



**DEFENDANTS' RESPONSE TO PLAINTIFF'S UNDISPUTED FACTS.**

1. Admitted with Clarification. The Library Board controls the assets on behalf of the City. (Birmingham City Code, Section 2-5-71 et. al).
2. Admit.
3. Admitted with Clarification. The Library Board controls the assets on behalf of the City. (Birmingham City Code, Section 2-5-71 et. al).
4. Admit.
5. Admit.
6. Admit.
7. Admit.
8. Admit.
9. Admit.
10. Admit.
11. Admitted with Clarification. The Library Board controls and manages assets and employees on behalf of the City. (Birmingham City Code, Section 2-5-71 et. al).
12. Admitted with Clarification. Plaintiff is employed by the City.
13. Admit.
14. Admit.

15. Admitted in Part, denied in Part. Defendant admits that Plaintiff is an employee of the City and that she was subject to random, criminal acts by patrons at the Birmingham Library Branch as outlined in her complaints made in three (3) reported sexual based incidents involving her in the downtown branch from 2009 to 2010. (Wilson depo, p. 67-93; Attached Exh. 5)
16. Denied
17. Denied.
18. Denied.
19. Denied.
20. Denied.
21. Denied.
22. Denied.
23. Denied.
24. Admitted in part as to working on third floor, Denied in part as to male co-employees. (Robert Jones depo. P. 13-14, 34-40)
25. Denied. (Robert Jones depo. P. 13-14, 34-40)
26. Admit.
27. Admitted in part, dented in part. Defendant admits that Plaintiff

outlined her complaints to security and made in three (3) reported sexual based incidents involving her in the downtown branch from 2009 to 2010. (Wilson depo, p. 67-93; Attached Exh. 5),

28. Admitted in part, dented in part. Defendant admits that Plaintiff outlined her complaints to security and made in three (3) reported sexual based incidents involving her in the downtown branch from 2009 to 2010. (Wilson depo, p. 67-93; Attached Exh. 5),

29. Admitted in part, dented in part. Defendant admits that Plaintiff outlined her complaints to security and made in three (3) reported sexual based incidents involving her in the downtown branch from 2009 to 2010. (Wilson depo, p. 67-93; Attached Exh. 5),

30. Admitted in part, dented in part. Defendant admits that Plaintiff outlined her complaints to security and made in three (3) reported sexual based incidents involving her in the downtown branch from 2009 to 2010. (Wilson depo, p. 67-93; Attached Exh. 5),

31. Admit.

32. Admit.

33. Admit.

34. Admit.

35. Admit.
36. Admit.
37. Admit.
38. Admitted in part, Denied in Part. Defendant denies Sandra Lee was “third in command”. There is no testimony stating she is “third in command”. Lee is not in upper management but one of several coordinators at the library. Lee does not attend meetings with the Director or Associate Director. (Lee depo. 77-78)
39. Admit.
40. Admit.
41. Admit.
42. Admitted with Clarification. Lee never defined what type of sexual conduct or specifically recalled in what nature it was being said. (Lee depo. 46-48).
43. Denied.
44. Admitted with Clarification. Lee never defined what type of sexual conduct or specifically recalled in what nature it was being said. (Lee depo. 46-48).
45. Admit.

46. Admit.
47. Admit.
48. Admit.
49. Denied. (Major depo. P. 8-9, 12)
50. Admit
51. Denied. (Major depo. P. 8-9, 12)
52. Admit.
53. Admit.
54. Admitted with clarification. There is no evidence that neither Ms. Major nor Mike Lee is supervisor of the Plaintiff and their relationship is not a violation of Library policy.
55. Admit.
56. Admit.
57. Admit.
58. Admit
59. Admit.
60. Admit.
61. Admitted with Clarification. Ms. Lee is not the supervisor over security and had no authority to investigate. (Ms. Lee depo. 67)

62. Admitted with Clarification. Ms. Clotfelter is not the supervisors over security and had no authority to investigate. (Clotfelter depo. 64)
63. Admit.
64. Denied. (Hall depo. 76-77)
65. Admit.
66. Admit.
67. Admit.
68. Denied (Blalock depo. 188-192).
69. Denied. (Lee depo.49-53)
70. Admit.
71. Admit.
72. Admit.
73. Admit.
74. Admit.
75. Admitted with Clarification. Computers were place in common area per grant. (Blalock depo.31-32, 83-85).
76. Admitted with Clarification. Computers were place in common area per grant. (Blalock depo.31-32, 83-85).
77. Denied. Security guards routinely patrolled the entire library. The

“Computer Common area” was placed there in January and thus security patrols started in January. (Lee depo. 17-18)

78. Admit.

79. Admit.

80. Admitted with Clarification. Lee also admitted that the security was given support and handling the situation. (Lee depo. 28-29)

81. Admit.

82. Admit.

83. Admit.

84. Admitted with Clarification. Lee did not feel that Graham had any experience or qualified to deal with any security issues that the library may be facing. (Lee depo.71-72).

