

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

BARBARA ANN WILSON,)	
Plaintiff,)	
)	CIVIL ACTION NO.
v.)	
)	CV-10-KOB-2386
CITY OF BIRMINGHAM, et al.,)	
Defendants.)	

PRETRIAL ORDER

The court held a pretrial conference in the above case on **February 16, 2012**, wherein, or as a result of which, the following proceedings were held and actions were taken:

1. Appearances. Appearing at the conference were:

For Barbara Wilson: Adam Morel

For The City of Birmingham: Frederic L Fullerton, II, Nicole E. King

For Birmingham Library Board: Frederic L Fullerton, II, Nicole E. King

2. Nature of the Action, Jurisdiction and Venue.

(a) The nature of this action is as follows:

Plaintiff, Barbara Wilson (“Wilson” or “Plaintiff”), brings this action for alleged injuries against the Defendants, the City of Birmingham’s (“the City” or “Defendant”)

and the Birmingham Library Board (“the Board” or “Defendant”) 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;

- (b) The court has subject matter jurisdiction of this action under the following statutes, rules or cases: 42 U.S.C. § 2000(e) *et. seq.*
- (c) All jurisdictional and procedural requirements prerequisite to maintaining this action **have** been met.
- (d) Personal jurisdiction and/or venue **are not** contested.

3. Parties and Trial Counsel. The parties and designated trial counsel are correctly named as set out below.

Note: Counsel appearing at the conference will be required to proceed at trial notwithstanding the naming of others as designated trial counsel.

	Parties:	Trial Counsel:
Plaintiff:	Barbara Wilson	Adam Morel
Defendant:	The City of Birmingham	Fredric L. Fullerton, II Nicole E. King
	The Birmingham Library Board	Fredric L. Fullerton, II Nicole E. King

4. Pleadings. The following pleadings have been allowed. The answers filed to the original complaint suffice as answers to the Amended Complaint, without refileing:

(a) **Amended Complaint** Filed October 21, 2010

(b) **Answers** September 20, 2010 and November 3, 2010

5. Statement of the Case.

(a) Agreed Summary.

The Plaintiff, Barbara Wilson, sues the City of Birmingham and the Birmingham Library Board alleging that, from late 2002 until November 2010, she worked in a sexually hostile environment at the downtown branch of the Birmingham public Library. Ms. Wilson alleges that the City and Library management failed to address the sexually hostile work environment which she alleges was created by Library patrons. Ms. Wilson alleges that she is a victim of a sexually hostile environment in two ways: (1) Patrons used the Library's computers to view pornographic images; and (2) Patrons entered the Library and committed sexually obscene acts. Plaintiff alleges that the Defendants allowed and/or failed to adequately address the sexually hostile environment in the library.

The Defendants deny each and every material allegation. The Defendants deny that the Plaintiff worked in a sexually hostile environment. The Defendants deny that

they allowed and/or failed to adequately address the sexually hostile environment in the library.

(b) Stipulated Facts.

Plaintiff began working for the City of Birmingham as a Librarian II at the Main Downtown Branch of the Birmingham Public Library in August 2002. Since November 2010, Plaintiff is no longer employed with the Defendants. Plaintiff worked in the Business, Science and Technology section at the Linn Henley and East Building located at the Main Downtown Branch at 2100 Park Place, Birmingham, Alabama 35203.

(c) Contested Issues of Fact.

The Plaintiff's allegation that the Defendants allowed and/or failed to adequately address a sexually hostile work environment at the Birmingham Public Library.

(d) Agreed Applicable Propositions of Law.

In this case the Plaintiff makes a claim under the Federal Civil Rights statute that prohibits employers from discriminating against their employees in the terms and conditions of their employment because of the employee's sex or gender.

More specifically, the Plaintiff claims that she was subjected to a hostile or abusive work environment by non-employees entering the Birmingham Public Library because of sexual harassment which is a form of prohibited employment

discrimination.

To prevail on this claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

- First : That the Plaintiff was subjected to a hostile or abusive work environment because of her sex or gender;
- Second : That such hostile or abusive work environment by a non-employee was permitted by the Defendants; and
- Third : That the Plaintiff suffered damages as result of such hostile or abusive work environment.

