UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

JOSEPH CARROLL	§	
Plaintiff	§	
	§	Civil Action No.: 1:15-CV-1057-SS
v.	§	JURY DEMANDED
	§	
LEIF BJORKHEIM AND	§	
BJORKHEIM'S DIAMONDS	§	
Defendant	§	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND AUTHORITIES IN SUPPORT

TO THE HONORABLE UNITED STATES JUDGE:

COME NOW DEFENDANTS LEIF BJORKHEIM and BJORKHEIM'S DIAMONDS (hereinafter referred to as "Defendants"), and file this Motion for Summary Judgment under Fed. R. Civ. P. 56 seeking dismissal of Plaintiff's claims because he can present no genuine issues of material fact.

I. SUMMARY OF PLAINTIFF'S CLAIMS AND DEFENDANTS' ARGUMENTS

On March 27, 2015, Plaintiff, Joseph Carroll, was in Bjorkheims Diamonds, a high-end jewelry store, with his friend Lerrick Martin, when the owner of the store, Leif Bjorkheim, told them both to leave. Mr. Bjorkheim's sales associate, Ana Diaz, had already alerted Mr. Bjorkheim to suspicious behavior by Carroll during a brief initial visit

to the store by Carroll. When Carroll returned to the store shortly thereafter with Mr. Martin, Mr. Bjorkheim noted that Mr. Martin had something bundled and hidden inside of a newspaper in his hand. Fearing for the safety of himself and his employee, Mr. Bjorkheim told them both to leave, while holding his shotgun, barrel pointed sideways and down by his hips.

Nine months later, Plaintiff filed suit against Mr. Bjorkheim and Bjorkheims Diamonds, alleging he was denied the opportunity to "enforce a contract" because he is African-American, in violation of 42 U.S.C. §1981. Plaintiff also claims Mr. Bjorkheim assaulted Plaintiff by "threatening him with a shotgun." Plaintiff further brings a negligence per se claim based on the Austin Human Rights Ordinance, claiming that Mr. Bjorkheim made a "racist decision" to refuse service to him. For the reasons discussed in this motion, Plaintiff's claims are without merit and Defendants move for summary judgment.

With respect to Plaintiff's retail discrimination claims (both under §1981 and the Austin Human Rights Ordinance), summary judgment is warranted because, based on the deposition testimony submitted, no reasonable jury could conclude: (1) Defendants intended to discriminate against Plaintiff because of his race; or (2) that Plaintiff lost an actual and tangible contract interest in purchasing jewelry because of his race. Additionally, summary judgment is proper with respect to Plaintiff's assault claim because, rather than putting forth evidence to support such a claim, Plaintiff admits that Defendant Leif Bjorkheim never pointed any weapon at him or made any threat against him. Further, the Court should deny supplemental jurisdiction under the state law claims.

II.
EXHIBITS

Defendants rely on the following exhibits in support of this motion:

1. Excerpts from the deposition of Plaintiff Joseph Carroll, attached hereto as Exhibit A.
2. Excerpts from the deposition of Lerrick Martin, attached hereto as Exhibit B.
3. The Declaration of Leif Bjorkheim, attached hereto as Exhibit C.
4. The Declaration of Ana Diaz, attached hereto as Exhibit D.

III.
FACTUAL BACKGROUND

In March of 2015, Mr. Carroll was a thirty one year old man who rented a room in Austin and earned $11.20 per hour working at the ARCH, a homeless resource center in downtown Austin. See Exhibit A, Deposition of Joseph Carroll, page 7, lines 21-25; page 11, lines 2-9; page 4, lines 13-25. Around March of 2015, Carroll was making $1,400 to $1,600 per month. *Id.*, page 96, lines 9-21. His monthly bills (minus groceries, food, clothes, gas and other expenses) consisted of $400 for rent, $350 for his car payment, and $30 for a pre-paid cell phone. *Id.*, page 74, line 17 to page 76, line 19. Carroll had two credit cards, which both had minimal limits of $500. *Id.*, page 75-76; page 87, line 8 to page 88, line 3. He had no savings account. *Id.*, page 88, line 10-12.

