

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

GREGORY SEATON : CIVIL ACTION
 :
 v. :
 :
 UNIVERSITY OF PENNSYLVANIA :
 et al. : NO. 01-2037

MEMORANDUM

Dalzell, J.

November 30, 2001

Gregory Seaton is an African-American graduate student at the University of Pennsylvania who alleges in this action that he entered a copy shop near the campus to obtain photocopies for his studies, but was denied service in favor of a white customer. Seaton also claims he was beaten at the shop because he was black.

Named as defendants in the complaint are the Campus Copy Center, the University of Pennsylvania (the "University"), Ronald Shapiro, John Capman, Joseph Bristow, Robert McGrody, and Professor Erling Boe. Before us is the motion to dismiss or, in the alternative, for summary judgment of the University of Pennsylvania and Professor Erling Boe and the motion for partial dismissal or, in the alternative, for partial summary judgment of Campus Copy Center and its employees.¹

¹ In considering a motion to dismiss for failure to state a claim, a court must accept all facts alleged in the complaint to be true and make all reasonable inferences in favor of the plaintiff. Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990). "The question, then, is whether the facts alleged in the complaint, even if true, fail to support the claim." Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993)(internal quotations omitted). To survive the motions to dismiss, Seaton's complaint must contain "sufficient information
(continued...)"

We may consider matters outside the complaint, such as the materials the University and Erling Boe proffer here, if we convert a motion to dismiss into a motion for summary judgment, provided all parties have had a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b). Since discovery has not yet begun and Seaton has not had such opportunity, we decline to rely on outside materials and begin by describing in some detail the facts alleged in the amended complaint.

I. BACKGROUND²

A. Campus Copy Center Incident

Gregory Seaton, a doctoral candidate and graduate assistant in the Department of Education at the University of Pennsylvania, on April 3, 2001 entered Campus Copy Center, a copy shop in the vicinity of the University campus, to obtain photocopies of maps and topographical materials. Am. Compl. at ¶ 19. Seaton waited at the counter to be served for about ten minutes when Professor Erling Boe entered the shop. Am. Compl. at ¶ 20. Seaton is black and Boe is white. Am. Compl. at ¶¶ 9, 25. Ronald Shapiro, a manager of Campus Copy, coming from a rear

¹(...continued)
to outline the elements of his claim[s] or to permit inferences to be drawn that these elements exist." Id.

² Seaton filed his original complaint on April 25, 2001, shortly after the incident in question. The complaint on which we rely here is the amended complaint he filed on June 7, 2001.

office approached the service counter where Boe was standing to take Boe's order despite the fact that Seaton had come first. Id. An employee of Campus Copy told Shapiro that Seaton had waited in line longer and was the next customer to be served. Seaton stated, "Sir, I was here first. This individual came after me" or words to that effect. Am. Compl. at ¶ 21.

Shapiro allegedly hollered, "You were here first but you will be served last." According to the complaint, this remark was racially motivated and engendered in part by a "climate" on the University of Pennsylvania campus in which racial discrimination is "condoned". Am. Compl. at ¶ 22.

Boe apparently did not do or say anything. Am. Compl. at ¶ 59. He allegedly did not yield to Seaton as the next customer at the service counter. Id. at ¶ 23. Seaton, "stunned, shocked and speechless", left the store. Id. at ¶ 24.

Seaton returned seconds later to question Shapiro, inquiring, "Excuse me. Do you have to stand in line to get service or do you have to be white?". Shapiro responded in a "loud[]" and "rude" tone, "I don't like your attitude. Get out of my store." Id. at ¶ 25. Seaton refused to leave and, rather, demanded that the police be called. Id. at ¶ 26.

Shapiro leaned across the counter and allegedly thrust his finger into Seaton's forehead and shouted, "You idiot!" Id. Seaton claims that he "swiped Shapiro's finger away" with an open hand. Id. at ¶ 27.

Employees of the store, John Capman, Joseph Bristow, and Robert McGrody, then allegedly "assaulted and battered" Seaton. Am. Compl. at ¶ 27.

B. Professor Boe's Letter

Within days of the incident at Campus Copy Center, Seaton wrote what is described as a "widely circulated" e-mail to the University of Pennsylvania community to expose what had happened. Am. Compl., Ex. A. Seaton also initiated this action against the defendants, among them Erling Boe.

