COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION
CIVIL ACTION NO. 14-CI-1016

AMENA MOUSA PLAINTIFF

v. **OPINION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

UNIVERSITY OF KENTUCKY;
ALLYSON YATES; KATHRYN ZELLER DEFENDANTS

*** *** ***

This matter is before the Court on the Motion for Summary Judgment filed by the Defendants, University of Kentucky ("UK"), Allyson Yates ("Yates"), and Kathryn Zeller ("Zeller"). Upon agreement of the parties, the Court conducted a telephonic hearing on March 25, 2020. The Court having considered the arguments of counsel, the memoranda of the parties, including the supplemental memoranda filed by Defendants on April 1, 2020 and the supplemental memoranda filed by Plaintiff, Amena Mousa ("Mousa"), on April 8, 2020, the record in its entirety, and being otherwise sufficiently advised, hereby issues the following Opinion and Order granting Defendants' Motion for Summary Judgment.

Statement of Facts

Mousa is a native of Beirut, Lebanon, and moved to the United States in 2010. Mousa is Muslim and abstains from consuming pork.

On or about August 20, 2012, UK hired Mousa as a temporary employee to work in the Markey Cancer Multidisciplinary Clinic ("Clinic"). Zeller, Rachel Hay ("Hay"), Debbie Haggard ("Haggard"), and Donna Shaw ("Shaw") were also employed within Mousa's department. At other times, a woman named Ronita worked in Mousa's department. Yates was the supervisor.

The job duties of Mousa, Zeller, Hay, Haggard and Shaw included preparation, delivery and pick-up of medical records to various locations within the Clinic. When making these rounds, employees were expected to retrieve records so they could be scanned and re-shelved. Job duties also included preparation of patient charts and transportation of the "fee sheet" to a different building on the medical campus.

The job duties of Mousa and her co-workers overlapped and Mousa described a cooperative atmosphere regarding getting necessary tasks accomplished:

> A: Yes. And whatever Kathi asked me to do I do. I never deny to do any responsibility from Kathi. She said – like sometimes I was working on something and she gave me like two – two charts, like multiple – two charts for one patient, and she asked me to join them. I closed my job and did that for Kathi and give them to her and continue later what I was doing. ... And that was our relation. That was like sharing, cooperative responsibilities at the clinic.
>
> *** *** ***
>
> Q: Would that be the same if Rachel or Debbie or any of the other co-workers had asked you to do something, would you do it?
>
> A: What everyone asked me to do I did ... everything. ... Sometimes Kathi ask, Donna Shaw ask, and I do whatever everyone ask me to. ... I never deny any responsibility. I was extremely cooperative with all of them.

Mousa Dep. at 80:8 – 81:17. Zeller similarly testified that "duties are kind of influx, and everybody's sort of helping out and doing different things." Zeller Dep. at 16:4 – 16:6.

1. Mousa's Complaints Regarding Distribution of Work

Although she describes a cooperative working environment, Mousa makes general complaints about tasks she was asked to perform, particularly by Hay. Mousa complains she was singled out to deliver the fee sheet testifying, "the only persons they trust to take [the fee sheet] and gave this responsibility is Kathi Zeller, and she relied that to me for one year[.]" Mousa Dep. at 65:11 – 65:14. Mousa claims co-worker Hay asked her to help with job responsibilities to the

extent Mousa felt she was "a slave" to Hay, although she admitted that all tasks fell within her job description:

> Q: So you thought that Rachel [Hay] made you a slave because you would have to go get patients' medical records?
>
> A: Not because of that, because I was discussion what happened. The first part of my job the only thing I do is just listening to Rachel's order. Like she prepares the whole clinic, she printed out labels, she prepares the charts like whatever the physician asks for. The only thing I have is just open up the chart and stick – just the sticking.
>
> Q: Okay.
>
> A: I have no – I don't know. I have no idea.
>
> *** *** ***
>
> Q: Let me ask you this. Did Rachel ever require you to do something for her that was not related to your position as medical records within Markey? … ***[All the tasks you were asked to do were] all related to your all's job within the medical records department?***
>
> A: ***Yes, but that was her clinics, not my clinics – her clinics.***
>
> *** *** ***
>
> Q: But ma'am, what I'm trying to understand from you is, ***when you say*** – and you've said it multiple times in an email and in your lawsuit – that ***you thought you were the slave of Rachel*** or a servant to the other employees, what ***you're referring to is all issues that were related to medical records within Markey Cancer Center?***
>
> A: ***Yeah.***

Mousa Dep. at 200:9 – 201:22 (emphasis added). Mousa testified that if she did not do what Hay asked, "[Hay] just like yelling, throwing charts. One time I have five charts and she just like throw them on the floor like that and they spread on the work area, and I just like – directly I cried, you know. Directly I cried." *Id.* at 260:22 – 261:2.

Mousa describes Hay as "moody" and testified Hay made her cry more than "100 times." *Id.* at 77:12 – 78:23. Mousa alleges that if Hay lost a chart, "automatically that meant to her Amena took it and hid it." *Id.* at 77:19 – 77:20. She testified, "[Hay] repeated, you are undetermined, you are unorganized person, you are always the reason for I'm missing my charts." *Id.* at 89:5 – 89:7.

Mousa is also critical of Hay's work suggesting that Hay made many mistakes and did not do her work. Mousa testified, "I don't like to describe [Hay] as a lazy person, but she – we have our storage room where we get our stuff on the first floor. She never goes to the first floor to grab forms." *Id.* at 79:10 – 79:13. Mousa said Hay made many mistakes that were left to Mousa to correct. *Id.* at 82:4 – 85:12.

