IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

ANAKA HUNTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:12-CV-4 ERW
	)	
CITY OF SALEM, MISSOURI, et al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT CITY OF SALEM'S MOTION TO DISMISS

Plaintiff opposes Defendant City of Salem's motion to dismiss her claims against it.

The sole basis upon which the City urges dismissal is its assertion that once the Salem Public Library was created pursuant to MO. REV. STAT. §§ 182.140, et seq., and the board members were appointed by the mayor and approved by the board of alderman, "[c]hapter 182 reserves no power or authority to [the] city… to direct the activities of [the library] or set its policies." Doc. #18 at ¶ 3. From this premise, the City concludes that "Plaintiff's Complaint fails to state a claim against [the] City on which relief may be granted under 42 U.S.C. § 1983." Id. at ¶ 4.

The City's conclusion is incorrect, and Plaintiff has adequately pled her claims against the City. The City maintains control over the operation of the library.

I. Background.

Beginning in July 2010, Plaintiff Anaka Hunter ("Hunter") conducted research at the Salem Public Library on indigenous American tribes and their spirituality. Doc. #1 at ¶¶ 1, 12. Many of the websites she attempted to access were blocked by the Internet filtering system employed by the Library because they were categorized as the "occult" and "criminal skills." Id.

at ¶¶ 1, 13-14. None of the sites were obscene, child pornography, harmful to minors, or pornographic for minors. Id. at ¶¶ 33-36. The sites that were blocked discuss minority religions, religious practices, and beliefs from a positive or neutral viewpoint. Id. at ¶ 53. At the same time, numerous websites discussing the same topics from the point of view of mainstream religions are categorized as either "religion" or "general," and not blocked by Defendants. *Id.* at ¶ 54.

Hunter was rebuffed in her repeated efforts to have the websites unblocked and to challenge the policies, practices, and customs of filtering out information about minority viewpoints on spirituality. Id. at ¶¶ 1, 15-26. In one instance, Hunter told Defendant Glenda Wofford, the library director, that the filtering of the websites she sought to view was improper and the classification of Native American cultural and religious history and practices as the "occult" and "criminal skills" was misleading and derogatory. Id. at ¶ 19. In response, Wofford stated she only would override the filtering system's default blocking of websites if the patron's research pertained to their job, if they were writing a paper, or if she determined that they otherwise have a legitimate reason to view the content. Id at ¶ 20. Wofford additionally asserted that she had an "obligation" to call the "proper authorities" to report those who were attempting to access blocked sites if she thought they would misuse the information they were attempting to access. Id at ¶ 21. Wofford's assertion that she would be obligated to notify authorities caused Hunter to be reasonably concerned that she would be reported to the police if she continued to attempt to access websites about Native American cultural and religious history and the Wiccan Church. Id at ¶ 22.

Hunter's final pre-litigation effort to address the Defendants' actions and policies, practices, and customs was to address a meeting of the Board of Trustees for the Salem Library

on November 8, 2010. Id. at ¶¶ 23-24. At the meeting, she was told that the Library's Internet Content Filtering system would not change. Id. at ¶ 26.

II. Legal Standard.

When ruling on a motion to dismiss, the court must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party. *Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005). See, also *Culkin v. Walgreen Co.*, 4:05CV1859ERW, 2006 WL 839195 (E.D. Mo. Mar. 27, 2006) (citing *Hafley v. Lohman,* 90 F.3d 264, 267 (8th Cir.1996)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

III. Argument.

The sole basis for dismissal of the City as a defendant is the City's contention that once the Salem Public Library was created pursuant to MO. REV. STAT. §§ 182.140, et seq., and the board members were appointed by the mayor and approved by the board of alderman, "[c]hapter 182 reserves no power or authority to [the] city… to direct the activities of [the library] or set its policies." Doc. #18 at ¶ 3. Based on the authority retained by the City, however, Hunter has stated a facially plausible claim that the City is liable for the alleged violation of her rights as secured by the First Amendment.