Bjorkheims Diamonds is owned by Leif Bjorkheim, and has been in business in Austin since 1986. See Exhibit C, Declaration of Leif Bjorkheim. The store specializes in high end diamond jewelry, including designer & custom precious-stone jewelry. The

store also performs jewelry and watch repair. The average price of jewelry at the store is $3,000 to $5,000.

On Friday of March 27, 2015, Mr. Carroll drove his friend Lerrick Martin to Einstein's Bagels, located next door to Bjorkheims Diamonds, for Martin's new job orientation. *Id.*, page 18, lines 13 to 17; page 19, lines 4-9. That was all Carroll and Martin had planned for the day. *Id.* Carroll had no plans to go to Bjorkheims Diamonds, and did not even know it was located there. *Id.*, page 20, line 21 to page 21, line 1. While he waited for Martin to complete his orientation, Carroll was interested in looking for a necklace.[1] *Id.*, page 21, lines 2 to 15. He did not have any specific necklace in mind. *Id.* He had not already picked out any particular item or brand or type of necklace that he wanted. *Id.*, page 21, lines 16 to 24. He had not purchased diamond jewelry in the last couple of years, and did not know when he had made any past major jewelry purchase. *Id.*, page 21, line 25 to page 22, line 7.

While Martin was at his orientation, Carroll walked into Bjorkheims Diamonds. When he was greeted by the sales associate and asked if he needed help, he responded only that he was fine. *Id.*, page 22, line 22 to page 23, line 3. As he walked through the store he was "browsing the cases." *Id.*, page 23, lines 18-21. He saw nothing that caught his eye. *Id.* He never asked to see a piece of jewelry or asked for the price of any piece of jewelry. *Id.*, page 25, lines 17-22. He was in the store for "only a few moments." *Id.*, page 29, lines 10-12.

[1] It should be noted that Plaintiff's Complaint states that he was interested in buying a set of earrings, not a necklace. See Complaint, Dkt. #6.

After Mr. Carroll left, Mr. Bjorkheim was alerted by his sales associate to what she felt was unusual behavior of Carroll. See Exhibit C, Declaration of Leif Bjorkheim. According to Ana Diaz, the sales associate, Mr. Carroll had walked in and bluntly said, "I don't want to see anything, I don't want to buy anything," and made one lap around the store, and then left. See Exhibit D, Declaration of Ana Diaz. Ana Diaz felt this was unusual, and it put her on guard, so she watched Mr. Carroll through the windows of the store and saw that he had walked to his car and retrieved something from his car. *Id.* At this point, she told Leif Bjorkheim that she thought something unusual was going on. *Id.* She saw Mr. Carroll walking back toward the store, and told Mr. Bjorkheim that he was coming back. *Id.* At this point, given the concerns of his sales associate, Mr. Bjorkheim retrieved his shotgun from the safe and stood in the back corner of his store. See Exhibit C, Declaration of Leif Bjorkheim.

After Martin's orientation was done, Carroll went back into Bjorkheims Diamonds with Martin. Martin was holding three bagged bagels, all wrapped up in a newspaper in his hand. See Exhibit B, Deposition of Lerrick Martin, page 20, lines 6-17; page 25, lines 3-24. In that second visit, Carroll did not talk to anyone in the store. See Exhibit A, page 32, lines 1-10. Carroll could not recall what kind of jewelry was in the area where he was "shopping" in that second visit. *Id.*, page 32, lines 11-19. In that second visit, Carroll never asked the sales associate if he could see any piece of jewelry and Carroll never pointed to any piece of jewelry he wanted to see. *Id.*, page 37, lines 13-25. He did not ask about any specific jewelry piece or point to any specific items. *Id.*, page 38, lines 6-

11. He never said he wanted to buy anything, and he never noted the price of any item in the store. *Id.*, page 38, lines 12-17. In fact, Carroll was turned around, looking out the front windows and "daydreaming," while Martin spoke with the sales associate. *Id.*, page 33, lines 7-15; page 36, line 25 to page 37, line 12.