On the other hand, Hay testified that Mousa was asked to help when Hay's work load increased by 40 percent. *See* Hay Dep. at 23:2 – 23:4. Hay alleges Mousa "refused" to assist her with chart preparation such that special action had to be taken to assign Mousa chart preparation duties for ENT and new patients. *See id.* at 23:2 – 23:6. Hay denied yelling, but said she once apologized to Mousa because "I didn't want to make her feel uncomfortable, so – and I guess with me asking her for help, it was making her feel uncomfortable[.]" *Id.* at 46:14 – 46:17. Mousa likewise agreed Hay called and said, "I am so sorry and I do apologize about what happened…" Mousa Dep. at 211:14 – 211:15.

Mousa and Hay had "big fight" in February of 2013, after which Mousa's relationship with her co-workers soured. *See* Mousa Dep. at 92:13 – 101:12. Yates witnessed a portion of the fight and spoke to both women in her office. *Id.* Mousa made complaints about Hay to Yates, but notably did not report that she believed any of the animosity was grounded in Mousa's religion or national origin. *See id.* at 95:25 – 97:22.

In this lawsuit, Mousa claims co-worker Zeller engaged in "trickery" to saddle her with additional tasks for two weeks in July of 2013. *See* Mousa Dep. at 133:1 – 137:15. Mousa testified she was asked to get charts because a co-worker, Robin Washington, was on vacation when, in fact, Washington was not on vacation. As Mousa tells it, "Kathi [Zeller] came towards me. … And she came, hey, baby, I'd like to ask you a favor. … Robin Washington is going to have her annual vacation and that means too much work relies on Donna [Shaw] on pre-certs, and I said, okay. And she said, I want you to help us during those two weeks where Robin is out gathering carts – ***you and Rachel [Hay]*** – from first to third, and I said, okay." *Id.* at 140:21 – 141:3 (emphasis added). Mousa went on to testify, "that week Robin there at the clinic. Kathi told me she's going to have her vacation. What I found, Robin is in the clinic that week." *Id.* at 143:11 – 143:12.

Mousa testified she confronted Zeller about the "trickery" and said, "Robin [Washington] was here, Donna [Shaw] and Rachel [Hay] were having a lot of free time and you tricked me and told me I have to help; I can't do it by myself." *Id* at 157:15 – 157:18. Mousa testified, Zeller said, "that is your responsibility on the [job description] wall" and told her to "do your job, whatever we ask you to do." *Id.* at 158:6 – 158:7, 221:8. Mousa did not make any contemporaneous allegation that the alleged "trickery" was due to her religion or national origin.

The record reflects that all tasks Mousa was asked to perform were within her job responsibilities. The record also reflects that Mousa did not make any contemporaneous complaints that being asked to perform her job responsibilities in this manner was based on her religion or national origin.

Certainly, there was discontent as between Mousa and her co-workers. On one occasion, Mousa alleges that Zeller shoved a chair in her direction and called her a "bitch." On other occasions, Mousa would report her co-workers to supervisor Yates for eating at their desks and

"having peanut butter, popcorn, drinking one gallon of coffee, three, four times running to Speedway ... but it takes you at least 15 minutes to go over and buy, and imagine you're not the only one waiting your turn to buy coffee." Mousa Dep. at 212:12 – 212:18.

The discontent boils down to (1) whether Mousa was asked to do more than her fair share of work; (2) whether Mousa "routinely neglected or refused to perform certain job duties" as alleged by UK[1]; or (3) whether Mousa was discriminated against because of her religion and/or national origin.

2. Mousa's Request for a Personal Workstation and Computer

Another of Mousa's complaints concerns the fact that Mousa did not have her own personal workstation with dedicated computer and was required to share equipment with her co-workers. Co-worker, Debbie Haggard, testified that Mousa worked at the prepping table. *See* Haggard Dep. at 13:22 – 15:3.

The record reflects that at least two people in the Clinic did not have a dedicated computer, Mousa and her co-worker, Ronita. Moreover, the person who performed Mousa's job prior to Mousa did not have a dedicated computer. *See* Zeller Dep. at 21:18 – 21:19 (testifying "the people that had done the job that [Mousa] came in for had never had [a personal workstation].").

Based on Mousa's appeals for a computer, Yates made a request for an additional computer for the Clinic. The record reflects that a computer was available, but the installation of the port proved to be too costly. In her deposition, Yates testified regarding a December 10, 2012 email from Zeller to Yates which states:

> ***The IT guy came up to try and set up a computer for Amena and Ronita to share***, and there are ***no active ports*** in this room. The two behind Deb and Donna desk are full and the one behind Rachel desk is full.

[1] *See* UK's Mem. at 5 (Jan. 31, 2020). *See also* Zeller Dep. 29:4 – 29:10, 46:18 – 47:19, 61:5 – 61:23 (testifying that Mousa refused to perform standard job duties).

> Amena needs to be able to look up patients in APM, print labels, work the database and Ronita needs to be able to look up numbers for loose filing and really she had the same duties that Amena has. It is extremely hard to do work with no computer and then having to wait for someone else to stop with what they are doing to help you. ☹ Bummer
>
> ***I have one of the computers from downstairs up here so all we need is a port*** ☺
>
> Let me know if it is ok and I will put in the ticket.