Erling Boe is a professor in the Department of Education, the same department where Seaton is a graduate student. Several weeks after the April 3 incident, Professor Boe sent the following letter to Margaret Beale Spencer, a Professor of Education and member of the Board of Overseers and Gregory Seaton's advisor:

May 31, 2001

Margaret Beale Spencer, Board of Overseers
Professor of Education

Dear Margaret,

In early April I was present during an incident between Gregory Seaton, a GSE student, and some of the Campus Copy staff. Allegations about what happened have been publicized widely around campus and in the press, and are currently in dispute. I have refrained from speaking out, other than cooperating with the investigation by the Penn Police, because my participation in the campus discussion would have intensified the strong feelings surrounding the incident.

Mr. Seaton has made several allegations publicly about my conduct in this incident, including that I discriminated against him because of race. Recently, he filed a federal lawsuit against Campus Copy, its owner and several employees, the University, and me, repeating and expanding on these allegations.

I wish to make it very clear that the allegations against me are groundless and without any merit. Suggestions that I somehow engaged in race discrimination, or otherwise acted wrongfully, are false. They are also outrageous. Nevertheless, I am advised not to discuss the specific content of these allegations while the lawsuit is pending.

The legal process, I understand, often takes time to sort out allegations that have merit from those like these that do not. It is easy to start a lawsuit. It takes longer to defend one, even when the claims have no basis. I look forward to completion of this process.

Sincerely,

Erling E. Boe
Professor of Education

Am. Compl., Ex. D.

Seaton characterizes the letter as "a retaliatory effort to unlawfully intimidate and harass the plaintiff and to impair plaintiff's academic standing." Am. Compl. at ¶ 32. "It is likely that a letter writing campaign has been undertaken, and that other letters have been sent to plaintiff's professors, administrators and individuals in positions of academic authority at University." Id. at ¶ 33. Seaton cites no instances of the "letter writing campaign" other than Professor Boe's letter.

C. Relationship between Campus Copy Center and the University of Pennsylvania

Campus Copy Center is located on University property. Am. Compl. at ¶ 18. Seaton claims that "Campus Copy enjoyed a monopolistic status among vendors on University's campus". Id. at ¶ 16. It is alleged to be the exclusive vendor of "bulk pack" materials assigned as required reading in certain classes. Id. Academic and administrative departments at the University have charge accounts with Campus Copy. The amended complaint also states:

For a long time prior to April 3, 2001, African American and other minority students of University made complaints about the conduct of Campus Copy towards them; to wit, racial discrimination, discourtesy, rudeness and unequal quality of service. University earned a reputation of declining to competently investigate or to act with respect to the said complaints, thereby creating a climate that encouraged unlawful racial discrimination against African American and minority students, and which fostered an understanding that overt discrimination against African Americans and other minorities would be tolerated and condoned. See newspaper article[s] published in Philadelphia Inquirer newspaper, April 12, 2001, Exhibit A hereto, and published [in] Daily Pennsylvania[n] newspapers, April 9 and April 11, 2001, Exhibits B and C, respectively.

Am. Compl. at ¶ 17. Oddly, the Philadelphia Inquirer and Daily Pennsylvanian articles attached, and incorporated by reference in the complaint, only constitute reportage about the incident and ensuing protests. See Am. Compl. Exs. B and C. The minority students interviewed in them neither complain of past racial discrimination by Campus Copy Center nor the failure of the

University to investigate complaints of racial discrimination by minority students. See Am. Compl., Exs. A-C.

II. ANALYSIS

Based upon these allegations, Gregory Seaton asserts eleven separate causes of action. Those claims assert: violation of civil rights under 42 U.S.C. § 1981 (University and Boe only); 1985(3), and § 1986 (all defendants); attorney's fees under 42 U.S.C. § 1988 (all defendants);³ state law torts of negligence (Campus Copy, University and Boe only), assault, battery, false imprisonment, negligent infliction of emotional distress, and intentional infliction of emotional distress (all defendants); declaratory judgment (all defendants); "Title VII of the Civil Rights Act of 1991", 42 U.S.C. § 2000e (University and Boe only); and Pennsylvania Human Rights Act, 43 P.S. §§ 951-963 (University and Boe only).

A. Motion to Dismiss of Campus Copy
Center, Ronald Shapiro, John Capman,
Joseph Bristow, and Robert McGrody

Defendants Campus Copy Center, Ronald Shapiro, John Capman, Joseph Bristow, and Robert McGrody (that is, Campus Copy Center and its employees) move for partial dismissal of the complaint. They attack the claims brought pursuant to 42 U.S.C. §§ 1985, 1986, 1988, and the claims for declaratory relief and an injunction. We address these claims seriatim.

³ Seaton cites the attorney's fee statute as the basis for his Eighth Cause of Action.

