

**STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS**

STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

CLARISSA OVERTON,

Complainant,

v.

**HAYWARD HUNTER, CHIEF STATIONARY
ENGINEER CUSTODIAN OF BUFFALO SCHOOL
DISTRICT, COMMUNITY SCHOOL #53,**

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 7943178

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on February 2, 2007, by Martin Erazo, Jr., an Administrative Law Judge of the New York State Division of Human Rights ("Division").

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist

from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED, this 26 day of March, 2007.


KUMIKI GIBSON
COMMISSIONER

TO:

Clarissa Overton
336 Herman Street
Buffalo, NY 14211

Haward Hunter, Chief Stationary Engineer Custodian
PO Box 208
Buffalo, NY 14215

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Buffalo, NY 14208

State Division of Human Rights
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Peter G. Buchenholz
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ELIOT SPITZER
GOVERNOR

KUMIKI GIBSON
COMMISSIONER DESIGNATE

February 2, 2007

Re: Clarissa Overton v. Hayward Hunter, Chief Stationary
Engineer Custodian of Buffalo School District, Community
School #53
Case No. 7943178

To the Parties Listed Below:

Enclosed please find a copy of my proposed Recommended Findings of Fact, Decision and Opinion, and Order. Please be advised that you have twenty-one (21) days from the date of this letter to file Objections.

Your Objections may be in letter form, should not reargue material in the Record, and should be as concise as possible. Copies of your Objections must be served on opposing counsel, including Division counsel, if any, and on the General Counsel of the Division of Human Rights. Objections provide the parties with an opportunity to be heard on the issues in the case before the issuance of a final Order of the Commissioner. See Rules of Practice of the Division of Human Rights, 9 NYCRR § 465.17(c).

The Objections must be filed by February 22, 2007, with the Order Preparation Unit, at the address below.

NYS Division of Human Rights
Order Preparation Unit
One Fordham Plaza, 4th Floor
Bronx, New York 10458

If we do not receive your Objections by the deadline noted above, the Division will assume that you do not object to the proposed order and will proceed to issue the final Order under that assumption.

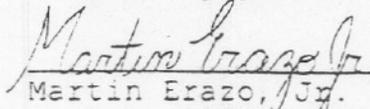
Notice of Recommended Order

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Buffalo School District, Community School #53

Please contact Peter G. Buchenholz, Adjudication Counsel,
at (718) 741-8340 if you have any questions regarding the filing
of Objections.

Very truly yours,



Martin Erazo, Jr.
Administrative Law Judge

Notice of Recommended Order

SDHR Case No. 7943178

Clarissa Overton v. Hayward Hunter, Chief Stationary Engineer Custodian Of
Buffalo School District, Community School #53

TO:

Complainant

Clarissa Overton
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Respondent

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Adjudication Counsel

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Chief Calendar Clerk

**STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS**

<p>STATE DIVISION OF HUMAN RIGHTS On the Complaint of</p> <p>CLARISSA OVERTON,</p> <p style="text-align: right;">Complainant,</p> <p style="text-align: center;">-against-</p> <p>HAYWARD HUNTER, CHIEF STATIONARY ENGINEER CUSTODIAN OF BUFFALO SCHOOL DISTRICT, COMMUNITY SCHOOL #53</p> <p style="text-align: right;">Respondent.</p>	<p>RECOMMENDED FINDINGS OF FACT, DECISION AND OPINION, AND ORDER</p> <p>Case No. 7943178</p>
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PROCEEDINGS IN THE CASE

On February 20, 2002, Complainant filed a verified complaint with the State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of the Human Rights Law of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent Hunter ("Respondent") had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Martin Erazo, Jr., an Administrative Law Judge ("ALJ") of the Division. The public hearing was held on February 21, 2006, February 22, 2006, and February 28, 2006.

Complainant and Respondent appeared at the hearing. The Division was represented by Gina M. Lopez Summa, former General Counsel, by Richard J. Van Coevering, of counsel. Respondent was represented by Lynette Copeland, Esq.