See Yates Dep. at 54:17 – 55:20 (emphasis added).[2] Yates testified that she "put in a couple requests for ports" but the requests were denied as "very costly." *Id.* at 56:1 – 56:5. Mousa acknowledged that she "knew that Kathi [Zeller] had been asked by Allyson [Yates] to do an estimate like on how much like it costs." Mousa Dep. at 123:22 – 123:24.

On July 24, 2013, Mousa made a final request for her own workstation. Mousa testified she told Yates that "when I want to check in like patient information, I have to use one of their computers, and they just like don't let me. The only person let me use her computer was Kathi [Zeller], because she was most of the time busy outside her office." *Id.* at 119:7 – 119:12. Later in her deposition, Mousa testified she was able to use Zeller's computer after 3:30, Hay "sometimes" let Mousa use the computer, and she was able to use Shaw's computer during Shaw's lunch break. *Id.* at 128:8 – 129:10, 130:10 – 130:13. At the time, Mousa did not claim her lack of a personal workstation and dedicated computer was based on her religion or national origin.

3. Specific Allegations Regarding Religion or National Origin

Mousa makes three specific complaints regarding behavior she believes was intended to harass her because of her religion or national origin.

[2] Quoting Yates deposition Exhibit 5, email from Zeller to Yates dated December 10, 2010.

A. B.J. Shaw

Mousa alleges B.J. Shaw, a non-employee of UK and the husband of her co-worker, Donna Shaw, engaged in all manner of rude behavior such as scaring Mousa[3]; saying inappropriate things[4]; calling and sending inappropriate text messages[5]; and burping in Mousa's face. When Mousa complained to Yates, action was taken to prohibit family members from coming into the office. Yates testified, "I talked to Donna and said your husband can't be around the clinic." Yates Dep. 71:10 – 71:11.

B. Pork Laden Luncheon

According to Mousa, the office tradition was to have a pizza party to celebrate team member birthdays where an assortment of pizzas would be served. *See* Mousa Dep. at 104:21 – 104:24. On Mousa's birthday, February 6, 2013, she testified her colleagues had a "ham and pork luncheon[.]" *Id.* at 105:13. Mousa testified Haggard said, "Muslims are ridiculous by don't eat pork and they eat beef." *Id.* at 106:16 – 106:17. Although she cannot remember whether this party happened before or after her relationships with her colleagues had soured, Mousa testified, "I don't know why they did this pork luncheon[]" but she believes "they meant it that day to hurt me." *Id.* at 108:12 – 109:13.

Haggard testified that she was aware Mousa did not eat pork for religious reasons. *See* Haggard Dep. at 25:12 – 25:14. Haggard acknowledged they likely ordered a sausage pizza as an option for others, but testified "we got veggie or something" for Mousa. *Id.*

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[3] "[B.J. Shaw] made himself a big monster[.]" Mousa Dep. at 115:4.
[4] "You are as Barack Obama[] … he's a Muslim like you." *Id.* at 114:6 – 114:7.
[5] Such as a text stating, "tell Donna I do love her[.]" *Id.* at 102:1.

C. Mimicking Accent

Finally, Mousa admits she occasionally made personal phone calls from the office and, on two occasions, Zeller "mimicked" her accent when Zeller overheard her talking in her native Arabic. *See* Mousa Dep. at 159:8 – 160:21.

For her part, Zeller contends she "would try and speak like [Mousa], you know, try and say the same words she's saying, not in a mimicking way, absolutely not." Zeller Dep. at 25:4 – 25:7. Mousa did not address this with Zeller and did not report it to Yates. *See* Mousa Dep. 160:21.

Mousa resigned on July 25, 2013, ultimately over her frustration of not having her own personal workspace coupled with her co-workers "not cooperating" with her in sharing their computers. *See* Mousa Dep. at 128:8 – 130:5.

D. Shaw Investigation

Following Mousa's resignation, UK engaged in a separate investigation of co-worker, Donna Shaw, and Shaw's treatment of co-worker, Robin Washington. Mousa points to information gleaned from this investigation as evidence that she was harassed and subjected to unlawful discrimination based on her religion and/or national origin.

Specifically, Mousa alleges Patty Bender said, "Washington overheard Shaw reportedly call someone a 'towel head' / 'sheet-head' when the instant lawsuit was discussed and computers were backed up per the University's litigation protocol." *See* Resp. at 11. Mousa alleges Patty Bender said, "Washington described Shaw as being racist even toward her own grandson and referring to 'sand people', who should 'go back to Afghanistan.'" *Id.* Mousa cites Bender's deposition where Bender said Washington said that Washington "heard Shaw call Mousa 'sheet head' or 'towel head.'"

In her deposition, Bender testified regarding her notes of an investigation. In many instances, she was interpreting her notes of interviews with various people wherein those people reported first, second or third-hand information. Barbara Simon testified that she heard Shaw call Mousa a "sheet head." *See* Simon Dep. at 13:1 – 13:17. Simon testified that she would go on smoke breaks with Shaw and that Shaw would "complain about just about everyone." *Id.* at 21:21 – 21:22. Simon testified that Shaw would "come off as racist" "every once in a while[]" but "not all the time[.]" *Id.* at 24:20 – 24:25.

The ultimate conclusion based on the investigation was that "Shaw has engaged in activity that is harassing and improper in the university workplace[]" because Shaw "was making comments in the workplace that would be considered discriminatory and against the policy of the university[.]" Bender Dep. at 48:11 – 49:7, 53:23 – 54:2.

