

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MARY ANN THURSTON and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 01BEM10465

LYNN SCHOOL DEPARTMENT,
STEPHEN DICKERSON, and
JAMES MAZAREAS,

Respondents

Appearances: Richard M. Callahan, Esq. for Complainant Thurston
Kenneth W. Terrell, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or around November 8, 2001, Mary Ann Thurston (“Complainant”), filed a complaint with the Massachusetts Commission Against Discrimination charging that Lynn Public School Principal Stephen Dickerson harassed her and discriminated against her in her job as school custodian because she was female. Complainant alleged that Principal Dickerson did not allow her to clean the boys’ bathrooms at the Harrington Elementary School and said that he wanted a man as the senior school custodian. The Investigating Commissioner issued a finding of probable cause.

After conciliation efforts failed, the case was certified for a public hearing on July 25, 2005.

A public hearing was conducted on May 2 and 3, 2006. The parties submitted seventeen (17) joint exhibits. Complainant testified on her own behalf and called the following additional witnesses: Mark Raftery, Richard Gardner, Lawrence Murray, and Dean Thurston. Respondent called Patricia Libby, Dennis Camilio, and Stephen Dickerson. The Complainant submitted a post-hearing brief on or around August 8, 2006. Respondent submitted a post-hearing brief on or around November 14, 2006 which was disregarded because it was not timely filed.

To the extent the Complainant's proposed findings are not in accord with or irrelevant to my findings herein, they are rejected. To the extent the testimony of the witnesses is not in accord with or irrelevant to my findings, it is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. The Complainant, Mary Ann Thurston, began to work for the Lynn Public Schools in 1994 as a school custodian. From October of 2000 to April 30, 2001, she worked as an acting "boilerman" at the Harrington Elementary School where Stephen Dickerson was the Principal. Complainant testified that as boilerman, she opened the building, cleaned some bathrooms, cleaned some classrooms, cleaned up after meals, and performed various other duties. Complainant admitted that as boilerman at the Harrington Elementary School, she was absent

an average of two days per week and that during her last month as boilerman in April of 2001, she took at least ten (10) sick days, one (1) personal day, and two (2) vacation days because she was attending to property she had purchased in New Hampshire in February of 2001.¹ On April 30, 2001, Complainant became the acting senior custodian at the Harrington Elementary School.

2. At the Harrington School, the daytime custodial staff consists of a senior custodian, a boilerman, and a houseworker. During the time that Complainant was the acting senior custodian at the Harrington School, Kathy Fuller was the boilerman and Gloria Jenkins was the houseworker. Fuller functioned as the acting senior custodian when Complainant was absent.
3. Complainant testified that on her first day as acting senior custodian at the Harrington School, there was a meeting with Principal Dickerson, senior custodian Mark Raftery,² custodial supervisor Dennis Camelio, and Complainant. At the meeting, Dickerson discussed his apprehension about Complainant becoming the school's acting senior custodian.
4. Dickerson testified that because of Complainant's frequent absences as the school's boilerman and because of personality conflicts between Complainant and other members of the school's custodial staff, he was concerned about Complainant's promotion to acting senior custodian in April of 2001. I credit Dickerson's testimony.
5. Complainant testified that she and Dickerson made an initial inspection of the

¹ Considerable testimony was devoted to whether there was a past practice of allowing custodians in the Lynn School System to use sick time for personal matters unrelated to sickness. It is not necessary to resolve this matter in order to resolve the charge of gender discrimination.

² Raftery was a union official at the time and became union president in 2003.

- school at the time she was made acting senior custodian. Complainant testified that as she approached one of the school's bathrooms, she anticipated taking the following steps in accordance with what she characterized as the "universal procedure" for a custodian entering a school bathroom: knock on the door, announce "custodian coming in" and wait for a response, repeat the announcement if no answer, wait until the bathroom empties if there is a response, and prop the door open with a mop after determining that the bathroom is vacant. According to Complainant, Dickerson said that he didn't want her going in the boys' bathrooms for any reason because he needed to respect the rights of his male students. I do not credit Complainant's testimony about Dickerson's alleged statement that he did not want her going into the boys' bathrooms for any reason.
6. Principal Dickerson testified that when he and Complainant made the initial joint inspection of the school, Complainant knocked on the door of a boys' bathroom, announced there was a "custodian on the floor," and proceeded to enter. Dickerson testified that he told Complainant that she needed to wait until someone of the same sex went in and checked the bathroom, to which she responded that she had sons and was "used to it." According to Dickerson, he said, "that's not the point" and she said, "then I won't go in at all." Dickerson disputes that he ever told Complainant she couldn't clean the boys' bathrooms. I credit Dickerson's version of what transpired over Complainant's version.
 7. Approximately ten days after Complainant and Dickerson made a joint inspection of the school, Complainant was conferring with custodial supervisor Dennis Camelio when she was buzzed by Dickerson. Complainant described the buzzing