1. Section 1985(3)

Section 1985(3) is a civil rights statute that in only very limited instances affords a private remedy for private conspiracies based on race.⁴ Where the conspiracy does not involve a governmental entity nor contemplate interference with the activities of government, the statute only provides a remedy where the conspiracy is directed to deny the plaintiff constitutional rights secured against the conduct of private parties. See Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 266 (1993); Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971); United Brown v. Philip Morris Inc., 250 F.2d 789, 805 (3d Cir. 2001). The only constitutional rights guaranteed against private encroachment, as opposed to invasion by government authority, are the Thirteenth Amendment right to be free from

⁴ The statute provides:

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3)(2001).

involuntary servitude and the right to engage in interstate travel. Bray, 506 U.S. at 278; Brown, 250 F.3d at 806. Seaton's amended complaint mentions neither right.

Viewing the facts alleged in the amended complaint in the light most favorable to Seaton, the hostility and violence alleged cannot reasonably be characterized as a conspiracy to deprive Seaton of the right to interstate travel nor to subject him to involuntary servitude. Nor does the racially charged confrontation alleged impose on Seaton "the badges and the incidents of slavery," or the relics and continuing vestiges of slavery, which the Supreme Court has also held to be within the Thirteenth Amendment's ambit. Griffin, 304 U.S. at 105 (citing Jones v. Alfred H. Mayer Co., 392 U.S. 390, 440 (1968)).

Seaton therefore does not state a valid claim under § 1985(3).

2. Sections 1986 and 1988

Having dismissed the conspiracy claim under 42 U.S.C. § 1985(3), we must also grant the motion to dismiss the claim brought pursuant to 42 U.S.C. § 1986,⁵ which affords a cause of

⁵ The statute provides:

Action for neglect to prevent.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for

(continued...)

action for the "neglect to prevent" a civil conspiracy or other violation of § 1985. As there is no violation of § 1985, the action for neglect to prevent such a violation must also fail. See id (providing as a condition for liability for neglect to prevent that "such wrongful act be committed"); Clark v. Clabaugh, 20 F.3d 1290, 1295-96 n.5 (3d Cir. 1994); Kessler v. Monsour, 865 F. Supp. 234, 239-40 (M.D. Pa. 1994).

Our dismissal of the claims brought pursuant to 42 U.S.C. §§ 1985 and 1986 removes the only predicate for attorney's fees against the Campus Copy defendants. As Seaton proffers his claim to entitlement to fees as a separate cause of action, it, too, must be dismissed.

3. Declaratory Judgment and Injunction

Lastly, Campus Copy and its employees also move to dismiss the portions of Seaton's complaint seeking declaratory and injunctive relief. Am. Compl. ¶ 6 (injunction); id. ¶ 67 (declaratory relief).

a. Standing

First, they allege that Seaton lacks standing. While the defendants are correct that Seaton must have standing to assert the declaratory and injunctive relief claims, apart from

⁵(...continued)
all damages caused by such wrongful act, which such person by reasonable diligence could have prevented.

42 U.S.C. § 1986 (2001).

standing necessary to pursue damages,⁶ it is premature to adjudicate this issue. Seaton alleges facts in his complaint that, if true, support his standing. See Am. Compl. ¶¶ 6, 67 (asserting concern of continuing misbehavior). This suffices at the pleading stage. Cf. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.")(quotations omitted).

b. Vagueness

The Campus Copy defendants alternatively attack the declaratory relief claim for vagueness and move to dismiss or strike it. For example, these defendants point out that while the amended complaint makes no claim under the Pennsylvania Constitution, the Pennsylvania Constitution is nevertheless recited as a basis for declaratory relief. Amend. Compl. at ¶ 67 ("defendants' conduct deprived plaintiff of his rights under the Untied [sic] States and Pennsylvania Constitutions"). Further, the paragraph seeking declaratory relief makes sweeping reference to the entire United States Constitution. See id.

Even under a regime of notice pleading, defendants cannot be expected to ferret out possibly relevant claims under

⁶ City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (stating that where an injunction is sought, a plaintiff must show likelihood of suffering future injury).

the entire Pennsylvania Constitution. We will therefore strike from paragraph 67 the references to the Pennsylvania Constitution.

To the extent the same paragraph invokes other general bodies of law, we construe it as a shorthand for the federal claims made elsewhere in the complaint, and not as a catchall for claims that occur to plaintiff's attorney later. We therefore leave those references intact.

B. Motion to Dismiss of University of Pennsylvania and Professor Erling Boe

Erling Boe and the University seek dismissal of all claims against them. We consider each in turn.

