



the Mayor does not have the ability to hire, fire, or discipline the Library Director. Defendants deny any remaining allegations in Paragraph 3 of the Second Amended Complaint.

4. Defendants admit Newton was a resident of Fremont, Dodge County, Nebraska, at all relevant times noted in the Second Amended Complaint. However, Defendants deny that Newton was Plaintiff's supervisor at all relevant times noted in the Second Amended Complaint. Newton was no longer Plaintiff's direct supervisor when Wimer took over the Assistant City Administrator role.

5. Defendants admit Wimer was a resident of Fremont, Dodge County, Nebraska, at all relevant times noted in the Second Amended Complaint. However, Defendants deny that Wimer was Plaintiff's supervisor at all relevant times noted in the Second Amended Complaint. Wimer only became Plaintiff's direct supervisor when he took over the Assistant City Administrator role.

6. Defendants admit the Court has original jurisdiction over the claims arising under federal law, but Defendants deny the Court has concurrent jurisdiction over Plaintiff's state law claims. All of Plaintiff's state law claims (Counts II, IV, VIII, X, and XI) fall under the Nebraska Fair Employment Practice Act ("NFEPA"). NFEPA claims by plaintiffs against Nebraska state and governmental agencies are barred in federal court since there has been no express waiver of sovereign immunity by the State for such actions. *Hasty v. Neb. Dep't of Educ.*, No. 4:09CV3196, 2010 WL 1552855, at \*5 (D. Neb. Apr. 15, 2010) (collecting cases). The lack of waiver of sovereign immunity for NFEPA claims is a jurisdictional issue, which bars the Court from exercising concurrent jurisdiction over Plaintiff's state law claims. *Davis v. State*, 297 Neb. 955, 978-79, 902 N.W.2d 165, 185-86 (2017).

7. Defendants admit the allegations in Paragraph 7 of the Second Amended Complaint.

8. Defendants admit the allegations in Paragraph 8 of the Second Amended Complaint.

9. Defendants admit the allegations in Paragraph 9 of the Second Amended Complaint.

10. Defendants admit the allegations in Paragraph 10 of the Second Amended Complaint.

11. Defendants admit the allegations in Paragraph 11 of the Second Amended Complaint.

12. Defendants admit the allegations in Paragraph 12 of the Second Amended Complaint.

13. Defendants admit the allegations in Paragraph 13 of the Second Amended Complaint.

14. Defendants admit the allegations in Paragraph 14 of the Second Amended Complaint.

15. Defendants admit the allegations in Paragraph 15 of the Second Amended Complaint.

16. Defendants admit the allegations in Paragraph 16 of the Second Amended Complaint.

17. Defendants admit the allegations in Paragraph 17 of the Second Amended Complaint.

18. Defendants admit the allegations in Paragraph 18 of the Second Amended Complaint.

19. Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 19 of the Second Amended Complaint and, therefore, deny the same.

20. Defendants admit that Plaintiff alleges the conduct stated in Paragraph 20 of the Second Amended Complaint. However, Defendants deny engaging in the alleged conduct in Paragraph 20 of the Second Amended Complaint.

**RESPONSE TO PLAINTIFF'S FACTUAL BACKGROUND**

21. Defendants deny Plaintiff commenced employment with the City of Fremont on July 22, 2016. Plaintiff was hired by the City on July 11, 2016, and has served as the Library Director of the City since her date of hire.

22. Defendants admit that Newton may have spoken over Plaintiff during a work meeting. However, Defendants deny that Newton treated Plaintiff differently than other employees by speaking over her at a work meeting. Newton regularly spoke over his employees during work meetings. Defendants deny the rest of the allegations in Paragraph 22 of the Second Amended Complaint.

23. Defendants deny the allegations in Paragraph 23 of the Second Amended Complaint. Plaintiff did not say that Newton had lied to the City Council or that he violated the union contract at any time during the September 12, 2017, City Council meeting.

24. Defendants deny the allegations in Paragraph 24 of the Second Amended Complaint.

25. Defendants deny the allegations in Paragraph 25 of the Second Amended Complaint.

26. Defendants admit Plaintiff filed a written complaint of gender discrimination and retaliation against Newton and Getzschman with City Attorney Paul Payne (“Payne”), and that Baird Holm was brought in to investigate Plaintiff’s complaints. Defendants deny the rest of the allegations in Paragraph 26 of the Second Amended Complaint.

27. Defendants deny the allegations in Paragraph 27 of the Second Amended Complaint. Wimer became Plaintiff’s supervisor on September 3, 2017. Additionally, the November 2017 conversation was a coaching conversation, not a disciplinary action. Wimer initiated the conversation because Plaintiff had been speaking negatively about the IT Director and his Department during a staff meeting when the IT Director was not present to defend or explain himself. Payne never told or instructed Wimer not to wear his police uniform, and never told Wimer that wearing it was inappropriate. Payne stated to Wimer, it might not be a good idea to wear your police uniform if and when you know you are going to discipline Plaintiff.