When a hostile or abusive work environment is created and carried on by non-employees, the Defendant, as the Plaintiff's employer, will be responsible or liable for permitting such behavior only if the Plaintiff proves by a preponderance of the evidence that the Plaintiff's supervisor or successively higher authority knew (that is, had actual knowledge), or should have known (that is, had constructive knowledge), of the hostile or abusive work environment and permitted it to continue by failing to take remedial action.

To find that a supervisor had constructive knowledge of a hostile or abusive work environment—that is, that the supervisor should have known of such environment—the Plaintiff must prove that the hostile or abusive environment was so pervasive and so open and obvious that any reasonable person in the supervisor's position would have known that the harassment was occurring. If you determine that

the Plaintiff was in fact exposed to a hostile or abusive work environment, you must find that the discriminatory harassment to which the Plaintiff was exposed was so pervasive and unconcealed that knowledge on the part of the supervisor may be inferred.

If you find that the Plaintiff has proved each of the things she must prove in support of her claim, you will then consider the Defendant's affirmative defense to that claim.

To prevail on the affirmative defense, the Defendant must prove each of the following facts by a preponderance of the evidence:

First : That the Defendant exercised reasonable care to prevent any sexually harassing behavior in the workplace; and

Second : That the Plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the Defendant to avoid or correct the harm or otherwise failed to exercise reasonable care to avoid harm.

(e) Plaintiff's Position.

The Defendants have subjected the Plaintiff to a sexually hostile work environment by allowing and/or failing to adequately address the matter. She has reported sexual harassment in compliance with the Defendants' policies.

Among other unlawful actions and/or omissions, the Defendants (1) failed to adequately communicate Ms. Wilson's complaints up the chain of command; (2) failed to adequately staff the security department; (3) failed to adequately train the security department; (4) failed to adequately train staff on how to use CybraryNet or otherwise deal with problem patrons; (5) failed to centralize computers for more effective patrol and monitoring by security; (6) failed to put a video surveillance camera in the computer area; (7) failed to investigate claims of improper, sexually harassing conduct by their own security staff; (8) failed to protect Ms. Wilson from additional, unnecessary exposure to pornography by, instead, requiring her to view more of it by documenting patron's illicit behavior on the computers; and (9) operated under a one person Human Resources Department with responsibility for addressing sexual harassment and all other personnel issues for 280 employees in 17 branches across the city, while that person was in a long-term romantic relationship with the Chief of Security she was charged with overseeing.

The Defendants' allowance of and/or failure to adequately address the hostile work environment has caused the Plaintiff substantial damages which include loss of wages (back and front pay), emotional distress and substantial attorney's fees. She has mitigated her damages to the extent possible and required by law.

Each of the Defendants is subject to suit under Title VII of the Civil Rights Act, as amended.

(f) Defendants' Position.

The Defendants deny each and every material allegation. The claims of the Plaintiff are untrue and the Defendants are not guilty. The Plaintiff does not work in a sexually hostile environment. The Defendants deny that they allowed and/or failed to adequately address the sexually hostile environment in the library. The Defendants deny they are legally responsible under Title VII for the actions of non – employees.

The Defendants plead that they provided adequate security and training.

The Defendants plead 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 sexual, criminal acts.

The Defendants plead that the Plaintiff has violated the Birmingham Public Library policies and the Plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities provided by the Defendants to avoid or correct the harm or otherwise failed to exercise reasonable care to avoid harm.

The Defendants have an anti-sex discrimination/hostile work environment policy which is enforced, and all employees and public are required to comply.

The Defendants have proven that they have established policies and procedures

to deter patrons entering the library from committing criminal acts. The Defendants plead that patrons wanting access to the internet services at the Birmingham Public Library are required to accept the policies that they will not violate the criminal laws of the State of Alabama and view pornographic and other objectionable websites. The Defendants plead that the Birmingham Public Library has used filtration software since 1998. Defendants plead that they properly trained their employees. The Birmingham Public Library currently and at the time of the Plaintiff's employment, uses *8e6.com* and *Cybrary.net* to stop access to pornographic websites by patrons.

Since 2001, the Library has a policy that informs its employees that working in a public facility they may encounter pictures, acts, sounds, etc. including internet access that may be objectionable to them.