1. Section 1981

Section 1981 forbids racial discrimination in, inter alia, the making and enforcement of contracts.⁷ Brown, supra, 250 F.3d at 796. It applies by its terms to private persons as

⁷ Pertinent to the issues here, this statute provides:

(a) Statement of equal rights

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. . . .

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (2001).

well as to state actors. 42 U.S.C. § 1981(c). Seaton alleges that Boe engaged in intentional discrimination, impeding Seaton's right to contract, when Boe "refused to yield to [Seaton's] status as the next customer to be served," failed to prevent the discrimination and abuses he observed, and failed to protect Seaton from his Campus Copy employee attackers. Am. Compl. at ¶ 23. Boe's actions, or rather inactions, so the argument goes, culminated in the denial of copy service, and impaired Seaton's freedom to enter a retail contract. The University is held responsible under a theory of respondeat superior. Am. Compl. at ¶ 52.

Boe and the University challenge the sufficiency of Seaton's § 1981 claim on several grounds. Foremost among them, they contend that the amended complaint does not demonstrate that Boe possessed discriminatory animus, as § 1981 requires,⁸ apart from its conclusory assertion that "Boe's conduct was motivated by racial animus," Am. Compl. at ¶ 52, and Boe did not participate in any discrimination. In sum, Boe did nothing.

At this early stage, we decline to address whether the complaint sufficiently pleads that Boe possessed racially discriminatory animus. We instead dispose of the defendants' challenge under the second argument. Even assuming that Boe in his heart possessed the desire to discriminate against Seaton, he

⁸ General Bdg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982); Brown v. Philip Morris Inc., 250 F.3d 789, 797 (3d Cir. 2001).

is not alleged to have engaged in any discriminatory action. Mere inaction like that alleged here cannot form the basis for § 1981 liability.

"A defendant in a § 1983 action must have personal involvement in the alleged wrongs." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1294 (3d Cir. 1997) (quoting Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988)). Thus, our Court of Appeals in Robinson held that a police officer does not commit a constitutional tort in failing to stop misconduct by a fellow officer. Id. at 1294. The Court stated, "We do not believe that Edwards can be held liable under § 1983 for failing to take action to correct the behavior of an individual over whom he had no actual control." Id. The Court of Appeals looked to basic canons of tort law, noting that, ordinarily, individuals are not held responsible for neglecting to control the torts third persons commit. Id. at note 6 (quoting §§ 876 and 877(a) Restatement (Second) of Torts).⁹ It held that "except perhaps in

⁹ Restatement (Second) of Torts § 876 states:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Section 877(a) provides:

(continued...)

extraordinary circumstances, a government official or employee who lacks supervisory authority over the person who commits a constitutional tort cannot be held, based on mere inaction" to be liable. Id. We see no reason why we should not interpret § 1981 also against the background of basic tort and agency principles.

Supreme Court jurisprudence also teaches that a defendant in a § 1981 case must actually do something affirmative. Considering the application of § 1981 to employers who subscribe to a multi-employer training committee and union hiring hall for purpose of hiring, where the hiring hall and committee engaged in discrimination, the Court held that § 1981 "meant to do no more than prohibit the employers and associations in these cases from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract. It did not intend to make them the guarantors of the workers' rights as against third parties who would infringe them." Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 396 (1982). Accord Boykin v. Bloomburg Univ. of Pa., 893 F. Supp. 409, 416 (M.D. Pa. 1995) ("Because liability is premised upon intentional discrimination, personal involvement of

⁹(...continued)

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own....

a defendant is essential.")(construing General Building Contractors).

Thus, § 1981 does not impose an affirmative duty to stop others' discrimination. It imposes a duty not to discriminate. Seaton does not claim that Boe influenced the decision of the Campus Copy employee to serve him ahead of Seaton, nor does he allege that Boe in any way partook in the assault. Boe simply entered the store and was a bystander. True, he did not yield his place in line. He was in this sense like a white job applicant who is hired over a black job applicant because of the employer's invidious discrimination. Realizing this and doing nothing do not constitute actionable discrimination. Neither is being served ahead of someone else because of someone else's discrimination (or rudeness).

By standing at the counter, Professor Boe did not discriminate against Seaton or impair Seaton's right to contract. We therefore dismiss the § 1981 claim against Professor Boe and his employer, the University.