28. Defendants deny the allegations in Paragraph 28 of the Second Amended Complaint. All salary ordinances and policies, including the Employee Handbook, are approved by the City Council. The City Council unanimously approved the salary ordinance in 2017. All employees are paid according to the current salary ordinance, and special increases are not given to employees for exceptional performance or other such reasons. Merit increases are only withheld when employees have significant performance issues. Cost of living increases are not withheld. Additionally, Plaintiff has never had an increase withheld. The increase Plaintiff received on January 7, 2018, was a merit increase, not a cost of living increase, as scheduled by the applicable salary ordinance at the time. Under the Employee Handbook, employees are only eligible for a one-step increase during their annual evaluation. Plaintiff was paid according to the Employee Handbook and the applicable ordinance. Newton, Wimer, and Hemschemeyer did not receive

wage increases in January of 2018. Wimer received a one-step (5%) merit increase in March 2018 after the completion of his probationary period for the Assistant City Administrator position. This is standard practice. Wimer also received a cost of living increase on October 1, 2017. This is required by city ordinance. All three received increases October 1, 2017. Newton and Wimer were cost of living increases. Hemschemeyer's position was moved up in pay grade due to a salary comparison study that was done. Hemschemeyer left the City's employment in October 2017, and had not received a merit increase since October 2016 when he left. Hemschemeyer did receive a cost of living increase on October 1, 2017, as required by city ordinance. Newton has refused a merit increase since he moved into the City Administrator position in June of 2017, until July of 2020 when he accepted a merit raise. Newton received a cost of living increase on October 1, 2017, as required by city ordinance. Plaintiff also received a salary increase on October 1, 2017, as required by city ordinance. Plaintiff received the same increase as the majority of the non-union city staff. All of the pay grade increases that took effect on October 1, 2017, were based on an independent salary comparison done by an outside firm that compared the scope and depth of responsibility of city positions with other utilities.

29. Defendants deny the allegations in Paragraph 29 of the Second Amended Complaint. Plaintiff's performance evaluation was not negative, although there were a few areas identified for improvement. Plaintiff was rated at "meets job requirements" or higher on all four areas in which she received a rating. Additionally, Wimer provided positive feedback and constructive suggestions to Plaintiff during the evaluation.

30. Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 30 of the Second Amended Complaint and, therefore, deny the same.

31. Defendants deny the allegations in Paragraph 31 of the Second Amended Complaint. Wimer emailed Plaintiff on February 9, 2018, telling her that he was the only person that had evaluated her, and that “no other person had input.” Wimer did state to Plaintiff that the Mayor had given him little input, which he didn’t use. Additionally, Wimer did make some changes to the evaluation after his first meeting with Plaintiff regarding it. He just did not make changes to every single thing that Plaintiff took exception to. Wimer explained this to Plaintiff during their meeting on February 14th.

32. Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 32 of the Complaint and, therefore, deny the same.

33. Defendants admit that Plaintiff’s attorney sent Human Resources Director, Jennifer McDuffee (“McDuffee”), the email noted in Paragraph 33 of the Second Amended Complaint. Defendants deny that they have not been preserving all relevant evidence. Defendants deny any remaining allegations in Paragraph 33 of the Second Amended Complaint.

34. Defendants deny the allegations in Paragraph 34 of the Second Amended Complaint. On February 15, 2018, Wimer sent Plaintiff the final copy of her evaluation for her comments and signature. Wimer did not revise Plaintiff’s evaluation after February 15th. On February 20, 2018, Defendants received correspondence from Plaintiff’s attorney stating Plaintiff had decided file charges against Defendants with the NEOC and EEOC. On February 28, 2018, Wimer sent Plaintiff an email reminding her to complete her evaluation, and requesting that she return it the following day. Wimer never sent Plaintiff a copy of her evaluation after February 15th. Wimer never told Plaintiff that her evaluation or any alleged disciplinary actions against her would affect her raises or ability to apply for other positions.

35. Defendants deny the allegations in Paragraph 35 of the Second Amended Complaint. Wimer did not give Plaintiff a written warning on March 9, 2018. Wimer did, however, give Plaintiff a written warning on May 9, 2018, for two separate reasons. Plaintiff was given the warning because of a direct quote from her in the newspaper, which she told the Mayor had been taken out of context. Wimer reviewed Plaintiff's recorded interview and determined that Plaintiff's quote had not been taken out of the context by the newspaper. For that reason, Plaintiff's warning was for the false statement that she made to the Mayor as well as the original disparaging comments she made to the reporter that reflected poorly upon the City. Wimer let the warning stand because two issues were covered. It was also not rescinded because as the Library Director, Plaintiff was expected to know the continuing education requirements of her staff. Further, Wimer never told Plaintiff that her write up would affect her raises or her ability to apply for other positions within the City. A written warning does not affect an employee's ability to apply for other City positions. It may affect whether they are considered the best candidate for a position, however.

36. Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 36 of the Second Amended Complaint and, therefore, deny the same.

37. Defendants deny the allegations in Paragraph 37 of the Second Amended Complaint. When a former IT Specialist left the library, there was a meeting held that included Wimer, Plaintiff, and the IT Department to address how the IT Department would help cover the library's IT needs without its own IT Specialist. A plan was formed to cover the library's IT needs, with the IT Department taking over some the network-related responsibilities that previously belonged to the library's former IT Specialist. Since the IT Department was taking these responsibilities over entirely, Wimer felt it appropriate to reclassify the library's open position for



an IT Specialist based upon the duties the individual would be responsible for, now that the IT Department was covering some of the duties the previous IT Specialist was responsible for. What made the process so difficult was Plaintiff's failure to participate in the process effectively and professionally. Plaintiff consistently delayed reviewing applications, scheduling interviews, and making hiring decisions.

38. Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 38 of the Second Amended Complaint and, therefore, deny the same.

39. Defendants deny the allegations in Paragraph 39 of the Second Amended Complaint.

40. Defendants admit that the City was aware of some of Plaintiff's alleged physical impairments. Defendants also admit that the City received an ADA request form on April 10, 2020, from the Plaintiff, which stated that she was suffering from depression, anxiety, PTSD, and fibromyalgia. However, the City was unable to obtain any information from Plaintiff's doctor regarding any of her alleged disabilities or a recommended accommodation. Additionally, Defendants deny that Wimer, Newton, or Getzschman were aware of any of Plaintiff's alleged disabilities. Wimer, Newton, and Getzschman are not privy to FMLA, ADA accommodation, or short-term disability paperwork. Defendants deny any remaining allegations in Paragraph 40 of the Second Amended Complaint.

41. Defendants admit that Plaintiff used Family Medical Leave in January, February, and March of 2019. Plaintiff's certification form from her doctor stated that she was scheduled for a L5-S transforaminal epidural steroid injection and would be re-evaluated about two weeks afterward. Defendants deny the remaining allegations in Paragraph 41 of the Second Amended Complaint.

42. Defendants admit Plaintiff contacted McDuffee and requested to work from home on January 23, 2019, who deferred the request to Wimer, with Wimer ultimately denying Plaintiff's request. At this time, the City was not aware of a potential disability that needed accommodation. Plaintiff's request to work from home was made because she had not saved up enough vacation and sick leave to cover her two-week waiting period for short-term disability benefits, as she stated in an email. Plaintiff's request was denied because she was unable to perform the essential functions of her position during this time and her duties were being covered by Laura England-Biggs, the Acting Library Director during Plaintiff's absence. Defendants deny the remaining allegations in Paragraph 42 of the Second Amended Complaint.

43. Defendants deny the allegations in Paragraph 43 of the Second Amended Complaint.

44. Defendants deny the allegations in Paragraph 44 of the Second Amended Complaint.

45. Defendants deny the allegations in Paragraph 45 of the Second Amended Complaint.

46. Defendants admit they received an email from Plaintiff on April 10, 2019. Defendants deny the remaining allegations in Paragraph 46 of the Second Amended Complaint.

47. Wimer admits that he may have reached to someone from Encore to determine what they needed, because Wimer's impression from Plaintiff was that Plaintiff was going to let Encore use the library auxiliary building for six months without a lease. Defendants deny the remaining allegations in Paragraph 47 of the Second Amended Complaint.

48. Defendants admit Plaintiff met with McDuffee on May 1, 2019; that Plaintiff made a verbal complaint to McDuffee during the meeting, alleging she was being treated differently than

other directors that Wimer was allowing to work from home; and that McDuffee asked Plaintiff to submit her complaint in writing. Defendants deny the remaining allegations in Paragraph 48 of the Second Amended Complaint.

49. Defendants admit Plaintiff complained to McDuffee during their May 1, 2019, meeting about a child being brought to work. Defendants deny the remaining allegations in Paragraph 49 of the Second Amended Complaint.

50. Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 50 of the Second Amended Complaint and, therefore, deny the same.

51. Defendants admit Plaintiff sent her written complaint to McDuffee. Defendants, however, deny that Plaintiff sent her written complaint to McDuffee on May 7, 2019, and that the allegations she provided in her complaint were facts. Defendants deny the remaining allegations in Paragraph 51 of the Second Amended Complaint.

52. Defendants admit Plaintiff met with an attorney from Dvorak Law Group, who was a third party brought in to investigate Plaintiff's claims of discrimination and retaliation. Defendants deny the remaining allegations in Paragraph 52 of the Second Amended Complaint. Specifically, a letter was emailed to Plaintiff on July 8, 2019, at 2:03 pm, notifying Plaintiff the investigation was closed and of its conclusions.

53. Defendants admit McDuffee emailed Plaintiff on May 24, 2019, about the pay increase; that McDuffee was confident she had signed the pay recommendation form and Finance had received it; and that no one was able to locate the paperwork for Plaintiff's pay increase. Defendants admit McDuffee then sent the pay sheet immediately to payroll for processing. Defendants deny the remaining allegations in Paragraph 53 of the Second Amended Complaint.

54. Defendants admit Wimer requested Plaintiff provide him with a list of the individuals on the Friends of the Library Board and a progress report on fundraising for the library expansion project that Plaintiff was responsible for. Defendants deny Wimer demanded this information from Plaintiff. Wimer merely requested the information from Plaintiff as her supervisor and asked that she report back to him with the information. Defendants deny the remaining allegations in Paragraph 54 of the Second Amended Complaint.

55. Defendants admit that City Attorney Molly Miller ("Miller") told Plaintiff on July 12, 2019, that Plaintiff would be unable to procure a donation for new security gates from the Friends of the Library because it did not follow City purchasing guidelines. Defendants deny the remaining allegations in Paragraph 55 of the Second Amended Complaint.

56. Defendants admit Wimer proposed making all copies from city facilities cost the same amount. Wimer discussed this change with other department heads. Wimer was not instructed to do anything regarding the recommendation by the City Council. The City Council simply modified Wimer's recommendation so that copies at the library would be less expensive than at any other city facility. Defendants also admit that Plaintiff disagreed with Wimer regarding copying fees. Defendants deny the remaining allegations in Paragraph 56 of the Second Amended Complaint.