Mr. Martin testified that he and Carroll had not previously planned on going into Bjorkheims Diamonds, and did not discuss doing so until right before they walked in to the store. See Exhibit B, Deposition of Lerrick Martin, page 20, line 18 to page 21, line 16. Though Mr. Martin claimed that he was interested in "pricing" some diamond earrings for his two children, ages three and seven, Mr. Martin did not ask to see anything. *Id.*, page 23, line 5 to page 24, line 20; page 30, lines 19-20. Martin never asked the sales associate to take any piece out of the case. *Id.*, page 32, lines 5-7. Martin did not ask about price of items in the store. *Id.*, page 32, lines 8-9. According to Martin, Carroll was just glaring out the door window, like he was ready to go. *Id.*, page 32, lines 19-23, page 33, lines 2-9.

When Carroll and Martin entered the store, Bjorkheim noted that Martin was holding something in his hand, hidden under newspaper. See Exhibit C, Declaration of Leif Bjorkheim. Bjorkheim asked him what he was holding, and Martin did not answer him. *Id.* At that point, Bjorkheim told them both to leave, while holding his shotgun down near his hips, pointed to the side. *Id.* When they did not leave, he told them again to leave, and took steps toward them. *Id.* They left. *Id.* Carroll drove his car to the front of the store and stopped in front of the store and came into the store one more time,

saying either "You'll regret this" (See Exhibit C, Declaration of Leif Bjorkheim) or "I didn't appreciate what happened," (See Exhibit A, Deposition of Joseph Carroll, page 44, lines 1 to 7.)

Both Martin and Carroll testified that Mr. Bjorkheim never moved his shotgun from the resting position in which he was holding it, and never pointed it at them. See Exhibit A, page 103, lines 17 - 24; Exhibit B, page 42, lines 3 - 5. They both testified that he never made any verbal threat to hurt or kill them. See Exhibit A, page 43, lines 17 - 25; Exhibit B, page 40, lines 10 - 15. According to Martin and Carroll, Mr. Bjorkheim used a racist term ("niggers") when he told them to leave. Mr. Bjorkheim did not use this term. See Exhibit C, Declaration of Leif Bjorkheim. Mr. Bjorkheim asked them to leave because, based on the actions of Carroll and Martin to that point, he reasonably feared that they planned to rob his store and he feared for the safety of himself and his employee. *Id.* He was concerned when his employee noted Carroll's unusual behavior, and became even more concerned when Carroll came back in with a second person who was holding something hidden in newspapers in his hand, who would not answer his question about what he was holding. *Id.* Mr. Bjorkheim did not ask them to leave because of their race. *Id.*

IV.
ARGUMENTS AND AUTHORITIES

A. Summary Judgment Standard

Summary judgment is proper when the pleadings and record taken as a whole demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A fact is "material" when it affects the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248. A dispute regarding a material fact is "genuine" only if the evidence produced is sufficient enough for a reasonable jury to return a verdict in favor of the non-movant. *See Anderson*, 477 U.S. at 248; *Jenkins v. Methodist Hosps. of Dallas, Inc.*, 478 F.3d 255, 260 (5th Cir.), cert. denied, 128 S.Ct. 181, 169 L.Ed.2d 35 (2007). Thus, an issue is not "genuine" if it is merely "formal, pretended, or a sham." *Bazan v. Hidalgo County*, 246 F.3d 481, 492 (5th Cir. 2001) (citation omitted).

When a defendant moves for summary judgment on the plaintiff's cause of action, the defendant need not support its motion with affidavits or other evidence negating the nonmovant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The defendant meets its summary judgment burden by pointing to the absence of evidence supporting the non-movant's case. *Celotex*, 477 U.S. at 325. Once the moving party satisfies its summary judgment burden, the non-movant may not rely on naked assertions of dispute, but must adduce admissible evidence creating a genuine fact issue on each essential element of his claim. *See Anderson*, 477 U.S. at 255-56; *Celotex*, 477 U.S. at 322-23. The

non-movant must do more than simply show that there is some metaphysical doubt concerning the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). The non-movant must set forth specific facts sufficient to raise a genuine issue for trial, not mere denials, vague allegations or legal conclusions. *Celotex*, 477 U.S. 322-23; *Delta Computer Corp. v. Frank*, 196 F.3d 589, 590 (5th Cir. 1999). To overcome summary judgment, the non-movant must "identify specific evidence in the record and articulate the 'precise manner' in which that evidence support[s] [its] claim[s]." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994).

