

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THERESA McCREA : CIVIL ACTION
 :
 v. :
 :
 SAKS, INC. : NO. 00-CV-1936

MEMORANDUM AND ORDER

McLaughlin, J.

December _____, 2000

The plaintiff, Theresa McCrea, has brought a three-count amended complaint against the defendant Saks, Inc. (“Saks”), a retail store corporation, contending that her civil and contractual rights were violated by a store employee. Count I alleges that the store discriminated against her in violation of Title II of the Civil Rights Act of 1964; Count II alleges that the store interfered with her right to “make and enforce” a contract in violation of 42 U.S.C. § 1981; and Count III alleges that the store’s negligence caused her humiliation, emotional trauma, and depression. The defendant has moved to dismiss the amended complaint pursuant to Federal Rules of Civil Procedure Rule 12(b)(6), 12(b)(1), or alternatively, 12(e). I will grant the motion.

I. BACKGROUND

According to the complaint, on April 18, 1998, the plaintiff was shopping with her aunt and young daughter in the defendant’s retail store located in the Franklin Mills Mall in Philadelphia. A salesman approached the plaintiff about her daughter, who was going through the aisles, and an argument ensued. The salesman then called security and, referring to the plaintiff, told

security to come and get this “nigger” out. The plaintiff, her aunt, and her daughter left the store without purchasing a shirt that the plaintiff was intending to buy.

The plaintiff subsequently reported the incident to the store manager and to the Philadelphia Human Relations Commission (“PHRC”), which eventually dismissed her charge as “unsubstantiated” in December of 1998. In April of 2000, the plaintiff filed an action for damages. As amended, the plaintiff’s complaint alleges that the defendant, through its agent and on the basis of her race and color, discriminated against and harassed the plaintiff in violation of 42 U.S.C. § 2000a (Count I) and prevented her from making and enforcing a contract in violation of 42 U.S.C. § 1981 (Count II). The plaintiff also claims that the store’s negligence with respect to employee training and supervision caused her a variety of emotional and psychological damages (Count III).

The defendant has moved to dismiss the amended complaint on multiple grounds. As to the federal causes of action, the defendant contends the following: that the statute of limitations had expired as to Count I; that Section 2000a does not apply to retail establishments such as the defendant; that monetary damages are not available under Section 2000a; that the plaintiff has failed to show a contract interest under Section 1981; and that punitive damages are not available under either Section 2000a or Section 1981.

II. DISCUSSION

A. Standard of Review

A motion to dismiss pursuant to Rule 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, the plaintiff is not entitled to relief. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997) (citing Bartholomew v. Fischl, 782 F.2d 1148, 1152 (3d Cir. 1986)).

B. Count I – 42 U.S.C. § 2000a

In order to state a claim under 42 U.S.C. § 2000a, the plaintiff must establish that she was deprived of the full and equal enjoyment of a public accommodation on the grounds of race, color, religion, or national origin. See 42 U.S.C. § 2000a(a). The issue here is whether a retail store such as Saks is a place of “public accommodation” within the meaning of Section 2000a. I hold that it is not.

Under Section 2000a(b)(2), places of public accommodation include:

- (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests . . . ;
- (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
- (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
- (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

See 42 U.S.C. § 2000a(b)(2). It is clear that Congress did not intend for retail establishments such as Saks to be covered by this section. First, Section 2000a(b)(2) presents a detailed list of establishments, none of which is a retail store. Because “the legislative purpose is expressed by the ordinary meaning of the words used,” see Richards v. United States, 369 U.S. 1, 9 (1962), establishments not listed in Section 2000a(b)(2) should not be read into that provision. Accord Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993).

Second, Section 2000a(b)(2) defines “places of public accommodation” as, inter alia, cafeterias, lunchrooms, lunch counters, and any facility “located on the premises of any retail establishment. . . .” The clear implication of this provision is that Congress did not intend to include retail establishments; otherwise, there would have been no need to make clear that restaurant-type facilities within a retail establishment are covered under Section 2000a(b)(2). If retail establishments were also intended to be covered, there would be no need for this provision. Accord Gigliotti v. Wawa Inc., 2000 WL 133755 (E.D.Pa. Feb. 2, 2000); Priddy v. Shopko Corp., 918 F. Supp. 358 (D. Utah 1995).

Because this decision disposes of Count I, I do not reach the other grounds for dismissal argued by the defendant.

C. Count II – 42 U.S.C. § 1981

Section 1981 addresses racial discrimination in contractual relationships. As amended by the Civil Rights Act of 1991, the statute reads in relevant part:

- (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .
- (b) For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
- (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

See 42 U.S.C. § 1981(a)-(c). To establish a claim under Section 1981, the plaintiff must show that (1) she is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., the making and enforcing of a contract). See Morris v. Office Max, Inc., 89 F.3d 411 (7th Cir.

1996); Green v. State Bar of Texas, 27 F.3d 1083, 1086 (5th Cir.1994); Mian v. Donaldson, Lufkin & Jenrette Secs. Corp., 7 F.3d 1085, 1087 (2d Cir.1993); Baker v. McDonald's Corp., 686 F. Supp. 1474, 1481 (S.D. Fla.1987), aff'd 865 F.2d 1272 (11th Cir.1988), cert. denied, 493 U.S. 812 (1989); Williams v. Penn. State Police Bureau of Liquor Control Enforcement, 108 F. Supp.2d 460 (E.D. Pa. Aug. 14, 2000); Wood v. Cohen, 1998 WL 88387 (E.D. Pa. Mar. 2, 1998). See also Pamintuan v. Nanticoke Mem. Hosp., 192 F.2d 378 (3d Cir. 1999).

The plaintiff has failed to show the second and third elements. A claim under Section 1981 must allege the actual loss of a contract interest, not merely the possible loss of future contract opportunities. Accord Morris v. Office Max, Inc., 89 F.3d 411, 414-15 (7th Cir. 1996); Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262, 1267 (10th Cir. 1989). The plaintiff does not assert that the defendant refused to sell her the shirt in question; rather, she contends that the store harassed and discouraged her from making the purchase. Moreover, she has produced no evidence to suggest that she had anything more than a general interest in the shirt. She has failed to demonstrate that she would have attempted to purchase the shirt even if she had not been harassed by the security guard. Finally, she has failed to show that the defendant knew she intended to purchase a shirt, or that the defendant intended to prevent her from doing so. Accord Morris, 89 F.3d at 414.

Because the plaintiff has failed to state a claim upon which relief may be granted as to the federal claims, I need not reach the other grounds for dismissal alleged by the defendant. The two federal claims therefore are dismissed.

D. Count III – Negligence

Pursuant to 28 U.S.C. § 1367(c), I decline to assert jurisdiction over the remaining state law claim.

An Order follows.

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v.	:	
	:	
SAKS, INC.	:	NO. 00-CV-1936

ORDER

AND NOW, this day of December, 2000, upon consideration of the Defendant's Motion to Dismiss Plaintiff's Amended Complaint (Docket # 3) and the Plaintiff's Reponse thereto, IT IS HEREBY ORDERED that the Motion is GRANTED. Counts I and II of the Plaintiff's Amended Complaint are dismissed with prejudice and Count III of the Plaintiff's Amended Complaint is dismissed without prejudice for the reasons expressed in the Memorandum of today's date.

BY THE COURT:

MARY A. McLAUGHLIN, J.