57. Defendants admit portions of the Baird Holm report investigating Plaintiff's discrimination and retaliation complaints were read during the public comment section of a City Council meeting on July 30, 2019. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in Paragraph 57 of the Second Amended Complaint and, therefore, deny the same.

58. Defendants deny Plaintiff alleged her email and calendar were being “tampered with.” Plaintiff stated that her emails and calendar appointments were disappearing. Wimer emailed Plaintiff regarding the issue, cc’ing McDuffee, Miller, and Nick Brand (“Brand”), the head of IT. Wimer explained how Brand described the issues Plaintiff was having, which were with her personal phone. Plaintiff was asked to keep detailed notes of any future issues and to contact IT when she had technical problems in the future. Defendants deny the remaining allegations in Paragraph 58 of the Second Amended Complaint.

59. Defendants admit the allegations in Paragraph 59 of the Second Amended Complaint. However, Defendants note that library board meetings were not recorded until June of 2019.

60. Defendants admit the Fremont Tribune published a Letter to the Editor on August 14, 2019. To the extent it is impliedly alleged, Defendants deny releasing the information and cannot control what the Fremont Tribune publishes. Defendants deny the remaining allegations in Paragraph 60 of the Second Amended Complaint.

61. Defendants admit the allegations in Paragraph 61 of the Second Amended Complaint.

62. Defendants admit that Wimer informed Plaintiff that she should not contact the City Attorney’s office directly, so that the City can keep its expenses reasonable. Plaintiff was told by Wimer that she could contact the Attorney when the Attorney was in the office at the City. Wimer requested Plaintiff to just CC him when she did it to keep him in the loop. Defendants deny the remaining allegations in Paragraph 62 of the Second Amended Complaint.

63. Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 63 of the Second Amended Complaint and, therefore, deny the same.

64. Defendants admit Plaintiff requested that a row of chairs in the back of City Council chambers be removed so that she Stacey Heatherly (“Heatherly”), a member of the public, could stand. McDuffee told Plaintiff and Heatherly that there was room to stand along the sides of the room and that other individuals have used those areas to stand when needed. Plaintiff and/or Heatherly responded that they did not like standing in front of others. McDuffee told Plaintiff she was not in charge of room setup, but that she would pass the information along. McDuffee informed Troy Schaben (“Schaben”), the Assistant City Administrator for Utilities, of Plaintiff and Heatherly’s request. Schaben told McDuffee that there was space alongside the sides of the room for people to stand if needed. McDuffee told Schaben of Plaintiff and/or Heatherly’s objection to standing along the sides of the room. Schaben stated that he would not be moving the chairs, as there was already standing room elsewhere. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in Paragraph 64 of the Second Amended Complaint and, therefore, deny the same.

65. Defendants deny the allegations in Paragraph 65 of the Second Amended Complaint.

66. Defendants deny the allegations in Paragraph 66 of the Second Amended Complaint.

67. Defendants deny that Newton took away one of her job duties. Purchasing property is not a responsibility of the library director, nor is it a responsibility of a department head. Purchases are handled by either the Assistant City Administrator or the City Administrator. Defendants deny the remaining allegations in Paragraph 67 of the Second Amended Complaint.

68. Defendants admit Schaben spoke at a City Council meeting during the public comment portion. Defendants deny ever receiving a complaint from Plaintiff regarding Schaben

speaking at the meeting. Defendants deny the remaining allegations in Paragraph 68 of the Second Amended Complaint.

69. Defendants deny the allegations in Paragraph 69 of the Second Amended Complaint. Wimer never attempted to remove the Library Technology position. Wimer attempted to work with the IT Department and Plaintiff to determine how IT could assist the library while maintaining consistency with the rest of the organization, and what needs the library had that IT could not meet. Ultimately, the library was allowed to retain the position while IT took over some of its previous responsibilities.

70. Defendants admit Plaintiff received a disciplinary action from Wimer. Wimer emailed Plaintiff with an outline of his concerns regarding the July board meeting on October 21, 2019. A meeting regarding these concerns was held with Plaintiff on October 23, 2019. Plaintiff presented a written response to Wimer's concerns at this meeting. Defendants deny any remaining allegations in Paragraph 70 of the Second Amended Complaint.

71. Defendants admit Plaintiff received two disciplinary actions on November 4, 2019. One for her statements during the July board meeting and another for her conduct at meetings on October 21st and 23rd of 2019. Defendants deny any remaining allegations in Paragraph 71 of the Second Amended Complaint.

72. Defendants deny Plaintiff made a formal complaint on November 8, 2019. However, Plaintiff did send an email to Wimer, on which McDuffee was cc'd, on that date. Defendants deny any remaining allegations in Paragraph 72 of the Second Amended Complaint.

73. Defendants admit Plaintiff took some FMLA leave during the time period of November 10th to November 23rd of 2019. However, Plaintiff's FMLA leave was only approved for November 12th through the 16th of 2019. Plaintiff's time records in the City's payroll system

indicate that she took sick leave on November 13th through the 15th and worked November 18th through the 22nd. Defendants deny any remaining allegations in Paragraph 73 of the Second Amended Complaint.

