

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT C.A. No. 98-1986C

GAIL NELSON Plaintiff v. SALEM STATE COLLEGE, BOARD OF TRUSTEES OF SALEM STATE COLLEGE, COMMONWEALTH OF MASSACHUSETTS, NANCY D. HARRINGTON, individually and as President of Salem State College, STANLEY P. CAHILL, individually and as Vice-President of Salem State College, BRIAN C. PRAY, individually and as Director of Public Safety for Salem State College, MARGARET L. BISHOP, individually and as Dean of Salem State College, FREDERICK H. YOUNG, individually and as Director of the Small Business Development Center of Salem State College, JANICE FULLER, individually and as a Public Safety Officer of Salem State College, and VINCENT O'CONNELL, individually and as a Public Safety Officer of Salem State College, Defendants

STATEMENT OF UNDISPUTED FACTS AND LEGAL ELEMENTS

- 1) Salem State College is a public institution of higher learning located in Salem, Massachusetts, and is an agency of the Commonwealth. See complaint, ¶ 2.

- 2) Gail Nelson has been an employee of Salem State College since 1988. Exhibit A (Deposition of Gail Nelson), p.6, ln. 5-7.¹ In 1995, Gail Nelson worked as a receptionist and secretary in what was known as the Small Business Development Center. Ex. A, p.8, ln. 4-17.
- 3) The Small Business Development Center was operated by Salem State College to assist the public with developing small businesses. Exhibit B (Deposition of Allan Leavitt), p.19, ln.2-8. Frederick Young has acted as the director of the Small Business Development Center since 1991. Exhibit C (Deposition of Frederick Young), p.7, ln.23 - p.8, ln. 7.
- 4) The Small Business Development Center ("SBDC") was located at 197 Essex Street, Salem, Massachusetts, in office space on a section of Essex Street which is closed to vehicular traffic and is a walking mall with small shops. Ex.C, p.142, ln.2-16. That portion of Essex Street is a popular shopping area in downtown Salem, particularly during the summer months. Ex.C, p.142, ln.17- p. 143, ln.1.
- 5) The SBDC occupied the first floor of the office space at 197 Essex Street. The office was a wide-open, rectangular space, the interior of which was almost entirely observable from the street because a large plate glass window extended over the length of the storefront. Ex.A, p. 9, ln.13-15; Ex.C, p.145, ln.14-18; Exhibit D (Deposition of Janice Fuller), p. 39, ln.14-16; Exhibit E (Deposition of Margaret Bishop), p. 52, ln.8-20; Exhibit F (Deposition of Vincent O'Connell, Vol. II), p. 12, ln. 3-17. There were no shades on the front window. Ex. A, p. 25, ln.23-24.

¹Abbreviations to citations to deposition transcripts shall appear as follows: page, "p" followed by page number(s), and line, "ln" followed by line numbers.

- 6) There were no offices on the first floor although there were two partial partitions, which were about five to six feet high. Ex.F, p.14, ln.6 - p.15, ln.1; p.31, ln.15-24. The basement level of the office space had a large conference room, a few offices for another group sharing the space with the SBDC and a unisex bathroom which was available for use by the people working in the SBDC. Ex. A, p. 11, ln.5-15; Ex.B, p.13, ln. 3-18.
- 7) Gail Nelson worked at a desk located about fifteen feet from the front entrance to the SBDC. Ex. A, p.9, ln.13-15; Ex.C, p.141, ln.1-10. The front of the Center opens out directly onto Essex Street. Ex. A, p. 9, ln.13-15; Ex. C, p.141, ln.13-19.
- 8) The programs run out of the Center attracted visitors and members of the public from a variety of sources. For example, the SBDC shared the office space at 197 Essex Street with what was known as the Institute for Learning and Retirement, also known as the Explorer's, a program for adult learners who gathered together under the sponsorship of the College and ran educational programs. Ex.B, p. 14, ln. 3-20; Ex.C, p. 139, ln. 9-14. Approximately once a week, the Explorer's conducted a meeting which would be attended by fifty to sixty people, and sometimes as many as one hundred. Ex.C, p. 140, ln.1-15. People who visited the Center sometimes entered and immediately proceeded downstairs. Ex.A, p.30, ln. 2-16.
- 9) In addition, Salem State College operated a program known as the Downtown Center out of the offices at 197 Essex Street. Ex.B, p. 15, ln.1-24. The Downtown Center served as an outreach program to the community, inviting the general public to come into the space at 197 Essex Street to obtain information about the College and its programs. Id.
- 10) All of the seven to nine people who worked at the Center had keys to the space. Ex. A, p. 10, ln. 2-9.