Plaintiff's "subjective perception" to the harassment as sufficiently severe and pervasive to alter the terms or conditions of employment is not objectively reasonable. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

Plaintiff's encounters with general vulgarity or references to sex that are indiscriminate in nature are not actionable. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

The Plaintiff's injury and damages, if any such were sustained, were a consequence of her own willful, wanton and unlawful conduct.

The Plaintiff failed to mitigate her damages.

The Defendants deny that the Plaintiff is due compensatory, actual or punitive damages, attorney's fees or costs of any type.

The Defendants deny that they can be liable for punitive damages for federal claims. §6-11-26, Code of Alabama, 1975, City of Newport News v. Facts Concerts, 453 U.S. 247, 101 S. Ct. 2748 (1981).

6. Discovery and Other Pretrial Procedures.

(a) All discovery in this case was completed by July 1, 2011. No further discovery is required.

(b) The Standard Pretrial Procedures specified on Exhibit A to the Pretrial Order hereto are adopted as part of this Order.

(c) Pending Motions.

No pending motions remain.

(d) Motions In Limine. Motions in limine must be filed at least **two weeks in advance of the scheduled trial date** and shall be accompanied by supporting memoranda.

7. Trial [Jury Case]. At least **five business days** prior to trial, the parties shall present to the court any special questions or topics for **voir dire** examination of the jury venire, and, to the extent the same can be anticipated, any requests for **instructions to the jury** (including extracts of any statutes on which instructions are requested). (See specific requirements for Jury Instructions in Exhibit A.) By the date

set for trial, the parties shall file and serve any requested **special verdict forms** or **interrogatories for submission to the jury**. These submissions should be served on opposing counsel and emailed in WordPerfect format to chambers (Bowdre_chambers@alnd.uscourts.gov).

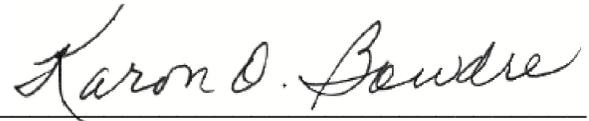
8. **Advisory for Limiting Personal Information in Transcripts and Exhibits.**

The judiciary's privacy policy restricts the publication of certain personal data in documents filed with the court. The policy requires limiting Social Security and financial account numbers to the last four digits, using only initials for the names of minor children, and limiting dates of birth to the year. However, if such information is elicited during testimony or other court proceedings, it will become available to the public when the official transcript is filed at the courthouse unless, and until, it is redacted. The better practice is for you to avoid introducing this information into the record in the first place. Please take this into account when questioning witnesses, presenting documents, or making other statements in court. If a restricted item is mentioned in court, you may ask to have it stricken from the record or partially redacted to conform to the privacy policy, or the court may do so on its own motion.

9. Trial Date.

- (a) This case is set for *Jury* trial on April 23, 2012.
- (b) Counsel reasonably anticipate that the case should take 4 days to try.

ORDERED this 29th day of February that the above provisions be binding on all parties unless modified by further order for good cause shown.



KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

EXHIBIT A -- STANDARD PRETRIAL PROCEDURE

1. **Damages.** Thirty calendar days prior to the date set for the trial, the parties shall file and serve a list itemizing all damages and equitable relief being claimed or sought; such list shall show the amount requests and, where applicable, the method and basis of computation.

2. **Witnesses – Exchange of Lists.**
 - (a) **Expert Witnesses.** Thirty calendar days prior to the date set for trial, the parties shall file and serve a list stating the names and addresses of all expert witnesses who have previously been identified in accordance with Fed. R. Civ. P. 26(a)(2) and whose testimony may be offered at trial.
 - (b) **Other Witnesses.** Thirty calendar days prior to the date set for trial, the parties shall file and serve a list stating the names and addresses of all witnesses (other than expert witnesses) whose testimony they realistically expect to offer at trial. The list of witnesses exchanged should not include the name of any witnesses not previously identified, but should represent a narrowing of previously-identified witnesses.
 - (c) **Contents of Lists.** The parties shall appropriately indicate on their witness lists:
 - (1) the "primary" witnesses – those witnesses whose testimony the party expects to offer;
 - (2) the "optional" witnesses – those witnesses whose testimony the party expects will not be needed, but the party has listed to preserve its right to offer such testimony should the need arise in the light of developments at trial, and
 - (3) those witnesses the party expects to present by means of depositions with a listing

of the specific pages from the depositions to be used.