Permission to file post-hearing briefs was granted. Complainant and Respondent filed timely post-hearing briefs.

After evaluating the evidence presented at hearing, and the credibility of the witnesses, I am persuaded that Complainant satisfied her prima facie case of employment discrimination. However, Respondent articulated legitimate business reasons for its actions. Complainant failed to establish that Respondent's business reasons were a pretext for unlawful discrimination. It is therefore recommended that the Division dismiss the complaint.

FINDINGS OF FACT

1. In January 1998, Complainant began working as a custodial worker at Buffalo Public School District, Community School 53 ("Buffalo School 53"). (Tr. 25). Custodial staff are not employees of the Buffalo Public School District. Instead, they are employees of the engineer hired to maintain a particular school building. Engineers are independent contractors. (Tr. 16-20).

2. From January 1998 until February 2002, Complainant worked for various engineers assigned to Buffalo School 53. On May 28, 2001, Respondent became Complainant's employer. (ALJ Exhibit I, p.6). In February 2002 Complainant filed this complaint. (Tr. 19). As of the last hearing date, February 28, 2006, Complainant was still employed by Respondent. (Tr. 25).

3. Complainant makes five allegations about Respondent's conduct. First, Complainant alleges her regular and overtime pay dropped dramatically during Respondent's tenure, because of her gender. (Tr. 11-12). Second, Respondent allegedly disciplined Complainant differently than male workers. In one particular instance, Complainant was allegedly disciplined when she refused to complete work that required overtime hours. Respondent allegedly was unwilling to pay her overtime. (ALJ Exhibit I, p. 6, 7, ¶¶ 7, 8). Third, Complainant was allegedly assigned different work duties than males. (ALJ Exhibit I, p. 6; ¶ 4). Complainant was allegedly asked,

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inter alia, “to train” and “redo” the work of male workers while her male counterparts did not have to do the same. (ALJ Exhibit I, p. 6, ¶ 4). Fourth, Complainant allegedly received worse treatment in the work schedules and in the monitoring of her work, compared to males. (ALJ Exhibit I, p. 6, ¶¶ 5, 6). Fifth, Respondent sexually harassed Complainant. (ALJ Exhibit I, p. 7, ¶ 10).

4. Respondent denies discrimination. (ALJ Exhibit II).

5. Complainant alleges she was paid less than her male counterparts from the time she began working for Respondent in May 2001. Complainant’s allegations of pay disparity were initially based on the amounts shown on her Social Security earnings statements for the years 2000 and 2001. (Tr. 39). These statements showed a dramatic drop from the year 2000 to the year 2001 in an amount over \$17,000. (Complainant Exhibit 1). However, Respondent continued to pay Complainant \$11.00 an hour in May 2001. (Tr. 39). In addition, Complainant also admitted that, from the time she began working for Respondent in May 2001, she continued to work “forty hours a week.” (Tr. 83). Complainant’s pay rate and work hours did not change.

6. Respondent was not in control of Complainant’s earnings for half of the year 2001. (Complainant Exhibit 2). Complainant received two W-2 statements for her work as a custodian at Buffalo School 53. The first W-2 was issued by “Roger Alyster” who was Complainant’s brother. (Tr. 63, 103, 107). Alyster was her employer at Buffalo School 53 until May 2001. The second W-2 was issued by Respondent who was Complainant’s employer for the balance of that year. (Complainant Exhibit 2).

7. During the second day of hearing, February 26, 2006, Division Counsel specifically withdrew Complainant’s allegation of discrimination as to pay. (Tr. 141, 142). For the first time,

Complainant produced her "Wage and Tax Statements" ("W-2s") for review by Division Counsel during the course of the Division Hearing. (Tr. 143, 144). Upon review of the W-2s, Division Counsel stated that the W-2s did not show a considerable downturn in her earnings from 2000 to 2001 as initially alleged. (Tr. 140, Complainant Exhibit 2). Division Counsel specifically stated that "Ms. Overton was not substantially affected or discriminated against...at least in terms of her pay level." (Tr. 142).