74. Defendants deny that Plaintiff took FMLA leave during the time period of January 5, 2020, to January 18, 2020. Plaintiff was not approved for FMLA leave during this time. Plaintiff was sent a letter on January 16, 2020, for leave beginning on or around January 14th, but certain certification information was never received and approval letter/designation notice was never sent. Wimer admits he did contact vendors while Plaintiff was on leave, but only because Plaintiff stated that the project was single source. Wimer found it hard to believe that there was only one source for the project. Additionally, Wimer does not believe that he was using the wrong specifications. Wimer asked another vendor if they could perform the project, which the vendor said it could. The vendor was not from overseas. Defendants deny any remaining allegations in Paragraph 74 of the Second Amended Complaint.

75. Defendants admit City Clerk Tyler Ficken (“Ficken”) submitted a staff report to appoint a new Library Board member on February 11, 2020, and that Ficken was instructed by Getzschman to submit the report. Defendants also note that only the Mayor has the ability to appoint a new member of the Library Board. The Library Director is not required to make the staff report or to be involved in the process of appointing a new Library Board member. Defendants deny the remaining allegations in Paragraph 75 of the Second Amended Complaint.

76. Defendants admit Wimer sent an email and offered the Library Board the opportunity to provide input into Plaintiff’s evaluation. Plaintiff had previously asked for the board’s input into her evaluations. Defendants deny any remaining allegations in Paragraph 76 of the Second Amended Complaint.



77. Defendants deny Plaintiff attended the national library conference in Nashville, Tennessee, from March 1 to March 3, 2020. Defendants allege the conference was held from February 25 to February 29, 2020. Defendants allege Plaintiff was home by March 3rd, as Plaintiff emailed at 8:05 am on March 3rd and stated she was taking the day off. In the email Plaintiff also stated that she beat the tornado in Nashville which happened on March 3rd, thereby precluding her from being at the national library conference on that day. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in Paragraph 77 of the Second Amended Complaint and, therefore, deny the same.

78. Defendants deny Wimer told Plaintiff she is no longer allowed to discuss library job descriptions with the Library Board for approval. The Library Board is an advisory board and there are no rules or regulations requiring Plaintiff to take job descriptions to the Library Board. However, Plaintiff is still able to take job descriptions to the Library Board if she would like to; Wimer just is not requiring Plaintiff to do so. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in Paragraph 78 of the Second Amended Complaint and, therefore, deny the same.

79. Defendants deny the allegations in Paragraph 79 of the Second Amended Complaint.

80. Defendants allege that Plaintiff was not authorized to work from home, and that Plaintiff took twelve vacation hours and six sick hours. Defendants also allege that Plaintiff's sick and vacation time were not exhausted until March 23, 2020, the third week after she alleges she started experiencing symptoms consistent with a COVID-19 viral infection. Defendants deny any remaining allegations in Paragraph 80 of the Second Amended Complaint.

81. Defendants admit Plaintiff applied for FMLA leave and short-term disability benefits related to her absence. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in Paragraph 81 of the Second Amended Complaint and, therefore, deny the same.

82. Defendants admit Wimer told Plaintiff she was not authorized to work from home without his approval. Defendants allege that other employees who were working from home at this time were not quarantined. Defendants deny Plaintiff stated that she felt was being singled out again or that her request for accommodation was wrongfully denied. Defendants admit Plaintiff stated other employees were being allowed to work from home during quarantine, that she alleged she had a laptop from IT with everything she needed to work, that Wimer stated Plaintiff's staff could work for her during her quarantine, that Plaintiff told Wimer and McDuffee that she had administrative deadlines to meet and that her staff could not perform that work, that Wimer stated his decision was final, and that McDuffee told Plaintiff she needed to provide a doctor's note before she returned to work. Defendants deny any remaining allegations in Paragraph 82 of the Second Amended Complaint.

83. Defendants allege that March 20, 2020, was not a pay date. March 19, 2020, however, was. Plaintiff was paid her full salary on March 19, 2020. The following two checks, however, had payroll deductions. Defendants also allege Plaintiff received unemployment during this time. Defendants deny any remaining allegations in Paragraph 83 of the Second Amended Complaint.

84. Defendants allege McDuffee emailed Plaintiff at 8:24 am on April 2, 2020, to remind Plaintiff that she needed a release from her doctor to return to work. Plaintiff responded at 9:46 am, said she was on the phone with her doctor's office to get the release faxed to the library

and would leave work at 10:00 am if McDuffee had not received it by that time. Plaintiff ended up leaving work. On April 3, 2020, Plaintiff emailed McDuffee and stated she had spoken to the nurses at her clinic and they all said they were sending the note. Plaintiff stated she requested they send it to the library fax number, and that Plaintiff verified all the fax numbers. Defendants deny any remaining allegations in Paragraph 84 of the Second Amended Complaint.

85. Defendants allege Plaintiff came to work and had to go home on April 2nd, not April 6th. On April 6th, the City's Human Resources Department finally received the faxed release from Plaintiff's doctor. Defendants admit McDuffee emailed Plaintiff a number of times regarding Plaintiff's return to work date. Defendants, however, deny McDuffee called Plaintiff and told her she could return to work the next day on April 6th. Defendants deny any remaining allegations in Paragraph 85 of the Second Amended Complaint.