4. Causes of Action

Mousa filed the action herein on March 19, 2014 asserting causes of action for Count 1: Negligent Hiring, Supervision and Retention; Count 2: Respondeat Superior; Count 3: Intentional Infliction of Emotional Distress; Count 4: Hostile Work Environment and Violation of KRS Chapter 344; Count 5: Constructive Discharge and Violation of KRS Chapter 344; Count 6: Outrageous Conduct; and Count 7: Breach of Implied Contract Through Violation of University of Kentucky Administrative Regulation 6:1.

Opinion

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. The record is viewed in the light most favorable to the party

opposing the motion for summary judgment and all doubts are to be resolved in its favor. *Steelvest, Inc. vs. Scansteel Service Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). "The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch v. American Publ'g Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky. 1999).

"[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and ... the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citation omitted). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment."). The party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc.*, 807 S.W.2d at 480.

1. Sovereign Immunity

"[S]overeign immunity is a common law concept recognized as an inherent attribute of the state. Thus, contrary to assertions sometimes found in our case law, Sections 230 and 231 of our Constitution are not the source of sovereign immunity in Kentucky, but are provisions that permit the General Assembly to waive the Commonwealth's inherent immunity either by direct appropriation of money from the state treasury (Section 230) and/or by specifying where and in

what manner the Commonwealth may be sued (Section 231)." *See Yanero v. Davis*, 65 S.W.3d 510, 524-25 (Ky. 2001) (citations omitted).

Section 231 of the Kentucky Constitution provides that the "General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." This provision permits waiver of sovereign immunity only "'by the most express language or such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Louisville Arena Auth., Inc. v. RAM Eng'g & Const., Inc.*, 415 S.W.3d 671, 680 (Ky. App. 2013) (citation omitted).

"Once it has been determined that an entity is entitled to sovereign immunity, this Court has no right to merely refuse to apply it or abrogate the legal doctrine." *Withers v. Univ. of Kentucky*, 939 S.W.3d 340, 344 (Ky. 1997) (citation omitted).

The Court concludes the General Assembly has not waived sovereign immunity as to the common law claims asserted against the University of Kentucky for Count 1: Negligent Hiring, Supervision and Retention, Count 2: Respondeat Superior, Count 3: Intentional Infliction of Emotional Distress ("IIED"), and Count 6: Outrageous Conduct. Accordingly, UK's Motion for Summary Judgment on these claims is GRANTED. To the extent Mousa has asserted a common law claim for constructive discharge, such claim is also barred by the doctrine of sovereign immunity and is dismissed.

2. Implied Contract

In Count 7, Mousa asserts a claim for Breach of Implied Contract premised on the language in University Regulation 6:1. In Response to UK's Motion for Summary Judgment, she attempts to amend her claim as one for a violation of a written contract.

The General Assembly has waived sovereign immunity for claims based upon a "lawfully authorized written contract" but further mandates such claims must be brought in the Franklin Circuit Court:

> Any person, firm or corporation, having a ***lawfully authorized written contract*** with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. ***Any such action shall be brought in the Franklin Circuit Court*** and shall be tried by the court sitting without a jury. All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth.

KRS 45A.245(1) (emphasis added).

There is no written contract as between Mousa and UK. At most, there is an implied contract formed by the terms of University Regulation 6:1. *See Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 363 (Ky. 2005) (holding, "[o]nce an employer establishes an express personnel policy and the employee continues to work while the policy remains in effect, the ***policy is deemed an implied contract*** for so long as it remains in effect." (emphasis added)).

The Kentucky Supreme Court has distinguished between an implied contract – created by the actions of the parites – and a written contract required for the waiver of sovereign immunity. "By definition, '***[a]n implied contract is one neither oral nor written*** – but rather, implied in fact, based on the parties' actions.'" *See Furtula v. Univ. of Kentucky*, 438 S.W.3d 303, 308 n.6 (Ky. 2014) (quoting *Hammond v. Heritage Commc'ns, Inc.*, 756 S.W.2d 152, 154 (Ky.App.1988)) (emphasis added).

Accordingly, the Court concludes Mousa had, at most, an implied contact with UK which is insufficient to waive sovereign immunity under KRS 45A.245. The Court hereby GRANTS UK's Motion for Summary Judgment as to Count 7 for Breach of Implied Contract.

3. KRS Chapter 344

The purpose of KRS Chapter 344 is to "safeguard all individuals within the state from discrimination because of ... religion [or] national origin..." KRS 344.020(1)(b). The term "discrimination" is defined as "any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons, or the aiding, abetting, inciting, coercing, or compelling thereof made unlawful under this chapter." KRS 344.010(5).

The General Assembly has waived sovereign immunity for statutory claims brought pursuant to KRS Chapter 344. *See Dept. of Corr. v. Furr*, 23 S.W.3d 615, 618 (Ky. 2000) (holding, "by overwhelming implication, KRS 344.450 provides a cause of action against the Commonwealth for violations of the Kentucky Civil Rights Act.").

A. Discrimination

In Count 5, Mousa asserts a claim for "Constructive Discharge and Violation of KRS Chapter 344." Specifically, the Complaint alleges UK's actions "were violative of Chapter 344 and created conditions which were so intolerable that Plaintiff, a reasonable person, was compelled to resign" and that UK "should have foreseen that its actions would compel the Plaintiff to resign." *See* Complaint at ¶¶59 – 60. The Kentucky Supreme Court held that "constructive discharge may constitute an adverse employment action within the meaning of the KCRA" but that "not all adverse employment actions constitute constructive discharge." *Brooks v. Lexington-Fayette Urban Cty. Hous. Auth.*, 132 S.W.3d 790, 807 (Ky. 2004) (citations omitted). Accordingly, the Court evaluates this claim pursuant to the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting analysis set forth by the United States Supreme Court.

