

**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.)	

DEFENDANTS' POSITION STATEMENT AND TRIAL SUBMISSION

The Defendants, the City of Birmingham, a municipal corporation under the laws of the State of Alabama, and the Birmingham Library Board, by and through its attorneys, pursuant to the Court's Pretrial Order of February 29, 2012, Exhibit A, Item 5 submits the following as their *Position Statement and Trial Submission*:

Plaintiff's Sexual Hostile Environment Claim

Plaintiff, Barbara Wilson brings this action for alleged injuries against the Defendants, the City of Birmingham and the Birmingham Library Board 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. 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 work environment in two ways: 1. Patrons are using the Library's computers to view pornographic images and 2. Patrons are entering the Library and committing obscene acts sexual acts.

Plaintiff's Essential Elements

In order for Plaintiff to establish a claim of a sexually hostile work environment, 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, as hereafter defined, 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 a result of such hostile or abusive work environment.

Plaintiff's Burden of Proof

The burden of persuading a jury that the Plaintiff was subjected to a sexually hostile work environment because of her sex or gender, that such sexually hostile work environment by a non-employee was permitted by the Defendants and that she suffered damages remains at all times on the Plaintiff.

Defendants' Defenses

The Defendants obviously deny each and every material allegation. The Defendants deny that the Plaintiff worked in a sexually hostile work environment. Conduct that only amounts to ordinary socializing in the workplace such as occasional

horseplay, sexual flirtation, sporadic or occasional use of abusive language, gender related jokes, and occasional teasing, does not constitute an abusive or hostile environment. Only extreme conduct amounting to a material change in the terms and conditions of employment is actionable. The Defendants deny that they allowed and/or failed to adequately address the sexually hostile environment in the library. The Plaintiff's complaints were handled and taken seriously. The Defendants further deny they are legally responsible under Title VII for the actions of non – employees.

The Plaintiff has not been singled out due to her sex or gender and that male librarians were also exposed to patrons committing sexual, criminal acts. The actions of these random patrons are not directed towards the Plaintiff solely based on her gender or sex. The evidence shows that male librarians were also exposed to patrons committing criminal acts. The evidence will show that patrons, both male and female, have encountered other patrons committing obscene, illegal and criminal acts and reported it to security.

The Defendants has an anti-sex discrimination/hostile work environment policy which is enforced and all employees and public are required to comply. The Defendants also has established policies and procedures to deter patrons entering the library from committing criminal acts. The Birmingham Public Library has enacted a Patron Behavior Policy. 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.

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. 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 Defendants pleads that the Birmingham Public Library has used filtration software since 1998. 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. The Plaintiff was trained and familiar with such policies. The Plaintiff failed to use such policies.

Since October 25, 2001, the Birmingham Public Library also 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.

Regarding the lack of security claim of the Plaintiff, the Defendants have provided adequate security and training to prevent patrons entering the Library from

committing obscene acts sexual acts. The Plaintiff has no evidence or training in security matters to prove that the security was inadequate. The Plaintiff has no evidence that the Defendants failed to investigate claims of improper, sexually harassing conduct by their own security staff. Plaintiff's evidence is speculation.

If the Plaintiff establishes a prima facie case of sexually hostile environment, then the Defendant's can present affirmative defense to that claim. In order 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.

If Plaintiff is successful on her claim of a sexually hostile environment, she is entitled to compensatory damages. Compensatory damages are not a punishment and may not be imposed to penalize the Defendant. Compensatory damages must not be based on speculation or guesswork because only actual damages are recoverable. Plaintiff is also under duty to mitigate her damages which she has failed to do. The Defendants cannot be liable for punitive damages. §6-11-26, Code of Alabama, 1975.

The Defendants do not anticipate any extraordinary evidentiary or legal problems.

Respectfully Submitted,

/s/Fredric L. Fullerton, II

Fredric L. Fullerton, II
Chief Assistant City Attorney

/s/Nicole E. King

Nicole E. King
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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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

/s/Fredric L. Fullerton, II

Of Counsel