8. Complainant alleges she was denied overtime work. When testifying on the overtime issue, Complainant changed her position a few times. First, Complainant alleged that prior to Respondent's tenure, she received overtime work every Saturday. Respondent allegedly reduced her overtime work to one Saturday per month. (Tr. 37, 78). Complainant alleged that *all* her co-workers "worked more hours" than she. (Tr. 41). Second, Complainant then admitted that overtime work was *also* reduced for one other male custodian. (Tr. 46). Third, Complainant again changed her position admitting that Saturday overtime actually decreased for *everyone*. (Tr. 82). Complainant testified that Respondent informed all the employees that "we would no longer have it on Saturdays anymore." (Tr. 82). Complainant further admitted that the decrease in Saturday overtime hours was not under the control of Respondent. The reduction in Saturday hours was directly related to the decrease of the Saturday program hours for Buffalo School 53. (Tr. 80).

9. Complainant alleges that gender was the reason she was assigned to train other males or complete the work of other males. Respondent allegedly asked her "to redo work that male workers have not done properly." Respondent allegedly had her "help male workers who can't complete the job." (ALJ Exhibit I, p. 6). However, all custodians were assigned part time help

called "cleaners." (Tr. 188-190). Cleaners and custodians did not have the same work status. Cleaners were part time, non-union, temporary workers. There were generally two occasions when cleaners were assigned to a custodian. These assignments typically occurred during the holiday season at the end of the year and during the summer break. (Tr. 199-200).

10. Complainant's testimony supported Respondent's version of events regarding the assignment of cleaners. First, Complainant testified that there were only a total of two instances when she was asked to either redo, train, or complete the work of male employees. (Tr. 97-98). One instance occurred in December of 2001. The other instance occurred in the summer of 2002. (Tr. 125-127). Second, Complainant admitted that she did not know whether her male counterparts were assigned cleaners. She did not know whether or not male custodians were ever asked to redo, train or complete the work of others. (Tr. 99). Third, Complainant's own testimony clarified that she was not assigned a cleaner on a daily basis, on a frequent basis, or in a disparate manner compared with males, as her allegations initially suggested. Male custodians were also assigned cleaners. All custodians were responsible to make sure that the cleaners assigned to them properly performed the work. (Tr. 199). It was the "permanent employee's responsibility or assignment to complete that job" and train cleaners (Tr. 200).

11. Complainant alleges that Respondent disciplined her differently than males. Complainant provided two examples in support of this charge. Complainant states that Respondent once gave her an assignment that required overtime. Complainant alleged that she left at the end of her scheduled work day without completing her assignment because Respondent refused to allow for overtime. (ALJ Exhibit I, p. 6, 7 ¶¶ 7, 8). Complainant alleged she was "written up" for not "completing [her] work." (ALJ Exhibit I, p. 7 ¶ 8). However,

Respondent disciplined Complainant because he believed the assignment could be done within regular working hours. Respondent gave Complainant adequate time to complete the assigned task because Respondent personally "did the jobs [him]self ...for an entire week." (Tr. 249). The evidence also shows that Respondent had given Complainant the particular assignment in order to resolve a conflict that she had with a co-worker. (Tr. 248-249).

Complainant also compared herself with male cleaners that had been assigned to her. She claims the male cleaners were not disciplined for alleged poor performance and she completed their work. (Tr. 98). Cleaners were part time, temporary workers that did not have the same responsibility as custodians. (Tr. 199-201). Regardless of gender, it was the "permanent employee's responsibility or assignment to complete that job." (Tr. 200). The specific comparative data offered by Complainant did not describe similarly situated males.