B. *McDonnell Douglas* Framework

Like the Sixth, Seventh and Ninth Circuits, the Fifth Circuit has recognized that the three-part burden-shifting *McDonnell Douglas* test applies to non-employment discrimination claims under § 1981. *Zastrow v. Houston Auto Imports Greenway Ltd.*, 789 F.3d 553, 564 (5th Cir. 2015) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). *See also Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138 (9th Cir. 2005); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir.2001); *Bratton v. Roadway Package Sys., Inc.*, 77 F.3d 168, 176 (7th Cir.1996).

To establish a prima facie case of discrimination under § 1981, a plaintiff must show that: (1) he engaged in activity protected by § 1981; (2) he was subjected to an adverse action; and (3) a causal link exists between the protected activity and the adverse action. *Zastrow*, 789 F.3d at 564. As more succinctly put by the Ninth Circuit with regard to a retail discrimination case like this one, the adapted *McDonnell Douglas* test requires a plaintiff to show that: (1) he is a member of a protected class, (2) he attempted

to contract for certain services, and (3) he was denied the right to contract for those services. *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d at 1145. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to proffer a legitimate, non-discriminatory reason for the action. *Zastrow*, 789 F.3d at 564. If the defendant provides such an explanation, the burden returns to the plaintiff to show that the proffered reason was pretext for retaliation. *Id.*

C. Carroll's Retail Discrimination Claim

To establish a prima facie retail discrimination claim pursuant to 42 U.S.C. § 1981, Carroll must establish: (1) he is a member of a protected class (i.e., race, such as African American); (2) that Defendants intended to discriminate against Carroll because of his race; and (3) the discrimination concerned the making and enforcing of a contract. *See Morris v. Dillard Department Stores*, 277 F.3d 743, 751 (5th Cir. 2001). In addition to the foregoing elements, a patron must also prove, logically, that he had the ability to pay for the merchandise. *See Williams v. Staples, Inc.*, 372 F.3d 662, 667 (4th Cir. 2004) (customer must satisfy the retailer's ordinary requirements to pay for and to receive goods or services ordinarily provided by the retailer to other similarly situated customers).

With respect to the third prong, Carroll must establish the loss of an *actual* contract interest. *Morris v. Dillard Department Stores*, 277 F.3d 743, 751 (5th Cir. 2001). Speculative or prospective contract rights are insufficient. *Id.* An allegation of the possibility that a retail merchant would interfere with a customer's right to contract in the future is insufficient to support recovery under § 1981. *Id.* at 752. The plaintiff "must

offer evidence of some tangible attempt to contract" that in some way was "thwarted" by the defendant. *Arguello v. Conoco, Inc.*, 330 F.3d 355, 358–59 (5th Cir. 2003). Fifth Circuit courts have repeatedly refused to consider a broader interpretation of the § 1981 right to "make and enforce contracts." 42 U.S.C. § 1981(b), which was enacted as part of the Civil Rights Act of 1991, extends the reach of § 1981 by defining the term "make and enforce contracts" to include "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). However, the legislative history of the 1991 amendment makes it clear that Congress did not intend to convert section 1981 into a general prohibition against race discrimination. *See* H.R. Rep. No. 40(II), at 37 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 731 ("The Committee intends this provision to bar all racial discrimination in contracts."); *Garrett v. Tandy Corp.*, 295 F.3d 94, 100 (1st Cir. 2002); *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1118 (10th Cir. 2001)("We are aligned with all the courts that have addressed the issue that there must have been interference with a contract beyond the mere expectation of being treated without discrimination while shopping"). The Fifth Circuit agrees, stating that "section 1981 does not provide a general cause of action for race discrimination. Rather, it prohibits intentional race discrimination with respect to certain enumerated activities." *Arguello v. Conoco, Inc.*, 330 F.3d 355, 358 (5th Cir. 2003). Even if conduct is egregious, or an incident is disconcerting and humiliating, it does not support a section 1981 claim if the conduct did not prevent the formation of a contract or alter the substantive terms on which a contract was made. *Id.* at 361. Accordingly, without