86. Defendants admit Wimer called Plaintiff in for her annual performance evaluation on April 8, 2020, and put Plaintiff on a six month performance improvement plan requiring Plaintiff to meet with Wimer every two weeks. Defendants also admit Plaintiff requested accommodation for her disabilities during this time. McDuffee sent Plaintiff an accommodation request form and told Plaintiff she would need to fill out the form to start the accommodation process. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in Paragraph 86 of the Second Amended Complaint and, therefore, deny the same.

87. Defendants admit the allegations in Paragraph 87 of the Second Amended Complaint. Defendants also allege that McDuffee later clarified that Plaintiff was at the top of her pay grade and was ineligible for a merit increase in January 2020.

88. Defendants admit that McDuffee gave Plaintiff an ADA Accommodation Form to complete. However, Defendants allege McDuffee gave Plaintiff the form on April 8, 2020, not

April 10, 2020. McDuffee did not receive the accommodation form back until April 23, 2020. The medical certifications were sent to the providers Plaintiff listed. However, the EAP stated it could not fill out the form and the City did not receive a response from any of the other providers Plaintiff listed. Defendants deny any remaining allegations in Paragraph 88 of the Second Amended Complaint.

89. Defendants admit McDuffee denied Plaintiff's requested FMLA leave from March 31 to April 6, 2020. However, Plaintiffs deny that this was why Plaintiff was not paid short-term disability from April 1 to April 3, 2020. McDuffee sent Plaintiff a letter on April 10, 2020, approving Plaintiff's FMLA leave from March 12 to March 30, 2020. McDuffee had a prior conversation with Plaintiff about why the remaining dates were not approved and that Plaintiff could talk to McDuffee again to try and clarify her certification form. Defendants deny any remaining allegations in Paragraph 89 of the Second Amended Complaint.

90. Defendants deny that Plaintiff was "written up" during the meeting. It was merely documented in the notes of the meeting, and McDuffee confirmed that as the recipient of the email, Plaintiff's message was threatening. Defendants admit that Plaintiff had her first performance improvement plan meeting with Wimer and McDuffee on April 23, 2020. Defendants deny any remaining allegations in Paragraph 90 of the Second Amended Complaint.

91. Defendants admit Plaintiff had her second performance improvement plan meeting with Wimer on May 7, 2020. Defendants deny Plaintiff was "written up" during this meeting. Plaintiff's comments were just documented in the notes of the meeting. Defendants admit Wimer pointed out that Plaintiff's allegation that Wimer used to be in her office every day was inaccurate. Defendants deny Wimer mentioned Plaintiff's complaints during the meeting. Defendants also deny Wimer disciplined Plaintiff during the meeting. Plaintiff's allegedly untruthful statements

were merely a topic of discussion. Defendants deny any remaining allegations in Paragraph 91 of the Second Amended Complaint.

92. Defendants admit McDuffee informed Plaintiff that her request for accommodation was being denied because McDuffee did not receive the medical information she needed from Plaintiff's doctor. McDuffee sent a letter to Plaintiff telling her that she was unable to approve her accommodation request because her providers had not responded. Defendants deny Plaintiff ever requested McDuffee reconsider her FMLA denial. Defendants also deny Plaintiff ever put her complaint into writing, as requested. Defendants deny any remaining allegations in Paragraph 92 of the Second Amended Complaint.

93. Defendants admit that Wimer and Newton have attended library board meetings. Defendants deny the remaining allegations in Paragraph 93 of the Second Amended Complaint.

94. Defendants deny the allegations in Paragraph 94 of the Second Amended Complaint.

95. Defendants deny harassing Plaintiff. Defendants lack sufficient knowledge or information to admit or deny the remaining allegations in Paragraph 95 of the Second Amended Complaint and, therefore, deny the same.

96. Defendants deny the allegations in Paragraph 96 of the Second Amended Complaint.

97. Defendants deny the allegations in Paragraph 97 of the Second Amended Complaint.

**RESPONSE TO COUNTS I & II (SEX DISCRIMINATION UNDER TITLE VII/NFEPA)**

98. Defendants incorporate their responses to Paragraphs 1 through 97 as if fully restated herein.

99. Defendants deny the allegations in Paragraph 99 of the Second Amended Complaint.

100. Defendants deny the allegations in Paragraph 100 of the Second Amended Complaint.

101. Defendants deny the allegations in Paragraph 101 of the Second Amended Complaint.

102. Defendants deny the allegations in Paragraph 102 of the Second Amended Complaint.

**RESPONSE TO COUNTS III & IV (RETALIATION UNDER TITLE VII/NFEPA)**

103. Defendants incorporate their responses to Paragraphs 1 through 102 as if fully restated herein.

104. Defendants admit the allegations in Paragraph 104 of the Second Amended Complaint.

105. Defendants deny the allegations in Paragraph 105 of the Second Amended Complaint.

106. Defendants deny the allegations in Paragraph 106 of the Second Amended Complaint.

107. Defendants deny the allegations in Paragraph 107 of the Second Amended Complaint.

**RESPONSE TO COUNT V (EQUAL PAY ACT)**

108. Defendants incorporate their responses to Paragraphs 1 through 107 as if fully restated herein.

109. Defendants admit the allegations in Paragraph 109 of the Second Amended Complaint.

110. Defendants deny the allegations in Paragraph 110 of the Second Amended Complaint.

111. Defendants deny the allegations in Paragraph 111 of the Second Amended Complaint.

112. Defendants deny the allegations in Paragraph 112 of the Second Amended Complaint.

113. Defendants deny the allegations in Paragraph 113 of the Second Amended Complaint.

**RESPONSE TO COUNT VI (FIRST AMENDMENT VIOLATION)**

114. Defendants incorporate their responses to Paragraphs 1 through 113 as if fully restated herein.

115. Defendants deny the allegations in Paragraph 115 of the Second Amended Complaint. At all relevant times, Plaintiff was not speaking as a private citizen on a matter of public concern. Rather, Plaintiff was speaking and assembling pursuant to her job duties as the Library Director at all relevant times.

