

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION 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.)

**PLAINTIFF'S RESPONSE TO DEFENDANTS'
STATEMENT OF (ALLEGED) UNDISPUTED FACTS**

In accord with Superior Court Rule 9A(b)(5), plaintiff Gail Nelson hereby responds to the Defendants' Statement of Undisputed Facts as follows, using the same paragraph numbers, and states that, contrary to the defendants' position; numerous genuine disputes of material fact exist, as detailed below:

1. Admitted.
2. Admitted.

3. Admitted.
4. Admitted
5. Admit only the first and last sentence of this paragraph and that the office was a rectangular space. Plaintiff disputes the remainder of the alleged facts. Specifically, the street level floor of the Small Business Development Center ("SBDC" or the "Center") was not a "wide-open" space, as it was divided by two partitions, each approximately 5-6 feet in height, which provided a significant amount of unobservable area in the office. The first partition was placed approximately 10-12 feet from the entrance and the second was approximately two-thirds of the way back in the office. Anyone, including the plaintiff, who went behind either of the partitions could not be seen from the street. *See* photograph of the SBDC copied from the secret surveillance videotape made by the Salem State College police on August 24, 1995 which is attached hereto as Exhibit A.¹ Moreover, the interior of the SBDC office was not "almost entirely observable from the street," as during daylight hours, the glare from the front plate glass window made it difficult, if not impossible, to see into the Center from the street. *See* Exhibit B, Deposition of Gail Nelson at page 28, lines 8-21²; Ex. B, p. 30, ln. 17-21; Exhibit C, Plaintiff's Responses to Defendants' First Set of Interrogatories, Response No. 8³; Exhibit D, Deposition of Allan Leavitt p. 31, ln. 6-14; Exhibit E, Deposition of Brian C. Pray, Vol. I, p. 101, ln. 13

¹ It was stipulated by counsel for all of the defendants, Assistant Attorney General Henry Ellis, that this was the videotape of the SBDC found by Allan Leavitt in the Center in mid-October, 1995. *See* Exhibit D, Deposition of Allan Leavitt p. 63, ln. 1-4.

² References to deposition transcripts hereinafter shall be abbreviated as follows: the exhibit wherein they are located, followed by the page number(s) cited, followed by the lines cited (e.g., "Ex. B, p. 28, ln. 8-21").

³ References to Interrogatory Responses shall be abbreviated as follows: the exhibit in which they are located followed by the response number cited (e.g., "Ex. C, Resp. 8").

through p. 103, ln. 13; Exhibit G, Deposition of Margaret Bishop p. 52, ln. 21-24.

6. Admit that there were two partitions which were about five to six feet high, but dispute that there were no offices on the first floor, as Exhibit A plainly shows that there were desks in different parts of the first floor and cubicles created by the partitions. Admit the second sentence of this paragraph.
7. Admitted.
8. Admitted.
9. Admitted.
10. Admitted.
11. Admitted.
12. Admit the first sentence, but dispute the second sentence with regard to what was known by defendant Young concerning Mr. Koss's access to the SBDC space, as the deposition testimony of Gail Nelson cited by the defendants does not even make any reference to defendant Young's knowledge.
13. Admitted.
14. Admitted, except dispute that defendant Young identified either Wayne Koss or Gail Nelson to defendant Pray or told defendant Pray anything about any problems concerning Wayne Koss or Gail Nelson. See Exhibit F, Deposition of Brian C. Pray, Vol. II, p. 48, ln. 3-14; Exhibit K, Deposition of Frederick H. Young, p. 71, ln. 7-23.
15. Admitted, except dispute that Pray's deposition testimony establishes that the defendants were investigating any specific "incident" as opposed to any possible illegal entry into the Center by unknown persons. See Ex. F, p. 48, ln. 3-21 and p. 80, ln. 23 through p. 82, ln. 19; Ex. K, p.

71, ln. 7-23; Exhibit L, Deposition of Vincent O'Connell, Vol. II, p. 51, ln. 13-24.