- 11) In January, 1995, local Salem businessmen informed Frederick Young that a man named Wayne Koss, who used the SBDC's services from time to time, was being investigated by the City of Salem Police Department for various business practices. As a result, Mr. Young instructed Gail Nelson that Koss was not allowed to use the Center. Ex. C, p. 39, ln. 14 - p. 41, ln. 7; Ex.A, p.13, ln.7-20.
- 12) Later, in mid June, 1995, Frederick Young received a report that Wayne Koss was entering the office space at 197 Essex Street after normal business hours without authorization. Ex.C, p. 36, ln.1 - p. 47, ln.24. Unbeknownst to Mr. Young, Gail Nelson had provided Mr. Koss with access to the space and allowed him to use the facilities. Ex. A, p.12, ln. 7-21; p.17, ln.11-24.
- 13) After receiving this information, Mr. Young contacted Margaret Bishop and Anthony Cotoia, his supervisors at the College, who put him in touch with the Salem State College Police Department of Public Safety. Ex.C, p. 49, ln.3- p.50, ln.18; p.51, ln.3-9.
- 14) Mr. Young spoke to the chief of the Salem State Police Department of Public Safety, Brian Pray, who informed Mr. Young that the campus police would investigate this activity. Ex.C, p. 51, ln.24 - p.52, ln.15. Chief Pray had been the Director of Pubic Safety at Salem State College since 1986. Exhibit G (Deposition of Brian Pray Vol. I) p. 182, ln.14-21. Chief Pray holds a bachelor of science degree in Criminal Justice from Boston College and a Masters of Arts degree in the Administration of Justice from the University of Massachusetts. Ex. G, pp.176-177. Chief Pray also received training as a police officer at the Massachusetts State Police Academy. Ex. G, pp. 177-178.

- 15) Brian Pray spoke with Vincent O'Connell, another member of the Salem State Police Department, concerning how to investigate this incident. Exhibit H (Deposition of Brian Pray, Vol.II), p.81, ln.6 - p.82, ln.5. Vincent O'Connell had worked at the Salem State Police since 1989, and served as a police prosecutor for the College after receiving extensive training from a variety of police training institutions including the Criminal Justice Training Council. Exhibit I (Deposition of Vincent O'Connell, Vol.I) p.8, ln.8-11; p.18, ln.1- p.23, ln.24.
- 16) The police officers discussed investigative options such as posting a person to observe the premises. Ex.G, p.19, ln. 7 - p.21, ln. 23; Ex. H, p. 81, ln. 15 - p.82, ln.19. Ultimately, they decided that the campus police would install a camera in the interior portion of the Small Business Development Center to allow video surveillance to be done because it was difficult to post a person in the area. Id.
- 17) Salem State College had used a video camera to perform surveillance since the early 1990's when the camera was originally purchased due to the high rate of vending machine vandalism. Ex.I, p.92, ln.21 - p.93, ln.23. The camera had been purchased to conduct surveillance in areas where it would not make financial sense to conduct surveillance by other means. Ex. F, p.62, ln.12 - p.63, ln. 1.
- 18) Before installing the video camera at the SBDC, the Salem State Police had used it on several investigations. Ex.D, p.75 - p. 81; Ex. F, p.116, ln. 2 - p.117, ln 10. The Salem State Police Department first placed the camera to survey a public hallway in the Sullivan Building as part of an investigation into vandalism of a vending machine. Ex.I, p.94, ln.6 - p.96, ln.24. On two occasions the camera was placed in the hallway of the Horace Mann School operated by the College to monitor whether children were entering to vandalize the school. Ex.F, p.116, ln.2-

- p.117, ln.10; Ex.I, p.108, ln.2 - p.109, ln.18.
- 19) A form seeking authorization to install the camera in the Center was approved by Chief Pray. Ex.G, p.37, ln.1- p.38, ln.21. And see Form attached as Exhibit L.
- 20) On or about June 21, 1995, Inspector O'Connell and Officer Janice Fuller installed the camera in an emergency light fixture on the back wall of the SBDC. Ex.D, p. 29, ln. 4-6; p.34, ln.7 - p.37, ln.7. They installed the VCR containing the videotape in a closet. Id. The view from the camera showed the length of the office, the large plate glass window at the front and the front door. Ex.D, p. 39, ln.12-16.
- 21) The camera taped twenty-four hours a day. Officer Fuller viewed the tapes on behalf of the campus police, but she did not see anyone entering the premises after hours. Ex.D, p.44, ln.19 - p.46, ln.3.
- 22) The taping was originally scheduled to last for thirty days, and the officers thought that the investigation was not going anywhere. At some point in late July, Mr. Young spoke to Inspector O'Connell about the results of the taping and offered to change the tapes to allow the filming to continue for a period of time. Ex.C, p. 78, ln.9 - p.79, ln.4. As a result of this conversation, Mr. Young began to change the tapes and to send them to Inspector O'Connell by inter-office mail. Ex. C, p. 81, ln.12-23; p.85, ln.5-12.
- 23) The videotapes were not changed after Mr. Young went on vacation in the middle of August, 1995. Ex.F, p. 77, ln. 1-24. Alan Leavitt, the director of the Explorer's program, discovered the camera in October, 1995 because the officers had left the camera and VCR in place at the SBDC. Mr. Leavitt took and kept the video found at the SBDC. Ex.B, p.25, ln. 8-11; p.45, ln.1-12; p.48, ln.18-22.

