendant’s Motion for Summary Judgment on Count VI.

G. Count VII -- Intentional Infliction of Emotional Distress

In Count VII, Plaintiffs allege that Defendant intentionally and recklessly inflicted emotional distress on Mr. Guiliani. To prevail on this claim, Plaintiffs must prove that:

(1) Defendant intentionally or recklessly inflicted severe emotional distress or was certain that such distress would result from its conduct; (2) the conduct was so “extreme and outrageous” as to exceed “all possible bounds of decency” and must be regarded as “atrocious, and utterly intolerable in a civilized community;” (3) the actions of Defendant caused Mr. Guiliani’s emotional distress; and (4) the emotional distress suffered by Mr. Guiliani was so “severe” that “no reasonable [person] could be expected to endure it.” Henriksen v. Cameron, 622 A.2d 1135, 1139 (Me. 1993) (quoting Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 154 (Me. 1979)).

The Maine Supreme Judicial Court has held in the context of an intentional infliction of emotional distress claim that:

[i]t is for the Court to determine, in the first instance whether the Defendant’s conduct may reasonably be regarded as so extreme and outrageous to permit

⁴ While Mr. Guiliani alleges that he suffers severe headaches, he acknowledges that these headaches were caused by his severe emotional distress and anguish.

recovery, or whether it is necessarily so. Where reasonable [people] may differ, it is for the jury, subject to the control of the Court, to determine whether, in a particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Colford v. Chubb Life Ins. Co. of America, 687 A.2d 609, 616 (Me. 1996), cert. denied, --U.S.--, 117 S. Ct. 2433 (1997).

Viewing the facts in a light most favorable to Plaintiffs, the Court is satisfied that Defendant's conduct may not reasonably be regarded as so atrocious or extreme as to permit recovery on this theory. Defendant, itself, did not commit any of the three allegedly discriminatory acts. Rather, Plaintiffs allege that Defendant failed to prevent or correct a hostile work environment. While such allegations, if proven, may constitute sufficient evidence of intentional discrimination, the Court finds that they do not rise to the level of intentional infliction of emotional distress. The Court, therefore, grants Defendant's Motion for Summary Judgment on Count VII.

H. Count VIII -- Negligent Infliction of Emotional Distress

Count VIII of Plaintiffs' Complaint seeks relief for negligent infliction of emotional distress. In order to succeed on this claim, Plaintiffs must establish: (1) that Defendant failed to exercise reasonable care in keeping the workplace free from harassment; (2) that Defendant's failure caused Mr. Guiliani severe emotional distress; (3) that Defendant's failure would have caused a reasonable person severe emotional distress; and (4) that the harm was foreseeable.

Duplessis, 835 F. Supp. at 683 (citing Salley v. Childs, 541 A.2d 1297 (Me. 1988)).

Defendant contends that the mental anguish allegedly suffered by Mr. Guiliani does not rise to the level of severity necessary for a successful negligent infliction of emotional distress

claim. Mr. Giuliani alleges that the various incidents of discrimination caused him to experience emotional distress resulting in severe headaches and significant sleeplessness and nightmares. The Court is satisfied that a reasonable factfinder could determine that this mental distress was more than the “usual and insignificant emotional traumas of daily life in modern society,” Dewilde v. Guy Gannett Publ’g Co., 797 F. Supp. 55, 62 (D. Me. 1992), constituting instead trauma that no reasonable person could expect to endure. Defendant’s Motion for Summary Judgment on Count VIII is, thus, denied.

I. Count IX -- Punitive Damages

In Count IX, Plaintiffs move for punitive damages. Punitive damages are available under section 1981 when “the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 205 (1st Cir. 1987) (analyzing punitive damages award in section 1981 case) (quoting Smith v. Wade, 461 U.S. 30, 56 (1983)). Under Maine law, Plaintiffs are entitled to punitive damages on their common law tort claims if they can establish by clear and convincing evidence that Defendant acted with malice. Tuttle v. Raymond, 494 A.2d 1353, 1363 (Me. 1985).

The Court is satisfied that Plaintiffs have generated sufficient facts, if viewed in a light most favorable to Plaintiffs, from which a reasonable jury could conclude that Defendant acted with malice, or with reckless indifference to Plaintiffs’ federally protected rights. In general, however, punitive damages are not available in Maine for breach of contract. See Drinkwater v. Patten Realty Corp., 563 A.2d 772, 776 (Me. 1989). Since the Court has granted Defendant’s Motion for Summary Judgment on Counts II, VI and VII, the Court narrows Plaintiffs’ basis for

recovery on the punitive damages count to those damages arising from Counts I, V, and VIII.

CONCLUSION

Defendant's Motion for Summary Judgment is GRANTED as to Counts II, VI and VII, and DENIED as to all other counts.

SO ORDERED.

MORTON A. BRODY
United States District Judge

Dated this ____ day of March, 1998.