evidence of a tangible attempt to contract, such as an actual attempt to purchase a good, there is no section 1981 claim. *Id.* at 358-59. Merely browsing merchandise is insufficient. *Williams v. Dillard's Department Stores, Inc.*, 211 Fed. Appx. 327, 329 (5th Cir. 2006).

In this case, Carroll satisfies the first prong; he is African-American. Carroll cannot, however, satisfy the remaining elements referenced above, and thus cannot make a *prima facie* case of retail discrimination. Simply stated, Carroll cannot show that Defendants intended to discriminate against him because of his race, or that he was denied an actual opportunity to buy specific jewelry because he is African American.

As pointed out above, Leif Bjorkheim had a reasonable fear that his store might be robbed based on the unusual activities of Carroll and Martin on the day in question. In a society in which shoplifting and vandalism are rife, merchants have a legitimate interest in observing customers' movements and protecting against possible criminal activities. As set out by the evidence cited above, Carroll entered the store and walked quickly through, looking in cases, saying he did not want to buy anything. After being in the store for only a few moments, he walked to his car and retrieved something from the car. He then walked back in shortly after that with Mr. Martin, who had a suspicious looking item wrapped in newspaper in his hand. When Mr. Martin did not answer Mr. Bjorkheim's question about what was in his hand, Mr. Bjorkheim, holding his shotgun in a resting position, asked the men to leave.

There is no evidence that Mr. Bjorkheim treated Carroll any differently than he would persons of a different race. Thus, Carroll cannot argue, let alone demonstrate, genuinely, that Defendants intended to discriminate against Carroll because of his race. *See Williams v. Staples, Inc.*, 372 F.3d 662, 667 (4th Cir. 2004) (requiring patron to show he was treated less favorably than similarly-situated patron of different race). Based on this evidence no *reasonable* jury could decide otherwise. *See Jenkins*, 478 F.3d at 260 (genuine issue of material fact created only if the evidence produced is sufficient enough for a reasonable jury to return a verdict in favor of the non-movant); *Bazan*, 246 F.3d at 492 (5th Cir. 2001)(an issue is not "genuine" if it is merely "a sham"). Carroll's allegation, that Mr. Bjorkheim used a racist term when asking the men to leave (which Bjorkheim denies), does not alone demonstrate intent to discriminate, given all the facts set forth herein. Thus, Plaintiff cannot even prove a *prime facie* case of retail discrimination.

However, even if Plaintiff could present a *prime facie* case of retail discrimination, Defendants have put forth a legitimate, non-discriminatory reason for the actions taken by Defendants that day. The burden on Defendants in this regard is one of production, not persuasion, thereby involving no credibility assessment. *Lindsey*, 447 F.3d at 1147. The burden would then shift to Plaintiff to refute Defendant's legitimate explanation. Plaintiff cannot present such evidence. When evidence to refute the defendant's legitimate explanation is lacking, summary judgment is appropriate, even though the plaintiff may have established a minimal prima facie case based on a *McDonnell Douglas* type presumption. *Id. at 1148.*