It is unlawful for an employer to "fail or refuse to hire, or to discharge any individual, or ***otherwise to discriminate against an individual*** with respect to compensation, ***terms, conditions, or privileges of employment***, because of the individual's … religion [or] national origin…" KRS 344.040(1)(a) (emphasis added).

Similarly, it is unlawful for an employer to "limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect [her] status as an employee, because of the individual's … religion [or] national origin…" KRS 344.040(l)(b).

A claim of discrimination may be established "through direct evidence of an employer's discriminatory animus. or through circumstantial evidence of a discriminatory animus as established by the so-called *McDonnell Douglas* burden-shifting analysis. *See Charalambakis v. Asbury Univ.*, 488 S.W.3d 568, 576 (Ky. 2016) (citation omitted).

i. Direct Evidence

"[D]irect evidence of discrimination does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group. [T]he evidence must establish not only that the plaintiff's employer was predisposed to discriminate on the basis of [national origin], but also that the employer acted on that predisposition." *Id.* (quoting *DiCarlo v. Potter*, 358 F.3d 408, 415 (6th Cir. 2004)). In other words, "[t]he evidence, standing alone, must demonstrate discriminatory motivation" and the evidence "must connect the motivating animus to the adverse action without relying on inferences[.]" *Id.* at 577 (citations omitted).

In *Charalambakis,* the Court concluded that disparaging references to the claimant's Greek accent and alleged "nativist bias" relating to disciplinary dispensations did not qualify as direct evidence of national origin discrimination. *Id.* at 580.

In the case at bar, the Court concludes Mousa has no direct evidence that her supervisor, Yates, had a discriminatory animus. Nor does she have direct evidence that Zeller, the purported *de facto* supervisor, had a discriminatory animus. As to ***all*** of her co-workers, Mousa testified "there was ***no direct words*** [of discrimination], like what they did to me with no reason, you know, ***I just like translated to myself as a discrimination*** based on my race." Mousa Dep. at 241:14 – 241:17 (emphasis added).

ii. Circumstantial Evidence

Because her claim of discrimination is based upon circumstantial evidence, Mousa must establish a prima facia case of the following:

(1) she was a member of a protected group;
(2) she was subjected to an adverse employment action;
(3) she was qualified for the position; and
(4) similarly situated co-workers were treated more favorably.

The Bd. of Regents of N. Kentucky Univ. v. Weickgenannt, 485 S.W.3d 299, 306 (Ky. 2016) (citations omitted). If Mousa makes that prima facia showing, the burden shifts to UK to offer a "legitimate, nondiscriminatory reason" for the adverse employment action. *Id.* (citation omitted). Then the burden shifts back to Mousa to establish by a preponderance of the evidence that the stated reason for the adverse employment action was "'in fact pretext' for discrimination." *Id.* (citation omitted).

In order to establish that a proffered reason is pretext, three methods have been recognized: "(1) the proffered reasons are false; (2) the proffered reasons did not actually motivate the decision;

and (3) the plaintiff could show that the reasons given were insufficient to motivate the decision." *Charalambakis*, 488 S.W.3d at 578 (citation omitted).

The parties agree Mousa is a member of a protected group.

As to the next element, "'[a]n adverse employment action ... is a materially adverse change in the terms or conditions of employment because of the employer's actions.'" *Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 625 (6th Cir. 2013) (quoting *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 593 (6th Cir. 2007)). It can include "'a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" *Id.* (quoting *Michael*, 496 F.3d at 593).

Mousa points to three adverse employment actions: (a) disparate treatment regarding the ability to have her own personal computer and workspace; (b) the "trickery" regarding delegation of work assignments; and (c) the pork laden birthday luncheon.

a. Disparate Treatment Regarding Personal Computer and Workstation

Disparate treatment regarding the ability to have her own personal computer and workstation falls within the definition of an adverse employment action. In order to establish a prima facia case, Mousa must also establish that similarly situated co-workers were treated more favorably. *See Weickgenannt*, 485 S.W.3d at 307-08. In affirming summary judgment for defendant in a gender discrimination claim, the Kentucky Supreme Court held that "the *McDonnell Douglas* test means what is says" and requires a plaintiff "to show similarly situated male comparators" were treated differently:

> ***To establish a prima facie claim***, a plaintiff bears the burden of not only establishing that a male candidate received tenure but also that candidate was reviewed under the same circumstances and with similar qualifications. To state a

> claim, ***one must at least raise the inference that employment decisions were made on a discriminatory basis. And drawing that inference mandates more proof than anecdote***. So we must accordingly outline the proper judicial criteria for seeking an adequate similarly situated male comparator seeking promotion and tenure from NKU.
>
> In identifying suitable comparators, we must select individuals who are 'similarly situated in all relevant aspects.' Indeed, Weickgenannt must present evidence that 'all relevant aspects of [her] employment situation are nearly identical to those of the employees who [s]he alleges were treated more favorably.' To us, the appropriate standard in our search for comparators should be bifurcated: a comparator must be both of similar qualification to Weickgenannt and must have been subject to the same reviewers and application process at or about the same time.

Id. at 308 (internal citations omitted, emphasis added).

Here, Mousa cannot establish that similarly situated co-workers were treated more favorably. Indeed, the record reflects at least two workers lacked a personal computer and workspace – Mousa and Ronita. The record further reflects the person who performed Mousa's job, before Mousa was hired, did not have a personal computer or workspace. Zeller testified that while she would have preferred each employee to have his or her own workstation, "the people that had done the job that [Mousa] came in for had never had that. We just worked through it." Zeller Dep. at 21:18 – 21:20.