2. Title VII, 42 U.S.C. § 2000e

Seaton maintains that the letter from Professor Boe to Professor Beale Spencer, and the possible "letter writing campaign"¹⁰ the letter may evidence, was unlawful retaliation

¹⁰ The letter is quoted in full in Part I.B, supra. Seaton speculates from the letter, "It is likely that a letter writing campaign has been undertaken, and that other letters have been sent to plaintiff's professors, administrators and

(continued...)

against Seaton for "having asserted his civil rights," Am. Compl.

¶ 69. Seaton relies on Title VII, 42 U.S.C. § 2002, which provides in relevant part,

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3 (West 2001).

The gravamen of Seaton's complaint in this regard is that Professor Boe wrote to Professor Beale Spencer to render Seaton's academic life unbearable and threaten his academic standing. Seaton's reliance on 42 U.S.C. § 2000e-3, which prohibits retaliatory employment discrimination, is misplaced. Any claim under § 2000e must be premised on an employment relationship. The amended complaint fails to show such a relationship between Seaton and either defendant as the context of the alleged retaliatory letter.

Initially, the amended complaint does not suggest that Professor Boe is a statutory employer. See 42 U.S.C. § 2000e-3, quoted supra. It states rather that he is "a professor and an employee and agent" of the University of Pennsylvania where Seaton is a student. Am. Compl. at ¶ 14. Since a Title VII

¹⁰(...continued)
individuals in positions of academic authority at University." Am. Compl. ¶ 33.

action cannot be maintained against an individual employee, the claim against Professor Boe must be dismissed. See Sheridan v. E.I. DuPont De Nemours & Co., 100 F.3d 1061, 1078 (3d Cir. 1996) ("Congress did not intend to hold individual employees liable under Title VII."); Stilley v. Univ. of Pitt. of the Commw. Sys. of Higher Educ., 968 F. Supp. 252, 261 (W.D. Pa. 1996). We turn to whether Professor Boe's letter is actionable against the University.

Gregory Seaton is a graduate student pursuing a doctorate in Education at the University of Pennsylvania. The complaint makes an isolated reference to Seaton being a "graduate assistant," but does not tell what, exactly, that entails. Am. Compl. at ¶ 9.

Courts have addressed whether graduate research and teaching assistants can be employees under Title VII, able to avail themselves of the Act's protections against employment discrimination. Many courts have noted graduate students' "dual role" "as potentially both students and employees." See, e.g., Bucklen v. Rensselaer Polytechnic Inst., No. 00-1146, 2001 U.S. Dist. LEXIS 12686, *12 (N.D.N.Y. Aug. 23, 2001); see also Stilley v. Univ. of Pitt. of the Commw. Sys. of Higher Educ., 968 F. Supp. 252, 261 (W.D. Pa. 1996); Pollack v. Rice Univ., No. H-79-1539, 1982 U.S. Dist. LEXIS 12633 (Mar. 29, 1982). These courts have carefully delineated between graduate students' academic activities and employment activities, and deemed them to be employees only with respect to what they do in employment. See

id. As the court in Stilley concluded, "[T]he Title VII inquiry must focus only on the employee-employer relationship." 968 F. Supp. at 261.¹¹ In Stilley, the court held retaliation against the plaintiff in connection with her doctoral dissertation to be beyond the scope of Title VII since it only related to her as a student. Id. In Bucklen, the court held that alleged discrimination claimed in the administration of the plaintiff's doctoral examination to be discrimination in academics, not employment. Bucklen, at *11-12.

Seaton's complaint only obliquely asserts an employment relationship. See Am. Compl. at ¶ 9 ("At all material times, plaintiff was a doctoral candidate and a graduate assistant at the University of Pennsylvania."). The complaint does not

¹¹ The cited cases concern employment discrimination under § 2000e-2, not § 2000e-3. The holding that a graduate student's Title VII claim is actionable only inasmuch as it relates to the graduate student's status as an employee is equally applicable to § 2000e-3. First, § 2000e-3 provides, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees...." 42 U.S.C. § 2000e-3. It is incidental, and superfluous to the statute, that an individual who is the employee of the defendant is also the defendant's student. As the district court in Bucklen stated, "[T]he Court...cannot extend the parameters of Title VII to encompass purely academic decisions...." Bucklen, at *12.