85. Admitted with Clarification. Lee did not feel that Graham had any experience or qualified to deal with any security issues that the library may be facing. (Lee depo.71-72).

86. Admitted with Clarification. Lee did not feel that Graham had any experience or qualified to deal with any security issues that the library may be facing. (Lee depo.71-72).

87. Admitted with Clarification. Clotfelter never inquired with Lee or

any security guard and this was her personal opinion. (Clotfleter depo- 81-83).

88. Admit.

89. Admit.

90. Admit.

91. Denied. Library had an official policy in effect to ban individuals and had banned individuals. Policy was not written. (Blalock depo 145-150, 198-201)

92. Denied.

93. Admit.

94. Admit.

95. Admit

96. Admit.

97. Admit.

98. Admit.

99. Admit.

100. Admit.

101. Admit.

102. Admitted with Clarification. Blalock complete quote "I felt we had

not done an adequate job of training all staff in handling people and providing good customer service and knowing what to do when that broke down.” Blalock was referencing to better customer service for patrons in general. (Blalock depo. p. 79-80).

103. Admit.
104. Admitted with clarification. A policy manual already existed as well as a patron behavior policy. The Library has an internet use policy and a patron behavior policy. (Wilson depo, p.36-39; Blalock depo, p. 312-319, Defendants’ Exhs. 1, 2, 3, See also [www.bplonline.org](http://www.bplonline.org)).
105. Admitted with Clarification. Security has stations and patrols. (Blalock depo. 91-98).
106. Admitted with Clarification. Security has stations and patrols. (Blalock depo. 91-98).
107. Admitted with clarification. Security screens were determined not to be effective but promoted criminal and obscene behavior. (Blalock depo. 102-103).
108. Denied. Patrons wanting to access the internet services at the Library are required to accept the policies that they will not violate the

criminal laws of the State of Alabama and view pornographic websites. (Wilson depo, p. 40-59; Blalock depo, p. 103, 312-319).

109. Denied. Patrons wanting to access the internet services at the Library are required to accept the policies that they will not violate the criminal laws of the State of Alabama and view pornographic websites. (Wilson depo, p. 40-59; Blalock depo, p. 103, 312-319).

110. Admitted in part and denied in part, Patrons wanting to access the internet services at the Library are required to accept the policies that they will not violate the criminal laws of the State of Alabama and view pornographic websites. (Wilson depo, p. 40-59; Blalock depo, p. 103, 312-319). Further, Patron behavior policy is distributed in paper tear out form. (Blalock depo, p. 105-108)

111. Admitted with Clarification. Patrons wanting to access the internet services at the Library are required to accept the policies that they will not violate the criminal laws of the State of Alabama and view pornographic websites. (Wilson depo, p. 40-59; Blalock depo, p. 312-319).

112. Admitted with Clarification. Policy in place limiting time on computer usage. (Blalock depo. 36,40)

113. Admitted with Clarification. Policy in place limiting time on computer usage. (Blalock depo, 36, 40)
114. Admit.
115. Admitted with Clarification. Patrons wanting to access the internet services at the Library are required to accept the policies that they will not violate the criminal laws of the State of Alabama and view pornographic websites. (Wilson depo, p. 40-59; Blalock depo, p. 312-319).
116. Admitted with Clarification. Patrons wanting to access the internet services at the Library are required to accept the policies that they will not violate the criminal laws of the State of Alabama and view pornographic websites. (Wilson depo, p. 40-59; Blalock depo, p. 312-319).
117. Admit.
118. Denied. (Ryan depo. 73-76)
119. Denied. (Ryan depo. 73-76)
120. Admit.
121. Admit
122. Admit.