Even if Mousa could establish a prima facia case, the Court concludes UK has set forth a legitimate, nondiscriminatory reason for not providing Mousa with a personal computer and workstation. Both Zeller and Yates attempted to obtain personal equipment for Mousa and Ronita, but the request was denied as too costly.

Accordingly, the burden shifts back to Mousa to establish the stated reason for the adverse employment action was "in fact pretext for discrimination." Mousa cannot meet this burden. Both Yates and Zeller advocated for Mousa on this issue. There is simply no evidence of record that

Yates, Zeller, or the decision maker in the I.T. department who deemed it "too costly" to install a port, were motivated by Mousa's religion or national origin.

b. Workplace Trickery

"To be [a] materially adverse [employment action], a change must be of the magnitude of a termination of employment, a demotion, a decrease in salary, a material loss of benefits; it must be more than a mere inconvenience. Employment actions that are *de minimis* are not materially adverse, and are not actionable under Title VII." *Wills v. Pennyrile Rural Elec. Co-op. Corp.*, 259 F. App'x 780, 783 (6th Cir. 2008) (internal citations omitted).

In *Pennyrile*, the Sixth Circuit Court of Appeals determined that refusing to permit an African American employee to leave work ten minutes early one day per month to accommodate a board meeting (when it allegedly permitted a white employee to do so) did not constitute an adverse employment action. *Id.* The Court held that "requiring an employee to work the regular hours of her job" was not an adverse employment action. *Id.* at 784.

In the case at bar, the Court concludes the proffered adverse employment action of "trickery" regarding delegation of work assignments is not an adverse employment action. The record reflects that every task Mousa was asked to undertake was within her prescribed duties. The Court concludes that requests to perform one's job duties is not a materially adverse change in the terms or conditions of employment.

Moreover, Mousa's own testimony establishes that both Mousa ***and Hay*** were asked to fill in for Shaw while Washington was on vacation. *See* Mousa Dep. at 140:25 – 141:6. Accordingly, Mousa cannot establish that similarly situated co-workers were treated more favorably.

c. Pork Laden Luncheon

Assuming the facts in the light most favorable to Mousa, the Court concludes that co-workers planning a birthday luncheon which includes only pork products is not an "adverse employment action" as a matter of law, though it may be considered in the context of hostile work environment. Such a birthday party meal cannot reasonably be considered a "materially adverse change in the terms or conditions of employment."

For the reasons set out herein, the Court GRANTS UK's Motion for Summary Judgment on Count 5 for Constructive Discharge and Violation of KRS 344.

B. Hostile Work Environment

In Count 4, Mousa asserts a claim for "Hostile Work Environment and Violation of KRS Chapter 344." Specifically, the Complaint alleges that Defendants "committed acts of discrimination intending to create and, in fact, did create hostile and unreasonable working conditions, thus violating KRS 344.040. *See* Complaint at ¶57.

"Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).

The case law teaches that behavior "must be sufficiently severe or pervasive so as to alter the conditions of the plaintiff's employment and create an abusive working environment" and further that the behavior must meet a standard of being sufficiently continuous and concerted:

> ***[H]ostile environment discrimination exists 'when the workplace is permeated with discriminatory intimidation, ridicule, and insult*** that is ***sufficiently severe or pervasive*** to ***alter the conditions of the victim's employment*** and create an abusive working environment.' Moreover, the 'incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.' ... [The] ***harassment must also be both objectively and subjectively offensive as determined by 'looking at all the circumstances.'*** These circumstances may include 'the frequency of the discriminatory conduct; its severity; whether it is

> physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'

Ammerman v. Bd. of Educ., of Nicholas Cty., 30 S.W.3d 793, 798 (Ky. 2000) (internal citations omitted, emphasis added).

The United States Supreme Court held, "[i]n determining whether an actionable hostile work environment claim exists, we look to 'all the circumstances,' including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Morgan*, 536 U.S. at 116 (citation omitted).

Finally, the claimant must establish liability on the part of the employer. "[V]icarious liability of the employer is premised not on the employer's negligence but on the fact that the agent was aided in accomplishing the sexual harassment by the existence of the agency relationship." *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 287 (Ky. App. 2009) (citation omitted). The Court of Appeals further held:

> 'An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment ***created by a supervisor with immediate (or successively higher) authority over the employee***,' subject to an affirmative defense that '(a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.'

Id. (internal citations omitted, emphasis added). Federal courts have held "[t]he plaintiff must [] prove that his employer tolerated or condoned the situation, or knew or should have known of the alleged conduct and did nothing to correct the situation." *Wilson v. Dana Corp.*, 210 F.Supp.2d 867 (W.D.Ky. 2002) (citations and quotation marks omitted).

In this case, Mousa claims a hostile work environment based on the following: (1) Zeller mimicked Mousa's accent on two occasions; (2) B.J. Shaw made rude comments to and about

Mousa; (3) Donna Shaw called Mousa a "towel head"; (4) Mousa's co-workers used "trickery" to require her to perform more job duties than her colleagues; and (5) Mousa's co-workers held a pork laden luncheon for her birthday. The Court will consider the allegations individually and as a whole.