Second, an element of a retaliation claim under § 2000e-3 is "an adverse employment action." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997) (defining elements of § 2000e-3 claim). Inherent in an adverse employment action is employment, which the challenged behavior of the defendant affects. There is simply no nexus between Professor Boe's letter and Seaton's employment. Indeed, the only fair reading of Professor Boe's letter is that it pertained to his concerns about his employment relationship with the University. Thus, an element of retaliatory employment discrimination - adverse employment action - is absent.

suggest that Seaton was retaliated against as an employee; indeed, it emphasizes that the recipient of the letter is Seaton's academic advisor. See id. at ¶¶ 32, 70. It describes at length the impact of the letter on Seaton's graduate studies and degree. See id. at ¶¶ 32-33, 69-71, 73. What it does not describe is any effect of the letter on Seaton's job, or that the letter was inspired by Seaton's conduct on the job. We cannot infer such effect, since the amended complaint is silent about what Seaton's job is.

Since there is no demonstrable connection between the offending letter and Seaton's employment, if any, with the University, Boe's letter cannot be the predicate for a claim of employment discrimination.

We will not address the defendants' other arguments, including the serious First Amendment implications of Boe's expressions denouncing the allegations against him.

3. Pennsylvania Human Relations Act

The amended complaint appears to reference the Pennsylvania Human Relations Act as another basis for Seaton's retaliation claim against Boe and the University. Under this authority the claim still fails since Seaton did not experience retaliation as an employee, as just explained in detail. See 43 P.S. § 955(a),(d) (2001).

4. Assault, Battery, False Imprisonment, Intentional Infliction of Emotional Distress

The amended complaint asserts claims of intentional torts against Campus Copy and its employees, as well as against Erling Boe and the University.

Boe and the University contend that Boe cannot be liable for torts that he did not participate in. We agree. According to the amended complaint, Boe stood silently during the entire incident. Whatever torts may have been committed by others, Boe did not participate or render substantial encouragement or assistance in any of them. See, Restatement (Second) of Torts §§ 876 and 877(a), quoted supra in note 9; see also, e.g., Allen Organ Co. v. Galanti Organ Builders Inc., 798 F. Supp. 1162, 1171 (E.D. Pa. 1992) (discussing liability of joint tortfeasor). The intentional torts of battery,¹² assault,¹³ false imprisonment,¹⁴ and intentional infliction of emotional distress¹⁵ must therefore be dismissed against Boe, as well as the claims of vicarious liability against the University.

5. Negligence

¹² Levenson v. Souser, 557 A.2d 1081, 1088 (Pa. Super. 1989) (intentional harmful or offensive contact).

¹³ Sides v. Cleland, 648 A.2d 793, 796 (Pa. Super. 1994) (intentional imminent apprehension of harmful or offensive bodily contact).

¹⁴ Caswell v. B.J.'s Wholesale Co., 5 F. Supp. 2d 312, 319 (E.D. Pa. 1998) (intentional act to confine a person).

¹⁵ Dawson v. Zayre Dep't Stores, 499 A.2d 648, 649 (Pa. Super. 1985) (intentional extreme and outrageous conduct).

In addition to attempting to hold Professor Boe and the University liable for the intentional torts of assault, battery, false imprisonment, and intentional infliction of emotional distress -- claims which we rejected in the previous section -- Seaton attempts to hold them responsible on a theory of negligence, the idea being that they negligently failed to prevent the commission of these intentional torts by third persons, the employees of Campus Copy. This we also reject.

It is well-established that individuals owe no duty to protect others from harm by third persons, absent a special relationship with either the wrongdoer or the person subject to harm. See Emerich v. Phila. Ctr. for Human Dev., 720 A.2d 1032, 1036 (Pa. 1998); Brezenski v. World Truck Transfer, Inc., 755 A.2d 36, 40 (Pa. Super. 2000); Restatement (Second) of Torts § 315 (1965). As the Pennsylvania Supreme Court has summarized ancient law on the subject, "Although each person may be said to have a relationship with the world at large that creates a duty to act where his own conduct places others in peril, Anglo-American common law has for centuries accepted the fundamental premise that mere knowledge of a dangerous situation, even by one who has the ability to intervene, is not sufficient to create a duty to act." Wenrick v. Schloemann-Siemag Aktiengesellschaft, 564 A.2d 1244, 1248 (Pa. 1989).