16. Admitted, but proffer that prior to deciding to put a video surveillance camera in the SBDC, neither Chief Pray nor his subordinate officers, defendants Fuller and O'Connell, took any other steps to investigate whether or not there was any illegal usage or entry into the building in 1995. See Ex. F, p. 80, ln. 23 through p. 81, ln. 5. In addition, these Salem State College police officers did not discuss any options other than posting a person to observe the premises for 24 hours per day. They failed to consider the possibility of putting an alarm system on the door, or having the Salem Police increase the frequency of their patrols, or interviewing employees of the Center as to whether they had any information about illegal entries. See Ex. F, p. 81, ln. 6 through p. 82, ln. 19.

17. Admit only that Salem State College had used a video camera to perform covert surveillance since the early 1990's. Dispute all other allegations in this paragraph. According to defendants Cahill and Pray, the video camera was not purchased by Salem State College, but was paid for by the Viking Vending Company, to identify individuals who might be vandalizing Viking's vending machines at the college. See Exhibit H, Deposition of Stanley P. Cahill, p. 52, ln. 2-3 and p. 61, ln. 10-17, and October 23, 1995 memorandum from Dr. Stanley Cahill to Dr. Nancy Harrington, a deposition exhibit included in Ex. H hereto. Moreover, the deposition testimony cited by the defendants states that the reason the video camera had been obtained originally was that the campus police needed the equipment for use "in places where human surveillance would be detected" (see Defendants' Ex. I, p. 93, ln. 9-16), and not because of financial considerations.

18. Admitted.

19. Admitted. In addition to Chief Pray, the decision to install the hidden video camera at the Center in 1995 was made by defendants Vincent O'Connell, Janice Fuller, Margaret Bishop and Frederick Young. Ex. E, p. 8, ln.17-24 and p. 9, ln. 20 through p. 10, ln. 6; Ex. K, p. 60, ln. 15 through p. 61, ln. 24; Exhibit I, Deposition of Janice Fuller, Vol. I, p. 55, ln. 15 through p. 56, ln. 18.

20. Admitted, except dispute the last sentence of this paragraph in that the view from the camera also showed various private areas in the office that were behind the two partitions and which could not be seen from the street or by someone standing in the front part of the office. See Ex. A, photograph of the SBDC copied from the secret surveillance videotape made by the Salem State College police on August 24, 1995; Ex. I, p. 53, ln 24 through p. 55, ln. 5.

21. Admitted, but dispute that defendant Fuller was the only person who viewed the secretly made surveillance videotapes. At least one tape was viewed by defendant O'Connell, and, at various times, such tapes were in the possession of defendants Frederick Young, Vincent O'Connell and Brian Pray, as well as a third party, Allan Leavitt. Exhibit I, Deposition of Janice Fuller, Vol. I, p. 114, ln. 23 through p. 115, ln. 15; Ex. L, p. 157, ln. 7-17; Exhibit M, Defendant Brian C. Pray's Responses to Plaintiff's First Set of Interrogatories, Response No. 13.

22. Admitted. In addition, defendant Pray never ordered a halt to the secret video surveillance at the SBDC, even after one of the surveillance videotapes was discovered in the Center by Allan Leavitt on October 17, 1995, and such secret videotaping could have lasted for a period of more than four months. Ex. D, p. 63, ln. 9-15; Ex. F, p. 79, ln. 5-21.

23. Admitted, except dispute that defendant O'Connell's deposition testimony does not establish that the secret videotaping at the Center was stopped when defendant Young went on

vacation in mid-August, 1995. Defendant O'Connell in fact testified that he had no recollection of when the videotaping actually stopped. *See* Defendants' Ex. F, p. 77, ln. 5-16. *See also* Plaintiff's Ex. F, p. 79, ln. 5-21.