The Court concludes the allegations that Zeller "mimicked" Mousa's accent on two occasions, if accepted as true, constitute inappropriate or impolite actions, but do not rise to the level of subjecting Zeller's employer to a statutory claim for hostile work environment. *See Ammerman*, 30 S.W.3d at 800 (holding, "a single off-color comment ... legally insufficient to constitute actionable sexual harassment."); *Charalambakis*, 488 S.W.3d at 579 (finding three "inappropriate and impolite" statements regarding the claimant's Greek accent[6], while "insulting to some and embarrassing to others ... seem to fit comfortably within the category of 'simple teasing, offhand comments, and isolated incidents[.]'").

The Court concludes as a matter of law that the alleged actions of B.J. Shaw cannot subject UK to statutory tort liability. Mr. Shaw was not employed by UK. Moreover, when Mousa complained about his behavior to her supervisor, Yates, Mr. Shaw was barred from entering the Clinic. Assuming these facts as true, there is no legal basis on which to impose liability on UK for B.J. Shaw's action.

As to Donna Shaw, Mousa has evidence that after Mousa resigned, an investigation into an unrelated matter revealed that Shaw made discriminatory statements about Mousa and called her a "towel head." Shaw was Mousa's co-worker and did not hold a supervisory position. Shaw had no role in assigning work to Mousa. None of Shaw's statements were spoken to or heard by

[6] Specifically, "1) when asked whether his students could understand him; 2) when, in response to Appellant's desire to be appointed as chair of the economics department Kulaga responded 'but John, you have an accent;' and 3) when Kulaga, in discussing a literary work, referred to Appellant's "funny" accent." *Id.* at 578.

Mousa. There is no evidence Mousa's supervisor was made aware of Shaw's beliefs prior to the investigation. Other than the pork laden luncheon, discussed below, Mousa does not allege that Shaw engaged in discriminatory behavior directed to Mousa.

As to the workplace "trickery" allegedly designed to have Mousa perform more work than her colleagues, the record indicates Mousa was only asked to perform duties that fell within her job description. Mousa made no contemporaneous complaints that the delegation of duties was based on her religion or national origin. Mousa has not come forward with evidence that any of these actions, allegedly perpetrated by Zeller, were based upon her religion or national origin.

The Court accepts as true Mousa's allegation that her co-workers threw a birthday party at which all the food contained pork. The allegations regarding the work place luncheon leave much unsaid. Mousa simply alleges that unidentified "office staff, knowing Mousa's religion abstention from pork, presented her with a meal of pork-laden foods." Resp. at 4. Mousa alleges "the luncheon was purposeful and meant to hurt her based on the staff's turning on her after the altercation with Hay." *Id.* at 5.

Mousa does not identify the "office staff" behind the luncheon. It is not known if the luncheon was the effort of a single individual or collective of people. Mousa has no evidence regarding the identity of this person or persons. If food was ordered, the record is devoid of the identity of the person who determined the menu. If food was brought in by co-workers, the record is devoid of the identity of the persons who brought pork products and how the effort to serve only "pork-laden foods" was coordinated. If this was a coordinated effort, a jury would have to believe that all the participants engaged in an organized effort to serve only pork laden foods in order to humiliate Mousa based on her religion or national origin. Mousa has no evidence to indicate such a coordinated effort.

At most, Mousa has evidence that a separate investigation conducted after her resignation revealed that co-worker, Donna Shaw, made discriminatory comments. But Mousa cannot link Shaw to the coordination of the luncheon. Simply because Shaw may have harbored discriminatory attitudes, discovered by UK after Mousa resigned, does not mean the actions of other individuals were motivated by Mousa's religion or national origin.

In a similar case, the Western District of Kentucky considered a hostile work environment claim in which white co-workers were alleged to have used the n-word on multiple occasions. *See Wilson*, 210 F. Supp.2d at 879. While the statements of the co-workers were vile and facially racist, the Court held "[t]wo or three racist comments over the course of almost three years, none of which were directed at [the plaintiff], does not come close to constituting severe or pervasive harassment, even if [the plaintiff] regarded it as abusive." *Id.*

Wilson involved the claims of multiple plaintiffs. A female African-American complained of the company's use of an "Aunt Jemima" poster, seeing a white co-worker pull another white co-worker with a rope, a comment that a hook on a machine could be used to "hang" a co-worker, and three remarks including the use of phrase "n-word berry," a comment that "that's the reason you are as black as you are," and a reference to "Buckwheat." *Id.* at 879-80. The Court noted "each incident was an isolated event, was subject to a benign interpretation, and the remarks were neither directed as her or threatening." *Id.* at 879. The Court held the plaintiff "ha[d] not proven that her work environment was objectively and subjectively abusive" or that the company "tolerated or condoned the harassment." *Id.* at 879-80. In summary, the Court noted the following:

> There is no question that many of the Plaintiffs were subject to repugnant conduct—some Plaintiffs more so than others—but no reasonable jury could determine that Plaintiffs individually or collectively suffered harassment that was severe, pervasive, and extreme. Viewing this case alongside recent Sixth Circuit precedent, one finds several consistent comparisons: 1) the objectionable remarks were isolated and random rather than commonplace; 2) the remarks tended to be

> conversational slurs not directed at the claimant, and much less hostile than the direct, intimidating and vicious slurs present in other cases; 3) the remarks or slurs were not made by Dana's management; 4) the persons involved in the allegedly disparate treatment are not shown to have uttered racial slurs or threats; and 5) Dana's management did not ignore complaints, but generally responded in some fashion.

Id. at 882 (internal footnote omitted).