123. Admitted with Clarification. Librarians, male and female, that experience criminal behavior by patrons are to leave the situation, required to contact security and write a security report. (Blalock depo. 230-232)
124. Admitted with Clarification. Librarians, male and female, that experience criminal behavior by patrons are to leave the situation, required to contact security and write a security report. (Blalock depo. 230-232)
125. Admitted with Clarification. Librarians, male and female, that experience criminal behavior by patrons are to leave the situation, required to contact security and write a security report. (Blalock depo. 230-232)
126. Admitted with Clarification. Librarians, male and female, that experience criminal behavior by patrons are to leave the situation, required to contact security and write a security report. (Blalock depo. 230-232)
127. Denied.
128. Denied.
129. Denied.

130. Denied. Based on the security reports and evidence, the Plaintiff failed to take the appropriate steps to report. (Wilson depo, p. 67-93; Attached Exh. 5)
131. Admitted with Clarification. Lee was commenting on Security. Lee is not in upper management but one of several coordinators at the library. Lee does not attend meetings with the Director or the associate director. (Lee depo. 77-78)
132. Admit.
133. Admitted with Clarification. Blalock was commenting on security. (Blalock depo. 226-227)

### **ANALYSIS OF PLAINTIFF'S CLAIMS AND REBUTTAL ARGUMENT**

As stated in the Defendants' Summary Judgment Brief, the Plaintiff, Barbara Wilson, attempts to hold the Birmingham Public Library and the City of Birmingham liable for the random criminal acts of patrons entering the public library. The Plaintiff does not allege a sexually hostile environment based on the actions of her co-employee(s) at the Birmingham Public Library, but instead random, at times unidentifiable, patrons that are entering the library and using the Library's computers to view pornographic images and random patrons entering the Library and committing obscene, criminal sexual acts. (Wilson depo, p.35-36;

*Complaint*, paragraphs 18, 19, 20).

The Birmingham Public Library is a public institution and as such does not have the ability to deny entry to anyone. However, the Library has rules that are enforced in order to maintain a pleasant atmosphere that is conducive to quiet study, reading, choosing materials, and other information seeking behavior. Everyone is welcome at the Library but everyone must follow the rules. The Library is a public building it can only react to improper behavior but it is very difficult to prevent it. The Library has policies and procedures in place that are designed to help maintain an atmosphere that is not conducive to disruptive and/or illegal behavior by our patrons.

Plaintiff's sole claim against the City and the Board are brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et. seq.* and the Civil Rights Act of 1991. To prove a hostile work environment, the plaintiff must prove: (1) that she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment must have been directly based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working

environment; and (5) a basis for holding the employer liable. Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir.1999) (en banc) (citation omitted), Reeves v. C.H. Robinson Worldwide, Inc. ,594 F.3d 798 (11<sup>th</sup> Cir. Jan. 20, 2010). No court has ruled that Title VII of the Civil Rights Act of 1964 has been expanded to cover sexual, obscene criminal actions of patrons in a public facility. The Plaintiff has failed to meet the above elements as discussed below.

**1. Birmingham Library Board**

The Birmingham Public Library, which is operated by the Board, is administrative division or department of the City of Birmingham. As such, a department is not a legal entity subject to suit in its own capacity. White v. Birchfield, 582 So. 2nd 1085, (Ala. 1991), Dean v. Barber, 951 F.2d 1210 (11<sup>th</sup> Cir. 1992).

The Plaintiff testified that she was paid by the City and was employed by the City. (Wilson depo, p. 103; Lollar depo, p 8-9). Pursuant to the Birmingham City Code, Section 2-5-71 et. al., the Board members are appointed by the Birmingham City Council to maintain, operate and control the assets, property, employees, etc. of the Birmingham Public Library on behalf of the City. (Blalock depo, p. 40-44, 49; Defendants' Exh. 4) The Deputy Director of Personnel for the City, Barry Lollar, stated that the Library is considered a Department of the City of

Birmingham and is treated as such. (Lollar depo, p.10). All operating funds to the Library are provided by the City. (Blalock depo, p. 40-44; Lollar Exh. 3, p. 11). The Library's budget is presented by the Board to the Mayor on a yearly basis and approved by the City Council as part of the normal budgetary process. The Library and Board maintain no independent assets. (Blalock depo, p.40-44; Defendants' Exh. 4). The Defendant, City, has submitted that it is the Plaintiff's employee. Having the Library Board as a Defendant serves so no legitimate purpose. The Title VII claim against the Board is due to be dismissed.