12. Complainant made varied allegations of disparate treatment based on gender. Complainant alleged that Respondent allowed "male workers to leave earlier or to incorrectly report the time they worked." (ALJ Exhibit I, p. 6). Complainant also alleged that Respondent constantly followed her "around to see if I am working" and that Respondent did not do the same "to male workers." (ALJ Exhibit I, p. 6). However, as with other allegations, Complainant's testimony on the issue of disparate treatment was generalized and contradictory. First, Complainant was very clear and definitive that *all* male workers "signed out for a later hour than what they left." (Tr. 44). "They left at 2:00 and signed at 4:00 o'clock." (Tr. 44). When Complainant was questioned at hearing for more details, Complainant stated "I think it was, I don't remember exactly what day or time or anything like that but Mr. Carrion had left at 2:00

o'clock." Complainant then proceeded to respond that it was *only* "Mr. Carrion" that was allowed to go home early. (Tr. 56).

Carrion was not similarly situated to Complainant. Carrion performed custodial duties but his primary function was as a "certified substitute engineer." (Tr. 184). Carrion was paid as a "heating, ventilation and air conditioning" engineer. (Tr. 185). Carrion's title and schedule were different than that of the custodians. Complainant admitted that she had not been aware of Carrion's actual duties or title. (Tr. 108).

13. Complainant's testimony on the issue of disparate treatment was not credible. For example, Complainant testified that she had written witness statements from teachers and other employees supporting that she was treated different than males. (Tr. 91). However, Complainant's "witness" statements make no inference that she was discriminated against. Complainant admitted this at hearing. (Tr. 94- 97; Respondent Exhibit A).

14. Complainant alleged sexual harassment. She alleged that on December 24, 2001 she was "in the girls' bathroom using the toilet" and when she "came out of the stall, Hayward Hunter was standing there." (ALJ Exhibit 1, p. 7, ¶10). However, it was reasonable that Respondent would check in on an employee cleaning the student bathroom. It was part of Complainant's duties to clean the bathroom. Complainant's own witness, who is a male cleaner, stated that "...we were assigned to clean the classrooms...we would do the bathrooms to go along with the cleaning of the room." (Tr. 175). Second, Respondent testified that "the policy is that...the children, students bathrooms are secured, which means closed...they are not to be used by staff...we have places designated for staff..." (Tr. 221). Complainant admitted she was aware that there is a designated employee bathroom on each floor. (Tr. 108, 111-112). Third,

Respondent went looking for Complainant because he believed she was working the wrong area. (Tr. 226). Respondent testified that he saw Complainant at the sink and “asked her ‘are you working this space?’” (Tr. 215). Complainant’s verified complaint supports Respondent’s testimony. Complainant stated in her verified complaint that “he asked me if I was cleaning the bathroom.” (ALJ Exhibit I, p. 7, ¶ 10). Fourth, Complainant specifically stated that this was a single incident. There were no other allegations of sexually offensive conduct of any sort occurring prior or after this incident. (Tr. 70, 72).

DECISION AND OPINION

I find that Respondent did not unlawfully discriminate against Complainant on the basis of gender, in violation of the Human Rights Law. Complainant failed to prove that she was sexually harassed or treated differently because of her gender.

Disparate Treatment:

Complainant charged that she was discriminated against because she is female. Complainant alleged that she was treated differently than males in terms of regular pay, overtime, work assignments, work duties, and discipline.

Human Rights Law §296.1(a) states that “it shall be an unlawful discriminatory practice ... for an employer ..., because of the ... sex ... of any individual, ... to discriminate against such individual in ... terms, conditions or privileges of employment.”

In order to establish a prima facie case of unlawful discrimination, Complainant must demonstrate that: (1) she was a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. Pace

College v. Commission on Human Rights of the City of New York, 38 N.Y.2d 28, 377 N.Y.S.2d 471 (1975), *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant established a prima facie case of discrimination. However, Respondent articulated legitimate non-discriminatory reasons for his actions. Complainant has failed to offer any convincing evidence that these reasons are a pretext for unlawful discrimination.

Complainant alleged that Respondent unlawfully discriminated against her by reducing her overtime hours. However, the evidence supports that overtime work was reduced for everyone. Complainant provided contradictory and shifting testimony on the overtime issue. Complainant first testified that all male coworkers received more overtime hours. Complainant then testified that overtime work was also reduced for one other male custodian. Complainant finally admitted that Respondent reduced overtime for everyone.