116. Defendants deny the allegations in Paragraph 116 of the Second Amended Complaint.

117. Defendants deny the allegations in Paragraph 117 of the Second Amended Complaint.

118. Defendants deny the allegations in Paragraph 118 of the Second Amended Complaint.

119. Defendants deny the allegations in Paragraph 119 of the Second Amended Complaint.

**RESPONSE TO COUNT VII (DISABILITY DISCRIMINATION UNDER THE ADA)**

120. Defendants incorporate their responses to Paragraphs 1 through 119 as if fully restated herein.

121. Defendants admit the allegations in Paragraph 121 of the Second Amended Complaint.

122. Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 122 of the Second Amended Complaint and, therefore, deny the same.

123. Defendants deny the allegations in Paragraph 123 of the Second Amended Complaint.

124. Defendants deny the allegations in Paragraph 124 of the Second Amended Complaint.

125. Defendants deny the allegations in Paragraph 125 of the Second Amended Complaint.

126. Defendants deny the allegations in Paragraph 126 of the Second Amended Complaint.

127. Defendants deny the allegations in Paragraph 127 of the Second Amended Complaint.

128. Defendants deny the allegations in Paragraph 128 of the Second Amended Complaint.

**RESPONSE TO COUNT VIII (DISABILITY DISCRIMINATION UNDER NFEP A)**



129. Defendants incorporate their responses to Paragraphs 1 through 128 as if fully restated herein.

130. Defendants admit the allegations in Paragraph 130 of the Second Amended Complaint.

131. Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 131 of the Second Amended Complaint and, therefore, deny the same.

132. Defendants deny the allegations in Paragraph 132 of the Second Amended Complaint.

133. Defendants lack sufficient knowledge or information to admit or deny the allegations in Paragraph 133 of the Second Amended Complaint and, therefore, deny the same.

134. Defendants deny the allegations in Paragraph 134 of the Second Amended Complaint.

135. Defendants deny the allegations in Paragraph 135 of the Second Amended Complaint.

136. Defendants deny the allegations in Paragraph 136 of the Second Amended Complaint.

137. Defendants deny the allegations in Paragraph 137 of the Second Amended Complaint.

138. Defendants deny the allegations in Paragraph 138 of the Second Amended Complaint.

**RESPONSE TO COUNTS IX AND X  
(DISABILITY RETALIATION UNDER THE ADA/NFEPA)**

139. Defendants incorporate their responses to Paragraphs 1 through 138 as if fully restated herein.

140. Defendants admit the allegations in Paragraph 140 of the Second Amended Complaint.

141. Defendants deny the allegations in Paragraph 141 of the Second Amended Complaint.

142. Defendants deny the allegations in Paragraph 142 of the Second Amended Complaint.

143. Defendants deny the allegations in Paragraph 143 of the Second Amended Complaint.

**RESPONSE TO COUNT XI (WHISTLEBLOWER RETALIATION UNDER NFEPA)**

144. Defendants incorporate their responses to Paragraphs 1 through 143 as if fully restated herein.

145. Defendants deny the allegations in Paragraph 145 of the Second Amended Complaint.

146. Defendants deny the allegations in Paragraph 146 of the Second Amended Complaint.

147. Defendants deny the allegations in Paragraph 147 of the Second Amended Complaint.

148. Defendants deny the allegations in Paragraph 148 of the Second Amended Complaint.

**RESPONSE TO COUNT XII (FMLA VIOLATIONS)**

149. Defendants incorporate their responses to Paragraphs 1 through 148 as if fully restated herein.

150. Defendants admit the allegations in Paragraph 150 of the Second Amended Complaint.

151. Defendants admit the allegations in Paragraph 151 of the Second Amended Complaint.

152. Defendants admit the allegations in Paragraph 152 of the Second Amended Complaint.

153. Defendants admit in part and deny in part the allegations in Paragraph 153 of the Second Amended Complaint. Defendants admit that Plaintiff was entitled to a leave of absence pursuant to her rights under FMLA at certain times alleged in the Second Amended Complaint, but not at all times alleged in the Second Amended Complaint.

154. Defendants admit in part and deny in part the allegations in Paragraph 154 of the Second Amended Complaint. Defendants admit that Plaintiff invoked her right to a leave of absence under FMLA at certain times alleged in the Second Amended Complaint, but not at all times alleged in the Second Amended Complaint.

155. Defendants deny the allegations in Paragraph 155 of the Second Amended Complaint.

156. Defendants deny the allegations in Paragraph 156 of the Second Amended Complaint.

157. Defendants deny the allegations in Paragraph 157 of the Second Amended Complaint.

158. Defendants deny the allegations in Paragraph 158 of the Second Amended Complaint.

### **RESPONSE TO DAMAGES CLAIMS**

159. Defendants incorporate their responses to Paragraphs 1 through 158 as if fully restated herein.

160. Defendants deny the allegations in Paragraph 160 of the Second Amended Complaint.

### **GENERAL RESPONSE**

161. To the extent not otherwise specifically admitted, all remaining allegations in the Second Amended Complaint are denied.