24. Admitted, except dispute that only four persons at the College viewed or had the opportunity to view the secretly recorded surveillance videotapes of the SBDC. Defendant Young in fact engaged in videotaping on his own for some period of time. *See* plaintiff's response in paragraph 21 above and references cited therein. Moreover, defendant Harrington was told by defendants Cahill and Pray that the secretly recorded surveillance videotapes of the SBDC did not show Ms. Nelson changing her clothes in the office and that the camera was directed at the front door of the Center, which implies that either Cahill or Pray or both viewed one or more of the tapes. Exhibit J, Deposition of Nancy D. Harrington, p. 62, ln. 13 through p. 63, ln. 5.

25. [Omitted by Defendants]

26. Disputed. During the period June-August, 1995, Gail Nelson would sometimes change her clothes on the street level floor of the Center, at times stripping down to her underwear, but only before or after regular business hours and only after making sure that there was no one else was in the office, that the door to the Center was locked, and that she was behind one of the partitions in the office so that she could not be seen from the street outside the Center. Ex. B, p. 25, ln. 5-22; Ex. C, Resp. 7; Exhibit N, Affidavit of Gail Nelson, ¶¶ 3, 4 and 7. In addition, although the plaintiff admits that there were no shades installed on the front window of the Center, the glare from the front plate glass window made it difficult, if not impossible, to see into the Center from the street during daylight hours. Ex. C, Resp. 8. Moreover, during the month of

July, 1995, when Ms. Nelson was required to apply a prescribed medicated ointment to her chest during the time that she was working at the Center, she would do so only when the office was not busy, no one else was on the street level floor of the Center, no clients or visitors were expected, and no classes were scheduled. In order to do so, she would go behind a partition, unbutton, but not remove her blouse, and move her bra straps aside, all the while keeping alert for the sound of anyone approaching so that she could quickly cover up. Ex. B, p. 26, ln. 16-24; Ex. C, Resp. 7, 8 and 9; Ex. N, ¶¶ 6, 7 and 8. During the summer of 1995, she was not aware that she was being secretly videotaped while engaged in these activities. Ex. N, ¶ 7. Given that the defendants have admitted that the secret videotaping of the Center ran twenty-four hours a day for more than thirty days from at least June 21, 1995 until at least the middle of August, 1995 (*see* Defendants' Statement of Undisputed Facts, ¶¶ 20, 21, 22 and 23, and plaintiff's responses thereto as delineated above) and that at least four persons at the College viewed those videotapes (*see* Defendants' Statement of Undisputed Facts, ¶ 24 and plaintiff's response thereto as delineated above), it is a reasonable inference (and, indeed highly probable) that these private activities by Ms. Nelson were both recorded and observed by one or more of the defendants and/or Allan Leavitt. *See also* Ex. C, Resp. 10.

27. Admit the first two sentences and dispute the factual allegations contained in the remainder of the paragraph. Defendant Bishop recognized that the partitions in the Center would block the view into the Center from the street. Ex. G, p. 52 ln. 21 through p. 53 ln. 1. She was aware of secret video surveillance cameras being used at the College in that she thought that they may possibly have been used previously to investigate threats and/or a stolen computer in the graduate school. Ex. G, p. 22, ln. 7-16. The director of the SBDC, defendant Young, reported

directly to defendant Bishop in 1995 and her job responsibilities included oversight of the Center. Ex. G, p. 7, ln. 18-24. Together with defendants Pray, O'Connell, Fuller and Young, defendant Bishop was involved in the decision to investigate the alleged unauthorized entries at the SBDC in June, 1995 and to install a hidden video camera there. Ex. E, p. 8, ln. 17-24 and p. 9, ln. 20 through p. 10, ln. 6; Ex. L, p. 53, ln. 20 through p. 54, ln. 18.

28. Admit first sentence, but dispute the remaining factual allegation. Defendant Harrington believed that the SBDC was a public space based upon her misrecollection that the space contained only a single partial partition that did not obstruct the view of anyone looking in the front window. Ex. J, p. 57, ln. 13 through p. 58, ln. 5 and p. 60, ln. 15-19. This misrecollection is contradicted by the actual physical layout of the Center. See Ex. A hereto. Moreover, defendant Harrington believed that the only area of the Center that was secretly videotaped was the front door and she never did anything at any time to verify whether or not that was true. Ex. J, p. 39, ln. 10-22.