As to the third prong, Carroll again cannot make a *prime facie* showing as he cannot demonstrate loss of an actual contract interest. As he made clear in his deposition (portions cited above), there was no specific piece of jewelry he was interested in purchasing from Bjorkheims Diamonds. Instead, as he testified, he was "browsing," or "shopping." He never asked to look at any piece in particular. He did not select any piece of jewelry, ask for the price, attempt a transaction, or even discuss any piece of jewelry with the sales staff. In fact, in that second visit to the store when the men were asked to leave, he was not looking at any specific jewelry; instead, he was looking out the front window. It is clear that Defendants did not actually interfere with an attempted purchase by Carroll. There is no dispute as to a material fact regarding Carroll's failure to make or attempt to make a purchase at Bjorkheims Diamonds. There is no basis on which a reasonable jury could conclude that Defendants prevented Carroll from making a purchase. In any event, Carroll could not have afforded to purchase the jewelry in the store. As set out above, the jewelry prices in this store average between $3,000 and $5,000. After payment of regular monthly bills, and before payment for food, groceries, clothing, gas and other items, Carroll would be left with only $620 to $820 each month. With such a budget, and with minimal credit card limits, it is highly unlikely that Carroll could have afforded to purchase any of the items in the store. Carroll cannot genuinely demonstrate he was able to satisfy the retailer's ordinary requirements to pay. *See Williams*, 372 F.3d at 667. This further shows that he Carroll did not lose "an actual contract interest" when he was asked to leave the store. Summary judgment should be granted on this claim.

D. Carroll's Assault Claim

Carroll alleges that Mr. Bjorkheim intentionally threated him with imminent bodily harm. However, Carroll cannot present any evidence to support such an allegation. The elements of assault: The defendant acted intentionally or knowingly; the defendant threatened the plaintiff with imminent bodily injury; and the defendant's threat caused injury to the plaintiff. *See* Tex. Penal Code s. 22.01(a)(2) (Vernon 1994); *Johnson v. Johnson*, 869 S.W.2d 490, 491 (Tex. App. – Eastland 1993, rehearing denied). A threat is defined as, "a declaration of intention or determination to inflict punishment, loss or pain on another, or to injure another by the commission of an unlawful act." Black's Law Dictionary 1480 (6th ed. 1990). A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. Tex. Pen. Code § 6.03(a) (Vernon 1994).

As set out in the deposition excerpts cited above, according to both Martin and Carroll, Mr. Bjorkheim never made any verbal threat of any kind. He asked them both to leave. He did not say he would hurt them. He never moved his shotgun from the resting position in which he was holding it, and he never pointed it at them. Such acts do not give rise to assault under the authorities cited above. Summary judgment is proper.

Further, dismissal of the common law assault cause of action is proper pursuant to 28 U.S.C. § 1367(c)(3), as this is a state law claim subject to supplemental jurisdiction. The Court should decline supplemental jurisdiction over this state law claim and dismiss

it without prejudice because summary judgment and dismissal of the section 1981 claim is proper. *See* 28 U.S.C. § 1367(c)(3).

E. Carroll's Claim of Negligence Per Se

Like the claim for assault, dismissal of the common law negligence per se claim is proper pursuant to 28 U.S.C. § 1367(c)(3), as this is a state law claim subject to supplemental jurisdiction. The Court should decline supplemental jurisdiction over this state law claim and dismiss it without prejudice because summary judgment and dismissal of the section 1981 claim is proper. *See* 28 U.S.C. § 1367(c)(3).

Further, summary judgment on this claim is proper for the same reasons that summary judgment on the section 1981 claim is proper. The policy and intent behind section 1981 and the Austin Human Rights Ordinance are the same, to discourage racial (and other) discrimination in places of public accommodation when persons are obtaining goods or services. *See Section 5-2-1* ("It is the policy of the City to bring about through fair, orderly and lawful procedures, the opportunity of each person to obtain goods and services in a public accommodation without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, age, or disability.") Accordingly, for the same reasons that Carroll's section 1981 claim fail, Carroll's negligence per se claim based on the Austin Human Rights Ordinance must fail, too. Alternatively, section 1981 preempts the Austin Human Rights Ordinance.