Unless specifically agreed by the parties or allowed by the court for good cause shown, the parties shall be precluded from offering substantive evidence through any witness not included on the party's witness list. The listing of a witness does not commit the party to have such witness available at trial or to call such witness to testify, but it does preclude the party from objecting to the presentation of such witness's testimony by another party.

As to any witnesses shown on such list to be presented by deposition, within ten business days after the filing of such list, an opposing party may serve a list of additional pages of the deposition to be used, and may serve and file a list disclosing any objections to the use of such deposition testimony under Rule 32 or Rule 26(a)(3)(B). Any objections to deposition testimony should be accompanied by excerpts from the depositions including the testimony to which the objection relates. Objections not made within such time, other than objections under Fed. R. Evid. 402 and 403, shall be deemed waived, unless such failure to timely object is excused by the court for good cause shown.

3. Exhibits.

- (a) **Exchange of lists.** Thirty calendar days prior to the date set for trial, the parties shall file and serve a list providing an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those exhibits that the party expects to offer and those exhibits that the party may offer if the need arises. Unless specifically agreed by the parties or allowed by the court for good cause shown, the parties shall be precluded from offering as substantive evidence any exhibit not so identified.

Courtesy copies of Exhibit lists should be submitted to chambers by email (Bowdre_chambers@alnd.uscourts.gov) in WordPerfect format.

- (b) **Objections and Stipulations.** Upon receipt of Exhibit lists, the parties should immediately meet and confer regarding any objections to the listed exhibits. Most objections should be cured by discussion, and the parties should stipulate as to the admissibility of as many exhibits as possible. As to any document or other exhibit on which agreement cannot be reached, including summaries of other evidence shown on such list, at least ten business days before trial, an opposing party shall serve and file a list disclosing any objection, together with the grounds therefor, that may be made as to the admissibility of exhibits identified on such list. Objections not so disclosed, other than objections under Fed. R. Evid. 402 and 403 are waived, unless such failure to timely object is excused by the court for good cause shown. The court generally rules on objections to exhibits outside the presence of the jury and will do so prior to opening statements, to the extent possible.
- (c) **Counsel requiring authentication** of an opponent's exhibit must notify offering counsel in writing within five business days after the exhibit is identified and made available for examination. Failure to do so is an admission of authenticity.
- (d) **Marking.** Each party that anticipates offering more than five exhibits as substantive evidence shall premark such exhibits in advance of trial, using exhibit labels and lists available from the Clerk of Court. The court will provide up to 100 labels; if any party needs more labels, that party must use labels of the same type as those supplied by the court. Counsel must contact the courtroom deputy for the appropriate exhibit list form for use at trial. The court urges counsel to be

judicious in determining which documents actually are relevant to necessary elements of the case.

- (e) **Examination by Opposing Party.** Except where beyond the party's control or otherwise impractical (e.g., records from an independent third-party being obtained by subpoena), each party shall make such exhibits available for inspection and copying. The presentation of evidence at trial shall not ordinarily be interrupted for opposing counsel to examine a document that has been identified and was made available for inspection.
- (f) **Court's Copies.** In addition to the premarked trial exhibits mentioned above, the Court requests for the bench an exhibit notebook of anticipated trial exhibits (to the extent possible and practical). The notebook should include a copy of the exhibit list referenced in "d" above.
- (g) **Juror's Notebooks.** Only in extraordinary circumstances will the court allow the use of juror notebooks. Any such request should be made in writing at least 30 calendar days before trial.
- (h) **Use of Exhibits at Trial.** No exhibit can be shown to the jury or read aloud until after the exhibit has been admitted into evidence.
- (i) **Special and Visual Exhibits.** Should either side desire to present exhibits or other documents via projection onto a screen or monitor or by enlargement, or other special means to present the Exhibit to the jury, counsel shall advise opposing counsel at the same time as submission of Exhibit List which documents it plans to so present. However, no exhibit should be projected prior to admission by the court. No other document should be projected without first obtaining consent of the opposing party and permission of the court.