The amended complaint cites no special relationship between the Campus Copy defendants and Seaton. Viewing the facts

alleged in the complaint in the light most favorable to Seaton, we can infer no such relationship.

a. Erling Boe

The claim against Erling Boe -- alleging essentially that he failed to decline to be served ahead of Seaton and prevent the verbal abuse and assault that allegedly occurred in his presence, Am. Compl. at ¶ 59 -- can be dismissed outright. We know of no legal duty to decline to be served when one is about to be served ahead of another customer. The amended complaint and the plaintiff's memorandum of law cite no special relationship. Since Professor Boe had nothing to do with creating the danger that Seaton would be attacked, he owed no duty to protect Seaton from the alleged misconduct of the Campus Copy Center defendants. See Restatement (Second) of Torts § 321 (ascribing duty to act where prior conduct is dangerous).

b. University of Pennsylvania

The negligence alleged against the University encompasses many asserted failures, among them: "prolonged failure to make reasonable investigation or inquiry with respect to complaints and grievances of African American and minority students as related to Campus Copy;" "failure to establish and implement reasonable procedures to encourage or compel vendors, such as Campus [C]opy to service students of the University in a manner that was not unlawfully discriminatory;" "failure to properly monitor the conduct of vendors to prevent the type of

harm caused to plaintiff;" "acquiescence and condonation of the unlawful conduct by Campus Copy toward African American and other minority students;" and "granting Campus Copy the lucrative business opportunity to serve the University, its employees and students, while failing to prepare or publish guidelines to prevent the type of harm caused to the plaintiff." Am. Compl. at ¶ 58.

From this grab-bag of conclusory allegations, Seaton seeks to hold the University responsible for its inaction. As noted, however, one cannot usually be negligent for inaction. See Wenrick, supra; Restatement (Second) of Torts at § 314. Absent a special relationship, the law imposes no duty to protect others from harm by third persons. The question becomes whether a special relationship existed between the University and either the Campus Copy defendants or Seaton. See supra at Part B.5.

Seaton in his memorandum in opposition to dismissal identifies only one such relationship. He cites Restatement (Second) of Torts § 323, "Negligent Performance of Undertaking to Render Services," which provides,

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if, (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts ¶ 323 (1965). This section of the Restatement is unavailing. By its terms, it applies only to the rendering of services which the defendant "should recognize as necessary for the protection of the other's person or things". We fail to see how this could encompass photocopying. See id., cmt.; see, e.g., Gradel v. Inouye, 421 A.2d 674, 677-78 (Pa. 1980) (medical care); Battle v. Phila. Housing Auth., 594 A.2d 796, 770 (Pa. Super. 1991) (security service). Further, one must actually render the services. See Restatement (Second) of Torts ¶ 323, quoted supra. Realizing this, Seaton contends that the requisite relationship is met where, although not rendering services, the defendant forces the plaintiff to accept services that are rendered. Pl.'s Answer to Mot. to Dismiss at 7-8. We will now examine this contention in the context of whether the Campus Copy employees are somehow servants of the University.

Seaton insists that "the unique facts attending the scenario at bar have not been visited by a court in this jurisdiction, i.e., where a student is coerced to patronize a store with a long-standing financial relationship with University, to fulfill course and employment requirements of that University." Id. at 7. But Seaton was not coerced to patronize Campus Copy. Seaton attended Campus Copy to photocopy maps to use in an application for a funding grant. Am. Compl. at ¶ 19. What we are left with is that Campus Copy Center is located on University property, Am. Compl. at ¶ 18, and that for certain courses at the University of Pennsylvania students are assigned

reading in the form of "bulk pack" materials that must be bought at Campus Copy Center, and Campus Copy Center "was enriched through maintaining charge accounts with many of the various academic and administrative departments of University," Am. Compl. at ¶ 16.

A master-servant relationship is an exception to the general rule against liability for failing to restrain others' torts. Brezenski v. World Truck Transfer, Inc., 755 A.2d 36, 41 (Pa. Super. 2000); Restatement (Second) of Torts § 315, cmt. But not every agent is a servant, Moon Area Sch. Dist. v. Garzony, 560 A.2d 1361, 1367 (Pa. 1989); Myszkowski v. Penn Stroud Hotel, 634 A.2d 622, 625 (Pa. Super. 1993), and courts must distinguish between servants and independent contractors. Moon Area, 560 A.2d at 1367; Myszkowski, 634 A.2d at 625. The salient feature of a servant is the exclusive authority of the defendant to control the other's method and manner of production. Id.; Feller v. New Amsterdam Cas. Co., 70 A.2d 299, 300-01 (Pa. 1950); Myszkowski v. Penn Stroud Hotel, 634 A.2d 622, 626 (Pa. Super. 1993); Restatement (Second) of Agency § 2 (1958). If the master "not only controls the result of the work but has the right to direct the way in which it shall be done" the agent is a servant or employee, whereas if "the person engaged in the work has the exclusive control of the manner of performing it" the agent is an independent contractor. Moon Area, 560 A.2d at 1367 (quoting Feller, 70 A.2d at 300).