Lastly, and importantly, the Austin Human Rights Ordinance does not support a duty under negligence per se. No court has ever supported such a duty. It is well-established that the mere fact that the Legislature adopts a statute does not mean that this

court must accept it as a standard for civil liability. *Carter v. William Sommerville & Son, Inc*., 584 S.W.2d 274, 278 (Tex. 1979). The same can be said for the Austin Human Rights Ordinance, especially because it is not penal in nature, does not provide an appropriate basis for criminal or civil liability, and does not provide an avenue for private action in the courts. While persons have a duty to obey such an ordinance, this is not equivalent to a duty in tort. *See, e.g.*, *Smith v. Merritt*, 940 S.W.2d 602, 607–08 (Tex.1997) (statute making it a crime to furnish alcohol to persons under age 21 did not impose a tort duty on social hosts). "It is the unexcused violation of a penal standard which constitutes negligence per se." *S. Pac. Co. v. Castro*, 493 S.W.2d 491, 497 (Tex. 1973) (emphasis added). Thus, to prove negligence per se, the party must prove (1) a violation of a penal standard, (2) which is unexcused. *Kelly v. Brown,* 260 S.W.3d 212, 219 (Tex. App. – Dallas 2008, pet. stricken, review denied).

Whether or not the plaintiff belongs to the class that the statute was intended to protect and whether the plaintiff's injury is of a type that the statute was designed to prevent does not end the inquiry. *See Praesel v. Johnson*, 967 S.W.2d 391, 395 (Tex. 1998). The court must still determine whether it is appropriate to impose tort liability for violations of the statute. *See Smith*, 940 S.W.2d at 607–08. This determination is informed by a number of factors, which are not necessarily exclusive. *Perry v. S.N*., 973 S.W.2d 301, 304–07 (Tex. 1998). Nor is the issue properly resolved by merely counting how many factors lean each way. *Id.* One important factor is whether there is already a similar duty in the common law; i.e., whether, absent a change in the common law, a negligence per se cause of action against these Defendants would derive the element of

duty solely from the Austin Human Rights Ordinance. *Id.* There is no recognized common law duty similar to the duty Plaintiffs ask this court to establish. In most negligence per se cases, the defendant already owes the plaintiff a pre-existing common law duty to act as a reasonably prudent person, so that the statute's role is merely to define more precisely what conduct breaches that duty. *Id.* (citing *Rudes* v. Gottschalk, 324 S.W.2d 201, 204 (Tex. 1959) ("We adopt the statutory test rather than that of the ordinarily prudent man as the more accurate one to determine negligence."). Recognizing a new, purely statutory duty "can have an extreme effect upon the common law of negligence" when it allows a cause of action where the common law would not because se "bring[s] into existence a new type of tort liability. *Perry v. S.N.*, 973 S.W.2d 301, 304–07 (Tex. 1998). Because the Austin Human Rights Ordinance, is not penal in nature, does not provide an appropriate basis for criminal or civil liability, does not provide an avenue for private action in the courts, and does not correspond to some established common law duty, and because Plaintiff cannot establish an unexcused violation of a penal standard, this court should not establish a new statutory duty for tort liability under the ordinance.

V.
CONCLUSION AND PRAYER

For the reasons stated herein, Defendants are entitled to summary judgment on Plaintiff's claims.

WHEREFORE Defendants pray that the Court grant this motion, that Plaintiff take nothing, that Defendants recover their costs and attorney's fees, and for such further relief to which Defendants are entitled.

Respectfully submitted,
CHAMBERLAIN ♦ MCHANEY
301 Congress, 21st Floor
Austin, Texas 78701
(512) 474-9124
(512) 474-8582 FAX

By: __/s/ Erin Westendorf-Boyd_____
DAVID E. CHAMBERLAIN
State Bar No. 04059800
dchamberlain@chmc-law.com
ERIN WESTENDORF-BOYD
State Bar No. 24042412
ewestendorf@chmc-law.com
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify by my signature above that a true and correct copy of the above and foregoing has been served on all attorneys of record as listed below on the 14th day of October, 2016:

Brian McGiverin
DIETZ, LAWRENCE & MCGIVERIN
2221 Hancock Drive
Austin, Texas 78756
brian@lawcenterofaustin.com

Judith Bohr, *Pro Hac Vice*
ATTORNEY AT LAW
501 N. IH-35
Austin, Texas 78702
Facsimile: 512-597-1658
judithbohresquire@gmail.com

___/s/ Erin Westendorf-Boyd_____
ERIN WESTENDORF-BOYD