THE PARTIES ARE REMINDED THAT THEY WILL NOT BE ALLOWED TO USE AT TRIAL ANY WITNESS OR EXHIBIT NOT DISCLOSED IN ACCORDANCE WITH FED. R. CIV. P. 26(a) OR 26(e), UNLESS EXTREMELY GOOD CAUSE SHOWN AND THE OFFERING PARTY CAN SHOW THAT ITS FAILURE TO DISCLOSE WAS HARMLESS. *See Fed. R. Civ. P. 37(c)(1).*

4. Use of Depositions at Trial.

- (a) The court will accept the parties' agreement to use a deposition at trial even though the witness is available. Otherwise, parties must follow Fed R. Civ. P. 32.
- (b) Before trial, counsel must provide the courtroom deputy or law clerk with a copy of all depositions to be used as exhibits at trial.
- (c) To the extent possible, counsel will designate the portion of any deposition counsel anticipates reading by citing pages and lines in the final Witness list. Objections, if any, to those portions (citing pages and lines) with supporting authority must be filed within **ten business days** after filing of witness list as stated in paragraph 2.
- (d) Use of videotape depositions is permitted to the extent the parties agree on admissibility or edit to resolve objections.
- (e) In a non-jury trial, for any deposition offered as a trial exhibit, counsel shall attach to the front of the exhibit a summary of what each party intends to prove by the deposition testimony, with line and page citations.

5. Trial Submissions to Court.

Ten business days prior to the scheduled trial date, each party will submit the following to the court's chambers:

- a. A listing of any special evidentiary or other anticipated legal problems with citation to legal authority that supports the party's position.
- b. Parties may, if they desire, file trial briefs. Any such briefs must be filed at least ten business days prior to trial. Opposing parties may respond to such trial briefs at least five business days prior to trial. The briefs, if any, should not exceed ten typed pages and must otherwise comply with this court's Exhibit A to scheduling Order, and must be submitted in WordPerfect by email to chambers (Bowdre_chambers@alnd.uscourts.gov).

Five business days prior to the scheduled trial date, each party will submit the following to the court's chambers: any special questions or topics for voir dire examination of the jury venire.

6. Jury Charges.

At least five business days prior to the scheduled trial date, the parties must file a **single, joint proposed jury charge**, including all necessary instructions, or definitions applicable to the specific issues of the case. The court's standard instructions may be found on the court's website (www.alnd.uscourts.gov/bowdre/BowdrePage.htm) and need not be submitted to the court.

- a. **Each** requested **instruction** must be numbered and presented on a separate sheet of paper with authority cited.
- b. In joint, proposed jury materials, counsel are to include all necessary instructions or definitions, specifically including (1) the *prima facie* elements of each cause of

action and defense asserted; (2) legal definitions required by the jury; (3) items of damages; and (4) methods of calculation of damages. Counsel are to use the 11th Circuit Pattern Jury Instructions, or appropriate state pattern jury instructions, as modified by case law or statutory amendments, wherever possible. Any deviations must be identified, and accompanied with legal authorities for the proposed deviation.

- c. Even if the parties, in good faith, cannot agree on all instructions, definitions or questions, the parties should nonetheless submit a single, **unified** charge. Each disputed instruction, definition, or question should be set out in bold type, underlined or italics and identified as disputed. Each disputed item should be labeled to show which party is requesting the disputed language. Accompanying each instruction shall be all authority or related materials upon which each party relies.
- d. **The parties shall also submit a WordPerfect version of the proposed jury charges to chambers by email to Bowdre_chambers@alnd.uscourts.gov.**

7. **Court's Expectations.**

- a. The court will expect all parties to be ready for trial as of the trial date set in the Pretrial Order unless continuance is requested within ten business days after the date the court enters the Pretrial Order. Continuances based on inadequate preparation will not be considered favorably.
- b. The court calls to the attention of all parties the various time requirements in the Pretrial Order and Exhibits. The court strictly adheres to these time requirements to avoid last minute requests for rulings.

- c. Any case announced settled after the Pretrial Conference but before the scheduled trial date will be dismissed with prejudice and with costs taxed as paid on the scheduled trial date unless a different stipulated judgment form is submitted on or before the scheduled trial date.