29. Admit the second sentence of this paragraph and dispute the factual allegation contained in the first sentence. Defendant Cahill's belief that the SBDC was a "public area" was not based on his personal knowledge, as he never went to the Center himself and relied solely upon what he had been told by defendant Pray. Ex. H, p. 58, ln. 18 through p. 59, ln. 21. Defendant Cahill never personally viewed Ms. Nelson's work area at the Center and only believed, based on what he had been told, that there was a partition of undetermined size around Ms. Nelson's "work station" near the front door and that front area of the Center was a "public area." Ex. H, p. 135, ln. 9 through p. 136, ln. 20. These "beliefs" are contradicted by the actual physical layout of the Center. See Ex. A hereto.

30. Disputed as unsupported by the record. In fact, defendant Pray admitted that he did not inspect the SBDC to find a proper public area to focus the hidden video camera on and never saw the area being recorded on the videotapes until after the videotaping had ceased. Ex. E, p. 22, ln. 2 through p. 23, ln. 6. Furthermore, defendant Pray admitted that there were areas in the Center that could not be seen by people looking through the front window or entering the front door. Ex. E, p. 102, ln. 4 through p. 103, ln. 13.

31. Disputed in that defendant Young believed that it was Ms. Nelson's responsibility to lock the front door to the Center so as to exclude the public during Ms. Nelson's required lunch breaks, when Ms. Nelson was the only employee at the Center. Ex. K, p. 150, ln. 15 through p. 151, ln. 10 and p. 153, ln. 13 through p. 154, ln. 5.

32. Disputed in that defendant O'Connell's belief was based on an incorrect description of the street level floor of the SBDC as "a wide-open bullpen-type place" containing one 5 foot high divider "maybe three quarters of the way down the room from the first (sic) door." Ex. L, p. 13, ln. 1 through p. 15, ln. 1. This description is contradicted by the actual physical layout of the Center. *See* Ex. A hereto.

33. Disputed in that defendant Fuller stated that there were areas of the street level floor of the SBDC that were not visible to someone looking in the front door of the Center and that there were some areas of privacy in that office that could be seen on the videotape that could not be seen from the front door. Ex. I, p. 53, ln. 21 through p. 55, ln. 8.

ADDITIONAL MATERIAL FACTS

Facts Relating to Gail Nelson's Objectively Reasonable Expectation of Privacy

34. In June through August of 1995, Gail Nelson had a reasonable expectation of privacy during the times that she changed her clothes in the Center before or after the hours in which the Center was open to the public because she took affirmative steps to protect her privacy, including locking the door to the Center, making sure that there were no other workers present in the Center and changing behind the partitions in the Center so that she could not be seen from the street or elsewhere in the office. Ex. C, Resp. 7, 8 and 9; Ex. N, ¶¶ 3, 7, 8 and 10; Exhibit O, Plaintiff's Responses to Defendant Frederick H. Young's Second Set of Interrogatories, Resp. 1 and 2.

35. In July through August of 1995, Gail Nelson had a reasonable expectation of privacy during the times that had to apply sunburn medication to her chest while she was working at the Center because she took affirmative steps to protect her privacy, including sometimes locking the door to the Center, making sure that there were no other workers present on her floor of the Center, applying the medication behind the partitions in the Center so that she could not be seen by a passerby, turning her back to the opening of the partitioned area and listening carefully for anyone approaching so that she could quickly cover up if necessary. Id.

36. In June through August of 1995, Gail Nelson had a reasonable expectation of privacy against being secretly videotaped while she was working at the Center because she reasonably believed that no one could see her when she was working alone on the street level floor of the Center and engaged in normal at-case activities, or when she was changing her clothes, or when she was applying sunburn medication, and that she certainly couldn't see any one watching her

during those times. Id.

37. During that summer of 1995, Ms. Nelson was a 44 years old, unmarried, overweight woman, quite sensitive about her personal appearance and privacy, who would never have engaged in these private activities if she had known that anyone could see her or was making a videotape of her. Ex. N, ¶¶ 5, 7, 8 and 10.