Complainant also alleged that Respondent disciplined her when she left at the end of her scheduled work day without completing her assignment. Respondent refused to allow Complainant any overtime to complete the assignment. The evidence supports that Respondent's refusal stemmed from his belief that Complainant could have completed the assignment within regular work hours. The evidence does not support that Respondent was motivated by a gender bias.

The evidence does not support Complainant's allegations that Respondent denied her equal pay. Complainant initially alleged that Respondent dramatically decreased her pay because she is female. Respondent allegedly began reducing her pay when he became her employer at Buffalo Public School 53 in 2001. In support of her position, Complainant offered her Social Security statements as evidence. However, Complainant's W-2 statements support that

Respondent was not in control of Complainant's earnings during half of the year 2001. In addition, the W-2 statements did not show the dramatic drop in regular pay as Complainant initially alleged. Complainant withdrew her allegations of unequal pay during the course of the hearing.

The evidence does not support that Complainant was given work assignments and duties on an unlawful basis. Complainant charges that she was assigned to train and complete the work of male cleaners. The evidence supports that Respondent made similar assignments to male custodians. The purpose of assigning a cleaner was to assist the full time custodians. Cleaners were temporary, non-union, lower paid, part time staff. Custodians were higher paid, permanent, union employees. It was the responsibility of the custodian to finish the work of the cleaner, if necessary. Complainant admitted that she did not actually know whether male custodians had been given a similar assignment of cleaners.

The evidence does not support Complainant's allegations that some males were given preferential treatment in the daily work schedule. As with other aspects of Complainant's testimony, Complainant's testimony on this point was generalized and contradictory. The evidence does not support this allegation.

Hostile Work Environment:

A complainant may establish a hostile environment violation by proving that the discrimination was sufficiently severe or pervasive to alter the conditions of the employment and create a hostile or abusive working environment. A complainant must subjectively view the conduct as unwelcome that creates a hostile environment. In addition, a reasonable person must objectively view the conduct as severe and pervasive enough to create an abusive environment.

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Father Belle Community Ctr. v. N.Y. State Div. of Human Rights, 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept. 1996), *lv. denied* 89 N.Y.2d 809, 716 N.Y.S.2d 533 (1997). When assessing claims of hostile environment and its pervasiveness, the ultimate decision depends on the totality of the circumstances. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 669 N.Y.S.2d 122 (Sup.Ct. N.Y.Co. 1997), *aff'd in relevant part*, 256 A.D. 269, 682 N.Y.S.2d 167 (1st Dept. 1998), *lv. denied* 94 N.Y.2d 753, 700 N.Y.S.2d 427 (1999).

Complainant failed to show that a reasonable person can objectively view the offending conduct as sufficiently severe and pervasive to create a hostile working environment. Complainant alleges that Respondent's single act of entering a student bathroom while she used one of the stalls, created a hostile work environment. The evidence shows that it was reasonable to expect a supervisor to enter an employee's area of work. Complainant's job duties included working and cleaning the student bathrooms. Employees were expected to use the bathrooms designated for the staff. Respondent did not engage in any sexually offensive activity either prior to or after this single incident.

A single incident can support a determination of unlawful sexual harassment. However, the single incident described by Complainant does not objectively rise to the level of sexual harassment required under the Human Rights Law. The scenario described by Complainant did not describe a severe and pervasive environment. The single incident did not alter the terms and conditions of Complainant's employment necessary for a sexual harassment finding. Father Belle, *supra*; Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

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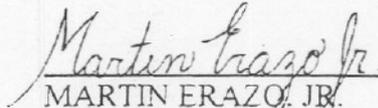
In summary, Complainant failed to establish that she was subjected to sexual harassment or unlawful discriminatory treatment based on gender.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the complaint be, and the same is dismissed.

DATED: February 2, 2007
Buffalo, New York


MARTIN ERAZO, JR.
Administrative Law Judge