At first, the City suggests that the only reference in Missouri statutes to its control over the Library is mayor's appointment and the board or aldermen's approval of the Library Board. Doc. #18 at ¶ 3; Doc. #19 at p. 3. Later, however, the City acknowledges that it can also "remove any trustee for misconduct or neglect of duty." Doc. #19 at p. 4. But the City maintains even more control than that.

To begin with, cities in Missouri have authority to not only establish, but also maintain, a public library. MO. REV. STAT. § 182.170. This power to maintain a library is not merely statutory flourish. It is backed by real and continuing power.

In addition to the initial board of nine trustees (MO. REV. STAT. § 182.170), the mayor, "with the approval of the [board of alderman]," has the continuing duty to appoint three trustees each year when terms ends (MO. REV. STAT. § 182.180), as well as appoint replacements for all trustees who might resign, die, or be removed (MO. REV. STAT. § 182.190). None of the trustees ever face the electorate.

What is more, as alluded to in the 1972 Attorney General opinion cited by the City, the mayor and the aldermen may force the removal of trustees for undefined "misconduct or neglect of duty" and replace those trustees. (Doc. #19-1 (Attorney General Opinion 20-72); MO. REV. STAT. §§ 182.180 – 182.190.

The Salem Public Library operates as a unit of the City of Salem. All moneys received for the library must be deposited in the city treasury. MO. REV. STAT. § 182.200.4. The library's board must transmit to the City an annual report that includes "the condition of the library and its services on the last day of the fiscal year, the various sums of money received from the library fund and from other sources, and how the moneys have been expended and for what purposes, and such other statistics, information and suggestions as may be of general interest." Mo. Rev. Stat. § 182.210. The City holds out the Library as a facility of the City. See http://www.salemmo.com/city/facilities.asp (last visited Mar. 12, 2012).

Further, Missouri statutes grant the City the power and authority to maintain the public library by passing and enforcing ordinances that impose penalties upon library patrons. MO. REV. STAT. § 182.240. Wofford discouraged Hunter from requesting unblocking of Internet site

by asserting that the library had an "obligation" to call the "proper authorities" to report those who were attempting to access blocked sites if Wofford thought they would misuse the information they were attempting to access. Doc. #1 at ¶¶ 21-22. When drawing all reasonable inference in favor of Hunter, it is reasonable to infer that Wofford was discouraging Hunter by suggesting that such attempts might be considered "injury upon the library," punishable by the City under § 182.240, or another crime that would require her to call Salem's police department.

Given the City's continuing control over the maintenance of its library, Hunter's Complaint states a cause of action against the City's for the violation of her constitutional rights.

As the City admits, the 1972 Attorney General opinion is not binding authority. The persuasive value of the opinion is decreased for several reasons. First, it understates a city's continuing control where the city can remove any trustees for undefined "misconduct or neglect of duty" and replace those trustees. *See* MO. REV. STAT. §§ 182.180-182.190. Second, the opinion neglects that the state grants the City the power and authority to maintain a public library by passing and enforcing ordinances. MO. REV. STAT. § 182.240. (This oversight is probably explained by referring to the question the Attorney General was answering. Specifically, the Attorney General was asked to opine on the "legal relationship between [the Board] and the appointing authority." Attorney General Opinion No. 20-72. The Attorney General was not asked to discuss the relationship between the City and library patrons, such as the plaintiff here.)

Assuming, *arguendo*, the City is correct that it has relinquished all meaningful control over the library and that the library has succeeded it as the entity responsible for any violation of Hunter's constitutional rights, then, rather than dismissal, the Salem Public Library should be substituted for the City of Salem as a defendant in this case.

IV. Conclusion.

For the foregoing reasons, the City's motion to dismiss the Plaintiff's claims against it should be denied.

Respectfully submitted,

/s/ Grant R. Doty
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and a copy was made available electronically to all electronic filing participants.

/s/ Grant R. Doty