as a frequent and disruptive occurrence that was audible in every classroom and hallway in the school. Camelio and Complainant responded to the buzzer by going to Dickerson's office. According to Complainant and Camelio, Dickerson said the school was, "going to hell in a handbasket" since Complainant had become the acting senior custodian, swore at Complainant, and yelled that he wanted a male senior custodian. Complainant testified that Camelio said to Dickerson, "we'll take care of it" and they both walked out while Dickerson continued to yell. I credit Complainant's testimony that she was buzzed to the office by Dickerson who expressed dissatisfaction with the condition of the school, but I do not credit her assertion that Dickerson swore at her and yelled that he wanted a male senior custodian.

8. The following day, Raftery, Camelio, Dickerson, and Complainant participated in an inspection of the school. According to Complainant, Dickerson complained about several floors being scuffed up. Complainant testified that she stayed late on a Friday afternoon and came in over the weekend to power wash and wax the floors of four rooms. Dickerson re-inspected the floors on the following Monday and acknowledged they had been cleaned. According to Complainant, Dickerson stated during the re-inspection that he didn't want "her" going into the boys' bathrooms and that he needed a man for that task. Complainant described herself as frustrated and upset after this exchange. I credit Complainant's testimony about the fact that she worked over the weekend to complete the task of power washing and waxing the floors, but I do not credit her testimony that Dickerson said he needed a man to inspect the boys' bathrooms.

9. Complainant testified that in May of 2001, Dickerson told her at approximately 7:45 a.m. on a school day that he needed her to immediately set up 300 chairs in the gym and that he did not mention that the chairs were to remain set up for several days. Complainant testified that the following morning, some of the chairs were scattered and closed as a result of basketball practice having taken place in the gym. I credit Complainant's testimony that Dickerson gave Complainant short notice of the need to set up the chairs and may not have communicated how long the chairs were to remain assembled, but I do not credit Complainant's assertion that Dickerson intentionally failed to communicate that the chairs were to remain set up for several days in order to force Complainant to take down and set up the chairs on three separate days.
10. At some point in late May of 2001, Dickerson buzzed Complainant about a child who had fallen on sand in the school yard. According to Complainant, Dickerson told her that the presence of the sand was unacceptable and that she was responsible for removing it. Complainant brought in her own equipment in order to remove the sand from the school sidewalks and play area. She transported the sand to her property in New Hampshire. I credit Complainant's testimony regarding the removal of the sand.
11. According to Complainant, Dickerson told her at the end of the 2000-2001 school year that he planned to use the auditorium stage for school graduation. In order to prepare the stage for graduation, Complainant cleaned and polyurethaned the floor. She was subsequently informed that the stage would not be used for graduation. I credit Complainant's testimony in this regard.

12. Complainant testified that she was frequently “buzzed” by Principal Dickerson during the school day. She stated that the frequent buzzing disturbed the teachers and interrupted her work because it required that she go to the office to find out what Dickerson wanted. Complainant testified that she asked Dickerson to contact her using a Nextel walkie-talkie instead of paging her with the buzzer but that he continued to page her. I credit Complainant’s testimony in this regard.
13. Complainant testified that school custodians usually receive a month’s notice in order to set up for summer school but that she did not receive notice until June 22, 2001 that the Harrington summer school program would commence on June 25, 2001.
14. On June 22, 2001, Complainant informed Dickerson in writing that he was required to perform inspections with her and that he had violated her contract by failing to do so.³
15. Complainant took sick leave for five days during the last two weeks of June, 2001, and vacation or sick leave for most of July, 2001⁴ but then worked at the Harrington School in July of 2001 on an overtime basis in the summer school program and in August of 2001, on a ten-man crew. Complainant re-commenced her duties as senior building custodian at the Harrington School beginning in September of 2001. Joint Exhibit 16.
16. Complainant testified that on September 24, 2001, Dickerson buzzed her to the office to inform her that a child had vomited. While Complainant was cleaning

³ The letter is dated June 22, 2000 but the reference to 2000 appears to be an error.