Accepting the facts alleged in the amended complaint as true, they do not demonstrate a relationship between the University of Pennsylvania as master and the Campus Copy employees as servant. The individuals in question are employees of Campus Copy Center. The amended complaint does not allege that the University had the authority to direct their manner of producing photocopies. The amended complaint does not suggest that the University had the right to hire, fire, train, supervise or equip the Campus Copy employees. The mere facts that the University had charge accounts at Campus Copy and retained Campus Copy as the exclusive vendor of the reading materials assigned in certain classes does not make its employees employees or agents of the University. The master-servant doctrine thus provides no special relationship to make the University of Pennsylvania negligently liable for its action or inaction.

The facts alleged suggest two other conceivable bases for holding the University liable for the misconduct of employees of Campus Copy Center which we will briefly address. The University owns the property on which Campus Copy Center is located.¹⁶ Am. Compl. at ¶ 18. But the alleged status of the University as landlord concerns only its liability for property defects. See, e.g., Dinio v. Goshorn, 270 A.2d 203 (Pa. 1969);

¹⁶ The defendants proffer the affidavit of Leroy D. Nunery, the Vice-President of Business Services for the University of Pennsylvania, to refute this proposition. However, as stated supra at 2, we will not look outside the amended complaint and, for purpose of this motion, assume all facts alleged in the amended complaint to be true.

Smith v. M.P.W. Realty Co., Inc., 225 A.2d 227 (Pa. 1967); Deeter v. Dull Corp., 617 A.2d 336 (Pa. Super. 1992). Second, Seaton is a graduate student at the University, but it is firmly established that this fact in and of itself does not make the University the guarantor of Seaton's safety and legally responsible for failing to protect him from misconduct by third parties. Alumni Ass'n v. Sullivan, 527 A.2d 1209 (Pa. 1990).

The University thus cannot be liable to Seaton on his negligence claims.

6. Negligent Infliction of Emotional Distress

We will also grant the defendants' motion to dismiss the claim of negligent infliction of emotional distress. Pennsylvania jurisprudence limits such claims to the contemporaneous observance of injury to a close relative. See Brooks v. Decker, 516 A.2d 1380, 1381-82 (Pa. 1986).¹⁷

7. Sections 1985 and 1986

As discussed at length above, neither of these statutes applies to the incident at Campus Copy Center. They therefore necessarily fail as to Erling Boe and the University, as Seaton claims that their liability under these statutes is vicarious.

8. Residual claims --

¹⁷ And the physical injury that arouses distress must be produced tortiously, which is not so here since we have held Boe and the University did not tortiously injure Seaton. See Brooks, 516 A.2d at 1381; Brown v. Phil. of College of Osteopathic Med., 760 A.2d63, 868 (Pa. Super. 2000).

§ 1988, Declaratory Judgment

Since the statutory basis for an award of attorney's fees is eliminated, the dismissal of all substantive claims against Erling Boe and the University renders moot Seaton's cognate claims for a fee award and declaratory and injunctive relief.

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

GREGORY SEATON	:	CIVIL ACTION
	:	
v.	:	
	:	
UNIVERSITY OF PENNSYLVANIA,	:	
et al.	:	01-2037

ORDER

AND NOW, this 30th day of November, 2001, upon consideration of the motion to dismiss or, in the alternative, for summary judgment of the University of Pennsylvania and Erling Boe (docket entry number 13), and the motion for partial dismissal or, in the alternative, for partial summary judgment of Campus Copy Center, Ronald Shapiro, John Capman, Joseph Bristow and Robert McGrody (docket entry number 16), and the responses thereto, and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. The motion of the University of Pennsylvania and Erling Boe is GRANTED;

2. The motion of Campus Copy Center, Ronald Shapiro, John Capman, Joseph Bristow and Robert McGrody is GRANTED IN PART;

3. As to the University of Pennsylvania and Erling Boe, the Amended Complaint is DISMISSED;

4. As to Campus Copy Center, Ronald Shapiro, John Capman, Joseph Bristow and Robert McGrody, the First Cause of Action (42 U.S.C. §§ 1985 and 1986) and the Eighth Cause of Action (42 U.S.C. § 1988) of the amended complaint are DISMISSED and, further, all references to the Pennsylvania Constitution are STRICKEN from Paragraph 67 of the amended complaint; and

5. By December 17, 2001, the parties shall advise the Court of their views as to whether this Court should exercise its supplemental jurisdiction as to the remaining state law claims. See 28 U.S.C. § 1367(c)(3).

BY THE COURT:

Stewart Dalzell, J.