### **STATEMENT OF AFFIRMATIVE DEFENSES AND OTHER DEFENSES**

162. All of Plaintiff's claims arising under the Nebraska Fair Employment Practice Act ("NFEPA") are barred in federal court for lack of jurisdiction. NFEPA claims by plaintiffs against Nebraska state and governmental agencies are barred in federal court since there has been no express waiver of sovereign immunity by the State for such actions. *Hasty v. Neb. Dep't of Educ.*, No. 4:09CV3196, 2010 WL 1552855, at \*5 (D. Neb. Apr. 15, 2010) (collecting cases). Sovereign immunity was previously considered an affirmative defense that should be pled by the defendant in its Answer. *See Jill B. v. State*, 297 Neb. 57, 92; 899 N.W.2d 241, 264-65 (2017). However, it has recently been found to be a jurisdictional issue that may be raised at any time by any party or by the court sua sponte. *Davis v. State*, 297 Neb. 955, 978-79; 902 N.W.2d 165, 185-86 (2017). All or part of Plaintiff's actions against the City under NFEPA are therefore barred in this Court.

163. All or part of Plaintiff's sex discrimination claims are barred because Plaintiff has not suffered an adverse action, Plaintiff's sex has not been a motivating factor in any of Defendants' decision-making regarding the terms of Plaintiff's employment, and Plaintiff has not suffered any damages due to her alleged discrimination by Defendants.

164. All or part of Plaintiff's retaliation claims are barred because Defendants have not taken any adverse action against Plaintiff in response to any of her protected activities and Plaintiff has not suffered any damages.

165. All or part of Plaintiff's Equal Pay Act claims are barred because Plaintiff has not been paid a lower wage than members of the opposite sex who performed substantially equal work under similar working conditions and Plaintiff has not suffered any damages.

166. All or part of Plaintiff's claims are barred by her failure to exhaust administrative remedies.

167. All or part of Plaintiff's claims are barred by her failure to timely file her complaints with the NEOC and the EEOC.

168. All or part of Plaintiff's claims based on the Equal Pay Act are barred based on Defendants' pay system being based upon seniority, merit, and other differentials other than sex.

169. All or part of Plaintiff's claims based upon the First Amendment Freedoms of Speech and Assembly are barred, because at all relevant times, Plaintiff was not speaking as a citizen addressing matters of public concern. Plaintiff was only speaking and assembling pursuant to her job duties as Library Director of the City.

170. Plaintiff's disability claims under the Americans with Disabilities Act and NFEPA are barred in whole or in part because her requested accommodations would have caused an undue burden on Defendants, because Plaintiff failed to properly certify her requests for accommodation and make some of her alleged requests for accommodation, because Defendants engaged in the interactive process required under the ADA in good faith, and Plaintiff was unable at all relevant times to perform the essential functions of her job with or without accommodation.

171. All or part of Plaintiff's disability retaliation claims are barred by Plaintiff not actually engaging in protected activity, because Defendants did not take adverse action against Plaintiff, and because there is no causal connection between any alleged protected activity and an adverse action.

172. All or part of Plaintiff's whistleblower protection claims arising under NFEPA are barred because she was not engaging in protected activities, she did not suffer an adverse employment action, and there is no causal link between any alleged protected activity and an adverse employment action.

173. All or part of Plaintiff's FMLA violation claims are barred because Defendants had legitimate, nondiscriminatory justifications for their conduct, Plaintiff did not suffer a materially adverse employment action, Plaintiff had at relevant times already used the twelve weeks of FMLA leave she was entitled to, and Plaintiff was not entitled to or did not invoke her right to a leave of absence under FMLA.

174. With regard to one or more of the causes of action asserted by Plaintiff, the Second Amended Complaint fails to state a claim upon which relief may be granted.

175. Plaintiff failed to mitigate her damages; as such, such damages are barred.

176. All or part of Plaintiff's claims are barred by after-acquired evidence of misconduct by the Plaintiff.

177. All or part of Plaintiff's claims are barred because Defendants exercised reasonable care to prevent and correct promptly any discriminatory conduct, and Plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by Defendants or to avoid harm otherwise.

178. Defendants reserve the right to assert additional affirmative defenses as they may arise in the course of litigation.

WHEREFORE, Defendants respectfully request that the Plaintiff's Second Amended Complaint be dismissed with prejudice, and that the Defendants be awarded their attorney fees and costs to the extent allowed by law, as well as any additional relief which may be just and equitable.

DATED: August 26, 2020.

THE CITY OF FREMONT, SCOTT  
GETZSCHMAN, BRIAN NEWTON, and  
SHANE WIMER, Defendants

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By: s/ Jerry L. Pigsley  
Jerry L. Pigsley, #16639

**CERTIFICATE OF SERVICE**

I hereby certify that on August 26, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the Plaintiff's counsel:

Jennifer Turco Meyer  
Dyer Law, P.C., LLO  
10730 Pacific Street, #111  
Omaha, NE 68114

s/ Jerry L. Pigsley  
One of Said Attorneys