38. Gail Nelson was not the only Salem State College employee at the Center who changed her clothes there. Allan Leavitt, the coordinator for the Center, also sometimes changed his clothes on the first floor of the Center, in the rear behind the partitions. Ex. D, p. 10, ln. 15-24, p. 32, ln. 11-17, and p. 39, ln. 7-11.

39. Allan Leavitt was aware that Gail Nelson sometimes changed her clothes after work in the same area of the Center that he used for such a purpose. Ex. D, p. 38, ln. 22 through p. 40, ln. 5.

40. Prior to Gail Nelson being secretly videotaped in June of 1995, defendant Frederick Young, the Director of the SBDC, was aware that Ms. Nelson would sometimes change her clothes on the street level floor of the Center before or after the hours in which the Center was open to the public. Ex. N, ¶¶ 6 and 9; Ex. O, Resp. 4.

41. Prior to Gail Nelson being secretly videotaped in June of 1995, defendant Young was aware that Ms. Nelson was sometimes at the Center both before and after her normal working hours and that there were times during the workday when Ms. Nelson would be the only person in the Center. Ex. K, p.146, ln. 4 through p. 149, ln. 22.

42. Gail Nelson had both the right and responsibility to prevent the public from entering the SBDC building at various times by locking the front door of the Center. Ex. K, p.153, ln. 4

through p. 154, ln. 5.

Facts Relating to the Installation of the Covert Video Surveillance Equipment

43. Defendant Frederick Young, the Director of the SBDC, asked defendants O'Connell and Fuller to investigate unauthorized entry into the Center in June, 1995, and did not instruct them to focus their investigation on Gail Nelson, Wayne Koss or anyone else (Ex. K, p. 71, ln. 7-23), nor did he tell defendant Pray anything about any problems at the Center concerning Wayne Koss or Gail Nelson. Ex. F, p. 48, ln. 3-14.

44. At the time they made the decision to install a hidden video surveillance camera inside the SBDC in 1995, defendants Pray, Fuller and O'Connell were only concerned about unauthorized entry into or usage of the Center by unknown third persons *after regular business hours*. Ex. E, p. 20, ln. 7-15; Ex. I, p. 29, ln. 16-20; Ex. L, p. 20, ln. 3-7.

45. Although the VCR used to make the secret video tapes at the Center in 1995 had a timer mechanism on it that would have allowed it to be set to tape only at night, after regular business hours, the Salem State College police never used or even discussed using that timer and instead set the VCR to tape 24 hours a day. Ex. I, p. 44, ln. 19 through p. 47, ln. 11; Ex. L, p. 52, ln. 23 through p. 53, ln. 19.

46. At the time he approved the installation of the hidden video camera at the SBDC in 1995, defendant Pray had no information or reason to focus an investigation on Gail Nelson. Ex. F, p. 46, ln. 2 through p. 47, ln. 2 and p. 48, ln. 7-14.

47. The secret videotaping conducted at the Center in the summer of 1995 never revealed any unauthorized entries into the Center nor any illegal activity of any kind by Gail Nelson. Ex. I, p. 52, ln. 8 through p. 53, ln. 20.

Facts Relating to the Training and Supervision of the College Police

48. Prior to the installation of the secret video camera at the SBDC in 1995, defendants Cahill and Harrington were aware that the Salem State College Public Safety Department possessed covert video surveillance equipment and had engaged in at least one instance of covert video surveillance on the College's campus. Ex. H, p. 27, ln. 9 through p. 28, ln. 9; Ex. E, p. 126, ln. 5-17.

49. Prior to the installation of the secret video camera at the SBDC in 1995, Salem State College did not develop any policy requiring any administrator, other than police chief Brian Pray, to give prior approval for the use of secret video surveillance on the campus. The sole reason for the lack of development of such a policy apparently was the inexperience, lack of knowledge and/or naivete of President Harrington. Ex. J, p. 77, ln. 6-16; Ex. H, p. 26, ln. 16-23 and p. 31, ln. 11 through p. 33, ln. 13.