As to the case at bar, none of the events set out above, independently or in combination, constitute discriminatory intimidation, ridicule, or insult that is sufficiently severe or pervasive such that a jury could find it to be both objectively and subjectively offensive. Assuming the facts in the light most favorable to Mousa, Zeller mimicked Mousa on two occasions, an unknown person or persons coordinated a pork luncheon to humiliate Mousa, and Shaw made racist comments to third parties which were discovered after Mousa resigned. Mousa admitted that (1) her supervisor, Yates, did not treat her differently because of her race; (2) Mousa did not report to Yates her belief that any behavior of her co-workers was motivated by religion or national origin; and (3) Yates took action to correct, or attempt to correct, the issues Mousa brought to her attention. Accordingly, there is no basis on which a reasonable jury could find these events constituted a hostile work environment or that UK is responsible for the actions of its employees. Accordingly, the Court GRANTS summary judgment in favor of UK.

4. Individual Claims Against Yates and Zeller

Mousa concedes that Defendants are entitled to summary judgment on the claims asserted against Yates and Zeller for negligent hiring, retention and supervision. She further concedes the statutory claims against Yates and Zeller are foreclosed by the terms of KRS Chapter 344. *See Conner v. Patton*, 133 S.W.3d 491, 493 (Ky. App. 2004) (holding, "individual agents or supervisors who do not otherwise qualify as employers cannot be held personally liable in their individual capacities under KRS Chapter 344." (citations omitted)).

The question before the Court is whether Mousa may pursue claims against Yates and Zeller, individually, for Intentional Infliction of Emotional Distress/Outrage. The Kentucky Supreme Court held a person asserting a claim for IIED/Outrage must establish the following:

1) the wrongdoer's conduct must be intentional or reckless;
2) the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and
4) the emotional distress must be severe.

Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 788 (Ky. 2004) (citations omitted), *overruled on other grounds by Toler v. Süd-Chemie, Inc.*, 458 S.W.3d 276 (Ky. 2014).

The appellate courts have set a high bar for recovery. "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 789.

"Citizens in our society are expected to withstand petty insults, unkind words and minor indignities. Such irritations are a part of normal, everyday life and constitute no legal cause of action. It is only outrageous and intolerable conduct which is covered by this tort." *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 65 (Ky. 1996).

"'It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery[.]'" *Stringer,* 151 S.W.3d at 788-89 (citations omitted). Examples of conduct found to have met the necessary threshold include:

- failing to warn a person for a period of five months that a building in which the person was working contained asbestos;
- using position of Catholic priest providing marriage counseling to have a sexual affair with wife;

- agreeing to care for long-time companion animal and then selling the animal for slaughter; and
- subjecting a person to nearly daily racial indignities for approximately seven years.

Id. at 789-90 (citations omitted). Examples of conduct found to fall *below* the threshold include:

- allowing a vehicle to leave the road and strike a child;
- wrongfully terminating a person from a job;
- displaying a lack of compassion, patience, and taste by ordering a mother who had just delivered a stillborn child to "shut up" and then informing her that the stillborn child would be "disposed of" in the hospital; and
- erecting a billboard referencing a person's status as a convicted child molester.

Id. at 790-91 (citations omitted).

A. Yates

As to the claim against Yates, Mousa testified, "I have no issues – like direct issues – with Allyson [Yates.]" Mousa Dep. at 252:19 – 252:22. Mousa thought Yates' meetings were "excellent" and "really loved when [Yates] was honest to me..." *Id.* at 253:1 – 253:11.

Mousa complained that Yates did not always have time to see her right away, particularly when Yates had just returned from vacation. *Id.* at 255:16 – 256:10. Mousa admitted that Yates was not motivated by Mousa's protected class:

> Q: And you don't think that Allyson [Yates] treated you any differently because of your race –
>
> A. No.

Id. at 254:7 – 254:9.

Mousa generally alleges Yates was "unavailable" after returning from vacation and Yates told her direct reports to "go and do your job." These allegations do not meet the high evidentiary bar necessary to pursue a claim for IIED/Outrage. Accordingly, the Court GRANTS the Motion for Summary Judgment as to all claims asserted against Yates.

B. Zeller

Mousa alleges Zeller (1) asked Mousa to deliver the fee sheet; (2) asked Mousa to assist Shaw with work duties while Washington was on vacation; (3) was present for a pork laden luncheon; and (4) mimicked Mousa's accent on two occasions.

The Court concludes asking Mousa to perform duties within her range of job responsibilities, even if Washington was not on vacation, is not "atrocious" or "utterly intolerable" such that Mousa can pursue a cause of action against Zeller.

Further, two instances of mimicking are not so extreme and outrageous as to rise to the level of an actionable tort.

Finally, to the extent Zeller participated in a pork laden luncheon for Mousa's birthday, the Court concludes such behavior constitutes an unkind action or minor indignity. While mean and hurtful, such behavior is not so outrageous and intolerable so as to subject Zeller to tort liability.

Accordingly, the Court GRANTS the Motion for Summary Judgment as to all claims asserted against Zeller.

Order

For the reasons set out herein, Defendants' Motion for Summary Judgment is GRANTED.

Dated this 21 day of April, 2020.

Hon. Lucy A. VanMeter /S/ LUCY A. VANMETER
Judge, Fayette Circuit Court

A TRUE COPY
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FAYETTE CIRCUIT COURT
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Attest copies this 24th day of April, 2020.
Hon. Marcus A. Roland
Hon. Bryan H. Beauman
Hon. Jessica R. Stigall
Hon. William E. Thro
VINCENT RIGGS, C.F.C.C.
By _____ D.C.