⁴ Complainant testified that she was out injured for most of July of 2001, however, her attendance record for July, 2001 contains notations which appear to be a “V” for vacation or else a check designating a different type of absence.

up the vomit, Dickerson again paged her to the office to tell her to clean up mouse droppings. According to Complainant, she disposed of the vomit, went to the basement to attend to the mouse droppings, and was buzzed to the office a third time by Dickerson about an unplugged refrigerator. Complainant testified that later in the day she noticed another refuse bag outside the classroom of the sick student. The teacher, in whose class the child vomited, wrote to Dickerson complaining about the “unacceptable” manner in which Complainant handled the clean-up. According to the teacher, Complainant put sawdust on the desk and chair where the child vomited, left the room and returned twenty minutes later to clean up the mess, but refused to take away the trash bag on the basis that the child might get sick again. According to the teacher, the trash bag was not removed for an hour. Joint Exhibit 9.

17. Complainant described Dickerson’s demeanor towards her as curt, condescending, and demeaning. According to Complainant, Dickerson yelled at her a lot. She testified that Dickerson did not invite her input on custodial matters but, rather, told her what to do and how to do it. Complainant testified that in response to what she perceived to be communication problems, she wrote Dickerson a memo on September 24, 2001 in which she “formally notified” him to put all future communications other than emergencies in writing and stated that she “expect[ed] ... cooperation, so as not to disrupt my staff with nonsense.” Joint Exhibit 3.

18. On September 26, 2001, Complainant wrote to Lawrence Murray, Supervisor of Custodians and Maintenance, accusing Dickerson of gender harassment, sexual

harassment, and sexual orientation harassment.⁵ Joint Exhibit 7. On the same day, she submitted to the Lynn Public Schools a complaint of sex/gender harassment against Dickerson. Joint Exhibit 8.

19. Complainant testified that following her “notification” to Dickerson that he should address his communications to her in writing, he paged her about a defective door to the teacher’s lounge. Complainant testified that she “secured” the door by putting up a sign and wrote out a maintenance slip about the problem, but did not take further action because it was not her responsibility to fix the door. In response, Dickerson immediately arranged for a carpenter to inspect the door and to order a new door “closer.” Joint Exhibit 14. Complainant wrote to Lawrence Murray on September 26, 2001 to complain about Dickerson “mishandling” procedure, refusing to notify her in writing about the door, interrupting” her to inquire about the status of the door, and making a “false statement” to someone in Murray’s office that the defective door was an emergency. Joint Exhibit 6.
20. Complainant testified that Dickerson continued to object to her going into the boys’ bathrooms to clean them and at one point said to her, “stay the hell out of the boys’ room.” However, Complainant also acknowledged that Dickerson merely instructed her to have a male inspect the boys’ bathrooms prior to her entering and “had no problem” with her cleaning the boys’ bathrooms. Custodial Supervisor Dennis Camelio corroborated that Dickerson wanted the boys’

⁵ Complainant testified that she accused Dickerson of sexual orientation harassment based on her contention that he would not allow her to clean the boys’ bathrooms. This claim is facially without merit since it does not involve Complainant’s sexual orientation. Compare Fijal v. Kentucky Fried Chicken/JTN Food Service, Inc., 20 MDLR 45 (1998) (owner called complainant “faggot” and subjected him to actions that established the owner’s disapproval of complainant’s status as a gay employee).

bathrooms “cleared” prior to Complainant cleaning them. I credit the testimony of Complainant and Camelio that Dickerson did not object to Complainant cleaning the boys’ bathrooms provided a male inspected the bathrooms first.

21. On one occasion after the start of the 2001-2002 school year, Complainant had to clean up a flood in the second floor boys’ bathroom. Complainant testified that prior to entering the bathroom, she asked a male teacher to inspect the bathroom to make sure that no boys were inside. The teacher refused to leave his classroom but allowed a male student to inspect the bathroom, even though his class was taking an exam at the time. According to custodial supervisor Dennis Camelio, it is reasonable for someone of the male gender to check a boys’ bathroom before a female custodian cleans it. Camelio described this practice as “common.”
22. Complainant testified that she “opted out” of the Harrington School on or around October 1, 2001. She was reassigned to the Ford Annex for approximately five weeks and subsequently assigned to the night shift at the Brickett School. Complainant’s base salary increased after she left the Harrington School, although Complainant testified that the Ford Annex and the Brickett Schools provided fewer overtime opportunities and that some of the increased salary was attributable to contractual raises which she also would have received at the Harrington School.
23. On or around October 4, 2001, James Mazareas, Superintendent of the Lynn Schools, notified Complainant, Dennis Camilio, Stephen Dickerson, Lawrence Murray, and others that they were to attend a meeting on October 16, 2001 relative to Complainant’s employment at the Harrington School. Joint Exhibit 10.