50. Prior to June, 1995, the College only had an unwritten procedure for the approval of covert video taping on campus, whereby police chief Pray would give his prior written approval for the installation of any secret video camera on an Application for Covert Video Surveillance, a one page form which was filled out only by detectives of the Salem State College police force. This procedure required the application to be renewed every 30 days. Ex. E, p. 37, ln. 1 through p. 39, ln. 2, and the Application for Covert Video Surveillance and the October 20, 1995 Memorandum from defendant Pray to defendant Cahill (Ex. E, p. 118, ln. 17-24), which are deposition exhibits included in Exhibit E hereto.

51. Defendant Harrington believed that she should have been informed of the decision to conduct secret video surveillance at the SBDC before the installation of a hidden camera there in

June, 1995, and both she and defendant Cahill agreed that it was inappropriate for the Salem State College police to conduct secret video surveillance at the College without their prior knowledge or approval. Ex. J, p. 23 ln. 11 through p. 24, ln. 7 and p. 31, ln. 8 through p. 32, ln. 9; Ex. H, p. 74, ln. 8 through p. 77, ln. 1.

52. The reason that both President Harrington and Dean Cahill wanted to be informed about any decision to conduct secret video surveillance at the College before a hidden camera was installed was to give them an opportunity to voice their disagreement and to veto such surveillance. Id.

53. As a result of the secret video surveillance conducted at the SBDC in 1995, without the obtaining the prior approval of either defendants Harrington or Cahill, Salem State College instituted a policy in October, 1995, which required that both President Harrington and Dean Cahill be informed of all requests for such secret surveillance prior to its implementation and that both police chief Pray and Dean Cahill give their prior written approval on a revised Application for Covert Video Surveillance form. Ex. p.123, ln. 2 through p. 125 ln. 10 and the October 24, 1995 Memorandum and revised Application for Covert Video Surveillance form, which are deposition exhibits included in Exhibit E hereto.

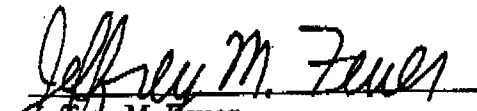
54. At no time did the Salem State College police officer defendants (O'Connell, Fuller and Pray) ever seek to obtain a search warrant for any of the covert video surveillances that they conducted, including the one at the SBDC in 1995. Ex. L, p. 112, ln. 1-14; Exhibit P, Deposition of Janice Fuller, Vol. II, p. 61, ln. 20 through p. 62, ln. 8.

55. From 1993, when Salem State College first obtained its video surveillance equipment, until the installation of the hidden video camera at the SBDC in June, 1995, the Salem State

College police personnel who used the video surveillance equipment received no training from defendant Pray or any other person, institution or entity, in the proper or appropriate use of such equipment. Ex. E, p. 39, ln. 3 through p. 40, ln. 1.

56. From 1993, when Salem State College first obtained its video surveillance equipment, until the installation of the hidden video camera at the SBDC in June, 1995, the Salem State College police personnel who used the video surveillance equipment received no training from defendant Pray or any other person or institution on issues of privacy, the Fourth Amendment or Article 14 of the Massachusetts Constitution. Ex. E, p. 41, ln. 16 through p. 43, ln. 20.

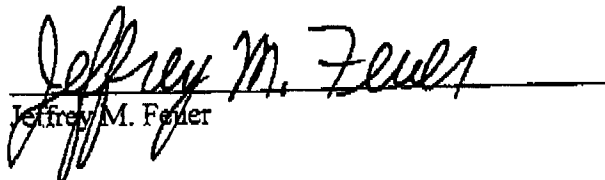
Respectfully submitted,
The plaintiff Gail Nelson
By her attorneys,



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Certificate of Service

I hereby certify that a true copy of the above PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF (ALLEGED) UNDISPUTED FACTS was served upon the Assistant Attorney General, David R. Kerrigan, who represents all the defendants, by hand delivery on July 12, 2002.


Jeffrey M. Feuer