## **2. Statute of Limitations Defense**

Plaintiff's response is simply without merit. Wilson's claims that predate her EEOC charge by more than 180 days, calculated from the date the claim was filed, are time-barred. In the instant case the Title VII claim was filed with the EEOC on October 7, 2009. (Wilson depo, attached Defendants' Exh. 2). The Court can only consider allegations of sexual hostile conduct that occurred on or after April 10, 2009. Any such incidents or claims before April 10, 2009 would have been separate and discrete acts, for which plaintiff did not timely file suit. Thomas v. Kroger Co., 24 F.3rd 147 (11th Cir. 1994); Jones v. Preuit & Mauldin, 876 F.2d 1480 (11th Cir. 1989). Plaintiff's incidents, allegations or complaints of 2007 and 2008 are not viable.

**3. Harassment not directed to Plaintiff based on her sex or gender**

Title VII prohibits discrimination, including harassment that discriminates based on a protected category such as sex. The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." (emphasis added) Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (Ginsburg, J., concurring)).

The Plaintiff argues that the acts were based on the fact that she is female and male librarians did not encounter patrons committing viewing pornography or committing obscene, criminal sexual acts. The Plaintiff states in her brief that: "None [sexual acts] were perpetrated toward males." and "Meanwhile, there is no evidence suggesting male employees were similarly the subject of sexual comments, touching or advances." (Plaintiff's Brief p.36). This is simply false.

The Plaintiff took the deposition of Robert Jones, a male librarian employed at the Birmingham Public Library and close friend of the Plaintiff. Coincidentally, the Plaintiff did not submit Mr. Jones' deposition as evidence. Mr. Jones testified that he also observed and personally witnessed patrons committing obscene, illegal and criminal acts directed towards him, including patrons viewing pornographic

websites in violation of the library's policies. Specifically, Mr. Jones testified under oath that he personally encountered and witnessed a male in the library's bathroom masturbate in the stall directly next to him and look directly at him. (See attached Robert Jones depo, p. 13-16, 34-41). Mr. Jones further testified under oath that he observed and personally witnessed patrons coming on to staff members, patrons kissing, etc. (Robert Jones depo, p. 13-16, 34-41) David Ryan, another male librarian employed at the Birmingham Public Library, testified under oath that he personally observed pornographic images on the computer and laptops used by patrons. (Ryan depo, p. 10-26, 72-77).

Further, the evidence presented in the Defendants' initial brief proves that patrons, both male and female, have encountered other patrons committing obscene, illegal and criminal acts and reported it to security. (Wilson depo, Defendants' attached Exh. 5; Blalock depo, Plaintiff's attached Exh. 33). The majority of incidents were reported by patrons, not by the plaintiff or other librarians. (Wilson depo, Defendants' attached Exh. 5; Blalock depo, Plaintiff's attached Exh. 33). The actions of these random patrons are not directed towards the Plaintiff solely based on her gender or sex. Plaintiff's argument that she solely encountered patrons committing obscene, illegal and criminal acts is false. The evidence clearly shows that the Plaintiff has not been singled out due to her sex

and that others, including male and female patrons, and male librarians, were also exposed to patrons committing criminal acts. Male librarian's employment was also affected. The Plaintiff has failed to prove a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et. seq.* and the Civil Rights Act of 1991 and meet one of the essential elements. As to the single Federal claim, summary judgment for the Defendants is appropriate.

#### **4. Not Severe and Pervasive**

The Plaintiff cannot present evidence that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and created a discriminatorily abusive working environment.

In this matter, as argued in the Defendants' Initial Brief, in reviewing the total number of incidents involving the Plaintiff in which she claims it created a sexually hostile environment there were three (3) from 2009-2010. (Wilson depo, attached Exhibit 5, Blalock depo, attached Exh. 33). The Plaintiff complains of three (3) isolated random incidents over a two (2) year time span. The incidents regarding the Plaintiff in 2007 and 2008 are time barred and cannot be considered. Clearly, these three (3) isolated random incidents would not be pervasive and severe. Plaintiff now attempts via an affidavit to increase the number of incidents, however the Plaintiff never testified to these "new incidents" and further did not

report them to security in incident forms (like she had done other times) nor are such incidents memorized in “monthly reports” submitted as evidence. (Balock depo, Plaintiff’s attached Exh. 33):