The meeting was postponed until October 22, 2001. Joint Exhibit 12. At the meeting, Superintendent Mazareas expressed his opinion that Complainant had been insubordinate in instructing Dickerson to communicate with her in writing about non-emergency matters and for telling him “not to disrupt my staff with nonsense.” Joint Exhibit 3. According to Complainant and Murray, Dickerson said at the meeting that he needed or wanted a man as senior custodian. Joint Exhibit 17. According to Raftery, Dickerson expressed concerns about “whether [Thurston] could do the job” rather than specifically asking for a male custodian. I find that that Dickerson: 1) likely expressed general concerns about the Complainant’s behavior at the Harrington School; 2) expressed specific concerns about the manner in which she entered the boys’ bathrooms; and 3) may have, at some point, expressed a preference for a male custodian to enter the boys’ bathrooms. No discipline was imposed on Complainant at or following the meeting.

24. Murray testified that at some point prior to the October 22, 2001 meeting, parents had complained about custodians of the opposite gender entering school bathrooms. In Murray’s opinion, it was reasonable to have someone of the same gender inspect a school bathroom to make sure it is empty prior to an opposite gender custodian entering the bathroom.
25. No female custodian, aside from Complainant, ever complained about Dickerson on the basis of sexual harassment or gender discrimination.
26. According to the credible testimony of Dennis Camelio, both Dickerson and Complainant have strong personalities and want things done their own way.

III. CONCLUSIONS OF LAW

A. Sexual Harassment

M.G.L. c. 151B, sec. 4 (1) prohibits workplace discrimination, including sexual harassment. See Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 676-77 (1993). Chapter 151B, sec. 4 (16A) also prohibits sexual harassment in the workplace. See Doucimo v. S & S Corporation, 22 MDLR 82 (2000). Sexual harassment is defined as “sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions or (b) such advances, requests, or conduct have the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, or sexually offensive work environment. M.G. L. c. 151B, sec. 1(18).

There is no evidence that Complainant was subjected to verbal or physical conduct of a sexual nature while performing custodial duties at the Harrington Middle School. Accordingly, it is unnecessary to determine whether Principal Dickerson’s conduct unreasonably interfered with her work performance by creating an intimidating, hostile, or sexually offensive work environment. See College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987); Parent v. Spectro Coating Corp., 22 MDLR 221 (2000); MCAD Sexual Harassment in the Workplace Guidelines, II. C. (2002). Based on the foregoing, I conclude that Complainant has failed to establish a case of sexual harassment on the job.

B. Gender-Based Disparate Treatment

Complainant focuses on Principal Dickerson's apprehensions concerning her elevation to acting senior custodian at his school to build a case of gender discrimination. To be sure, Dickerson did express concern about Complainant becoming the school's acting senior custodian based on her poor record of attendance and her personality conflicts with other members of the custodial staff. However, I do not credit Complainant's allegations that he swore at her, yelled that he wanted a male senior custodian, told her to stay the hell out of the boys' bathrooms, or said that he needed a man for that task. Instead, I credit Dickerson's assertion that he expressed dissatisfaction with the physical condition of the school and with Complainant entering the boys' bathrooms without giving male students adequate time to vacate the facilities. As Complainant acknowledged at public hearing, Dickerson "had no problem" with her cleaning the boys' bathrooms provided she made sure they were empty prior to entering. Even if, at some point, Dickerson expressed a preference for having a male custodian clean the boys' bathrooms, this comment alone is insufficient to constitute direct evidence of gender discrimination. Instead, the comment is an indication of Dickerson's frustration with Complainant's casual attitude towards entering the boys' bathrooms while male students were still inside. See *Morrissey v. Holiday Inn*, 25 MDLR 74, 84 (2003) (in employment discrimination case, isolated or occasional comments or incidents, unless extremely serious, are not sufficient to alter the terms and conditions of employment).