24) Before this action was brought, only four persons at the College viewed the videos made at the Center. Alan Leavitt watched the tape he took from the SBDC. Id. Officer O'Connell viewed one tape to make sure that the machine worked properly and was taping an appropriate view of the Office. Ex.F, p. 40, ln.24 - p.41, ln.10. Chief Pray viewed one tape with Ms. Nelson and her sister after the videotaping ceased. Ex.G, p. 22, ln.12-22. Officer Fuller reviewed the videotapes on a daily basis. No one else at the College saw the tapes. Ex.D, p. 44, ln.14 - p.46, ln.3; p.110, ln.22-24.

26) Gail Nelson claims to have changed from time to time on the first floor of the office when the lights were on without any shades being drawn. Ex. A, p.25, ln.1-24. She also claims that she rubbed lotion on the upper part of her body during the time that filming occurred due to a sunburn. This occurred during the weekday when the SBDC was open. Id.; p.26, ln.6 - p.27, ln. 22. No one observed any of these activities. Ex. B, p.38, ln.6-14; Ex.D, p.110, ln.17- p.111, ln.1.

27) Margaret Bishop was the Dean of nontraditional programs at Salem State College. Ex. E p. 6, ln. 4-15. Her job included general supervision of the evening undergraduate programs, the downtown center, and the Small Business Development Center. Id. Her job responsibilities did not include supervising the campus police. Id. Margaret Bishop believed that the office space at the Small Business Development Center was a public space. Ex. E, p.53, ln.23 - p.54, ln.6. Before this incident, Dean Bishop was not aware of any video cameras being used on campus, except in the parking lots. Ex. E. p.23, ln. 1-19.

- 28) Nancy Harrington is the president of Salem State College. Exhibit J (Deposition of Nancy Harrington), p.7, ln.3-7. President Harrington believed that the office space occupied by the SBDC was a public area. Ex.J, p.57, ln.4 - p.59, ln.3.
- 29) Stanley Cahill believed that the SBDC constituted a public area. Exhibit K (Deposition of Stanley Cahill), p.134, ln. 15 - p.135, ln.6; p.136, ln.2-16. Before the video camera was discovered in the center in October, 1995, he had been aware of one other use of the video camera, which occurred in a public area of the Horace Mann School on campus. Ex.K, p. 25, ln. 5 - p.30, ln. 5; p.37, ln. 22 - p.38, ln. 5.
- 30) Brian Pray believed that this SBDC workplace was a public area. Ex. G, p.21, ln.1-7; p.40, ln.13-18; p.49, ln.23 - p.50, ln. 24.
- 31) Frederick Young believed that the office space where Gail Nelson worked constituted a public area. Ex. C, p.145, ln.6-18.
- 32) Vincent O'Connell believed that the Center did not afford its workers a reasonable expectation of privacy. Ex. F, p. 12, ln.3 - p.13, ln.8.
- 33) Janice Fuller believed that the area being filmed was an open area in which no one had an expectation of privacy. Ex. D, p.47, ln.12-17.

STATEMENT OF LEGAL ELEMENTS

1. Once a Rule 56 "motion is made and supported by affidavits and other supplementary material, the opposing party may not simply rest on his pleadings or general denials; he must 'set forth specific facts' showing that there is a genuine, triable issue." Smith v. Massimiano, 414 Mass. 81, 86 (1993).
2. To determine whether a search has taken place in the constitutional sense, the Court is to