Further, in light of the fact that the downtown branch on the average has about 440,000 people enter the facility on a yearly basis and roughly 6500 a month; these incidents would not be pervasive and severe. (Exh. 2, p 319-322, Defendants’ Exh. 4). Even assuming that the Plaintiff’s additional incidents via her affidavit are true, based on the above numbers of patrons entering the library it would still not be pervasive and severe. As the Plaintiff claims patrons are creating the hostile environment, the total number of patrons entering the library would be relevant as evidence of harassment is considered both in frequency and in the totality of the circumstances. Further, the Plaintiff’s co-employees have denied that they are being inundated with sexually images and further that they are not in a sexually hostile environment. (Ryan depo. p 77-78, Clotfelter depo, p. 78-85).

The Plaintiff has failed to prove a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et. seq.* and the Civil Rights Act of 1991. As to the single Federal claim, summary judgment for the Defendants is appropriate.

## 5. **Birmingham Public Library Polices in Effect**

The Defendants have proven that it has established policies and procedures to deter patrons entering the library from committing criminal acts. First, since October 25, 2001, the Birmingham Public Library has had a policy informing all of its employees that due to public nature of the job, they may be exposed to images, etc. that they may find to be objectionable. (Blalock depo, p. 312-319, Defendants' Exh. 1).

Second, the Birmingham Public Library under state and federal law is not allowed to provide public internet access to pornographic websites. The Library has enacted an expansive internet policy which attempts to stop such actions. (Wilson depo, p.36-39, Defendants' Exh. 3, Blalock depo, p. 312-319, Defendants' Exh. 2). Under the Library's internet policy, a patron can only access the Library's internet by first filling in their name and library card number on the computer screen. Once logged in, the patron is required to accept the library's internet policy. If they do not, they are barred from accessing the internet. If a patron chooses to violate the law and policy, all computers in the library have a filter program call *8e6.com* that filters the patron from viewing pornographic websites. The Library began using internet filters in 1998 and has updated the software continuously. (Blalock depo, p. 312-319).

If an individual is caught viewing a pornographic website by a librarian or another patron complains, all librarians, including the Plaintiff, can remotely send a warning message to the patron or completely shut down the objectionable website. Contacting security is also mandated. The Library uses a program called *Cybrary.net* to achieve such. No librarians are required to approach or confront any patron. Normally, the offending patron that is caught runs out of the library. (Wilson depo, p. 61). In addition, any websites that are determined to be in violation of Library's internet policies are reported to the Library's Information Technology Department and from that point on are permanently blocked. The Plaintiff is well aware of this policy and had used it. (Wilson Depo, p.40-59; Blalock, p. 312-319).

Third, the Birmingham Public Library has enacted a Patron Behavior Policy. (Wilson depo, Defendant's Exh. 4; Exh. 2, Exh. 2, p. 312-319, Defendants' Exh. 3). The Birmingham Public Library has security personnel to enforce the patrons polices of the Library. (Blalock depo, p. 86-102, 108-131). The Patron Behavior Policy is made available in tear off pamphlets that are easily distributed to patrons entering the facility. The policy is in effect to control the behavior of patrons in the public facility. The Plaintiff is well aware of this policy.

Of course, no patron behavior policy can stop a patron with the intent on

violating the rules and the law. The evidence submitted show that the acts of the patrons entering the library are criminal in nature. The Birmingham Public Library has adopted policies that it does not permit, condone, encourage, or tolerate harassment or illegal acts of any sort through the use of any means, whether those means are the Internet, books from the library, patrons' activities or materials brought to the library. There is absolutely no way the Defendants can predetermine who will violate the rules or the law. As to the single Federal claim, summary judgment for the Defendants is appropriate.

## **CONCLUSION**

Based on the undisputed facts, the relevant law and considering them in the light most favorable to the Plaintiff, the Defendants' motion for summary judgment on claims predicated on hostile environment is due to be Granted.

Respectfully submitted,

*/s/Fredric L. Fullerton, II*  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on September 2, 2011 I electronically filed the foregoing with the Clerk of the Court using the e-filing system which will send notification to the following:

Adam P. Morel, Esq.  
517 Beacon Parkway West  
Birmingham, AL. 35209

*/s/Fredric L. Fullerton, II*  
Of Counsel

## **EXHIBITS**

1. Deposition of Robert Jones with attached Defendants' Exhibit 1.