In the absence of direct evidence of gender discrimination, Complainant may establish a prima facie case of disparate treatment based on sex through the inferential

method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976). See also Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 655-666 (2000); Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 444-445 (1995). To establish a prima facie case, Complainant must show that: 1) she is a member of a protected class; 2) she was adequately performing the duties of the job at issue; 3) she was subject to adverse treatment; and 4) she was treated differently from other employees similarly-situated but not members of the protected class. See Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000) (elements of prima facie case vary depending on facts).

Once a prima facie case is established, the burden shifts to the Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext for discrimination. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainants may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See id. Even if the trier of fact finds that the reason for the adverse employment action is untrue, it is not required to find discrimination in the absence of the requisite intent. See id.; Abramian v. President and Fellows of Harvard College, 432 Mass. at 117-

118.

Complainant is a member of a protected class who was adequately performing the duties of her position. Complainant contends that she was subjected to adverse treatment by Dickerson whom she alleges harassed her with constant paging, unreasonable demands, and swearing. Complainant does not identify any male custodians who received superior treatment by Dickerson, presumably because there were no male custodians assigned to the school at that time.

Turning to the second stage of proof, the evidence supports Complainant's assertions that Dickerson frequently paged her about assignments and expressed dissatisfaction in regard to matters of maintenance, but does not establish that the paging was constant, that the demands were unreasonable, or that Dickerson swore at her. What the evidence does establish is that Dickerson was concerned that Complainant's absenteeism would interfere with her ability to perform as the acting senior custodian and disliked Complainant's cavalier attitude towards entering the boys' bathrooms. These concerns were nondiscriminatory as evidenced by Complainant's poor attendance record and her insistence on entering the boys' bathrooms without first ensuring that no male students were present.

Dickerson had a legitimate, job-related reason to be concerned about Complainant's ability to perform as acting senior custodian in view of the fact that Complainant had been absent, on average, two days per week while working as the Harrington School boilerman. She took thirteen (13) days off in April of 2001, the month prior to her promotion to acting senior custodian. Dickerson also had legitimate reason to be concerned about Complainant's procedure for entering the boys' bathrooms as

evidenced by her conduct during their initial joint inspection of the school following her promotion to acting senior custodian. According to Dickerson's credible testimony, Complainant knocked on the door of a boys' bathroom, announced that there was a "custodian on the floor," and proceeded to enter. In response to being told that she needed to wait until someone of the same sex went in and checked the bathroom, Complainant responded that she had sons and was "used to it." The evidence indicates that Dickerson never prohibited Complainant from cleaning the boys' bathrooms during her tenure at the school although he insisted that she take steps to clear the bathrooms of male students.

Dickerson's practice of buzzing Complainant to his office to discuss custodial assignments was similarly unrelated to gender discrimination. Complainant described the buzzing as frequent and disruptive, but failed to establish that the practice was gender-based. Complainant's reaction to the buzzing -- giving Dickerson "formal notification" that he was to place future communications to her in writing ... "so as not to disrupt my staff with nonsense" -- was rude and insubordinate.

There were, to be sure, some incidents during the approximately six months that Complainant worked as acting senior custodian at the Harrington School which demonstrate that Dickerson was not particularly supportive of Complainant. Dickerson expressed dissatisfaction with the condition of the school from the outset of her tenure as acting senior custodian. He may not have given Complainant adequate notice of an assignment to set up 300 chairs, and he may not have provided adequate communication about plans to use the auditorium stage for school graduation or the need for the custodial staff to set up for the summer school program, but there is no evidence that these matters

were motivated by Complainant's gender. Moreover, there is no credible evidence that Dickerson swore at Complainant, yelled that he wanted a male senior custodian, or ordered her to stay out of the boys' bathrooms. To the extent that Dickerson instructed Complainant to remove sand in the school yard, clean up vomit, and remove mouse droppings, these matters are job-related and cannot be attributed to gender discrimination. In sum, I conclude that Respondent has satisfied its burden of articulating legitimate, nondiscriminatory reasons for Dickerson's actions that are supported by credible evidence. Although Complainant attributed Dickerson's hostility to gender bias, I find that a more credible explanation for his negative attitude was provided by custodial supervisor Dennis Camelio who testified that both Dickerson and Complainant had strong personalities and wanted things done their own way.

For the foregoing reasons, I conclude that Complainant's complaint of discrimination should be dismissed.

IV. ORDER

This decision represents the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may seek review by the full Commission by filing a notice seeking review within ten (10) days of receipt of this decision, and a petition for review within thirty (30) days of receipt of this decision.

So ordered this 8th day of December, 2006.

Betty E. Waxman, Esq.