- examine "(1) whether the defendant has manifested a subjective expectation of privacy in the object of the search and (2) whether society is willing to recognize that expectation as reasonable." Commonwealth v. Montanez, 410 Mass. 290, 301 (1991).
3. "It is simply implausible to suggest that society would recognize as reasonable an employee's expectation of privacy against being viewed while toiling in [an] open and undifferentiated work area." Vega-Rodriguez v. Puerto Rico Telephone Company, 110 F. 3d 174, 179 (1st Cir. 1997).
 4. A state cannot be liable under 42 U.S.C. §1983. Will v. Michigan Police Department 491 U.S. 58, 70-71 (1989). Similarly, an agency of the Commonwealth is not a "person" subject to suit for monetary damages. Laubinger v. Department of Revenue, 41 Mass. App. Ct. 598, 602 (1996) (agency not subject to suit for monetary damages under 42 U.S.C. §1983).
 5. State officials sued in their official capacities are not "persons" within the meaning of §1983. "[T]he law treats the action as [one] against the officials' office and hence against the state." O'Malley v. Sheriff of Worcester County, 415 Mass. 132, 141, n.5 (1993).
 6. Government officials performing discretionary functions are shielded from liability under the federal civil rights statute. Davis v. Scherer, 468 U.S. 183, 194 n.12 (1984) (immunity standard of Harlow applies in §1983 actions); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Government officials are entitled to qualified immunity if the acts complained of were (1) "discretionary functions", not ministerial in nature, and (2) not violative of "clearly established" statutory or constitutional rights at the time. Anderson v. Creighton, 483 U.S. 635, 639-41 (1987).

7. The doctrine of qualified immunity must be seen as protecting "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 344-345 (1986).
8. A plaintiff must prove the existence of a clear, factually-defined well-recognized right of which a reasonable official should have known. Id.; Anderson v. Creighton, 483 U.S. at 640-641.
9. A supervisor may not be liable under § 1983 on a theory of respondeat superior. Monell v. New York City Department of Social Services, 436 U.S. 658, 694 (1978). A supervisor may be held liable only on the basis of his or her own affirmative acts or omissions which result in constitutional harm, Figueroa v. Apnte Roque, 864 F.2d 947, 953 (1st Cir. 1989), either through direct participation or condonation or through tacit authorization of the conduct of subordinates. Camillo-Robles v. Zapata, 175 F.3d 41, 44 (1st Cir 1999).
10. To sustain a claim for invasion of privacy, the invasion must be both unreasonable and substantial or serious. Schlesinger v. Merrill Lynch et al., 409 Mass. 514, 518 (1991).
11. The Commonwealth, Salem State College and its Board of Trustees are immune from any claim for the intentional tort of invasion of privacy under G.L. c. 258 §10(c). G.L. c. 258 §10(c) provides that sections one through eight of c. 258 do not apply to "c) any claim arising out of an intentional tort, including assault, battery, false imprisonment...invasion of privacy...."

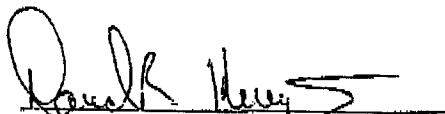
12. G.L. c. 258 §2 sets forth the general terms under which public employers may be liable for the acts of public employees and it provides that “[p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting in within the scope of his office or employment.”
13. Common law qualified immunity bars G.L. c. 214 § 1B claims when the acts complained of were discretionary and when the defendants acted in good faith. Duarte v. Healy, 405 Mass. 43 (1989).
14. The Massachusetts Tort Claims Act specifically exempts from liability claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee”. G.L. c. 258 § 10(b).
15. The decisions of law enforcement officers regarding whether, when, how, and whom to investigate, and whether and when to seek warrants for arrest are based on considerations of, and necessarily affect, public policy. So long as they are within the bounds of the law, and therefore within the officers’ discretion, they are public policy decisions. The conduct of law enforcement officials in investigating potentially criminal conduct and in seeking warrants for the arrest of those whom they investigate, are discretionary functions and therefore fall within the exception in § 10(b). Sena v. Commonwealth, 417 Mass. 250, 256 (1994).

- 16. Absent a showing that the plaintiff will be the subject of future wrongful video surveillance, she cannot obtain injunctive relief. Los Angeles v. Lyons, 461 U.S. 95 (1983).

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By their Attorneys,

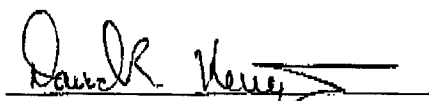
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Dated: May 3, 2002

CERTIFICATE OF SERVICE

I, David R. Kerrigan, hereby certify that I have this date, May 3, 2002, served the foregoing document upon the attorney of record, by hand delivering a copy to: Jeffrey Feuer, Goldstein & Feuer, 678 Mass. Ave., Cambridge, MA 02134 & John Reinstein, American Civil Liberties Union, 99 Chauncy St., Boston, MA 02111.


 David R. Kerrigan