

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

<p>Alisa Baker 1019 Fiedler Lane Madison, WI 53713</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Capital Services Inc. 900 North Shore Ste 215A Lake Bluff, IL 60044</p> <p style="text-align: center;">Respondent</p>	<p style="text-align: center;">RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p style="text-align: center;">Case No. 21489</p>
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This matter came on for a public hearing before Madison Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, on January 15, 1992 in Room G-04 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard, Madison, WI 53710. The Complainant, Alisa Baker, appeared in person but was not represented by counsel. The Respondent, Capitol Services Inc., appeared by its local manager, Marshall Orris and by its owner, Tom Herbick. Based upon these proceedings, the Hearing Examiner makes his RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is a Black or African American female.
2. The Respondent is an Illinois corporation solely owned by Tom Herbick. It does business in the City of Madison through a contract to provide janitorial services for the United States Department of Agriculture Forest Products Laboratory located at 1 Gifford Pinchot Drive. In furtherance of this contract, the Respondent employed ten (10) people.
3. The Complainant was employed by the Respondent in January of 1991 as a janitor. Her employment was involuntarily terminated on May 23, 1991.
4. At the time that she was hired, the Complainant was supervised by Andrew Mokrzycki or Zeno Racuha. Mokrzycki apparently replaced Racuha. Mokrzycki was replaced by Marshall Orris in April of 1991.
5. The Respondent has no written personnel policies except for ones related to attendance.
6. The Forest Products Laboratory has both an upper and lower parking lot. Employees of the Respondent were authorized to park their cars or vehicles in the lower parking lot but were not permitted to use the upper parking lot.
7. The Complainant knew of the parking restrictions but on several occasions received either warnings or Violation Notices regarding her parking in the upper lot.
8. Employees of the Respondent were not permitted to use telephones at the Forest Products Laboratory except for those in the Coffee Shop or in the first floor lobby. It is unclear how long this policy had been in effect or if the policy had been changed. On May 3, 1991, the Respondent circulated a memorandum clearly stating the policy concerning telephone use. The Complainant received or saw a copy of this memorandum

9. Subsequent to the May 3, 1991 memorandum, the Complainant used only the telephones designated for use by the employees of the Respondent.
10. The Respondent maintains Daily Diaries of deficiencies between the provisions of the contract with the Department of Agriculture and the work actually performed by the Respondent. These diaries are developed by Milo Renolds, who is the federal employee responsible for contract compliance. He forwards his daily report to his supervisor, Ilse Seeliger, who then provides it to the Respondent's on-site manager.
11. The Complainant had deficiencies in her work as early as February, 1991. It is unclear from the record whether her then-supervisor told her of these deficiencies. Once Marshall Orris became her supervisor, the Complainant was told of the problems with her work.
12. The Daily Diaries for the month of May, 1991 demonstrate that the Complainant had a significant number of deficiencies in her work performance on a daily basis. The Respondent does not provide written work evaluations or warnings but tries to counsel and work with problem employees.
13. The Complainant was dismissed as a result of her poor work performance and the Respondent's perception that she was regularly violating other provisions of its contract with the Department of Agriculture.

CONCLUSIONS OF LAW

14. The Complainant is a member of the protected class "race" because she is black or an African American.
15. The Complainant is a member of the protected class "sex" because she is a woman.
16. The Respondent is an employer within the meaning of the ordinance because of its contract with the U. S. Department of Agriculture.
17. The race of the Complainant did not play a role in the Respondent's decision to terminate the Complainant's employment.
18. The sex of the Complainant did not play a role in the Respondent's decision to terminate the Complainant's employment.

ORDER

19. The complaint is dismissed.

MEMORANDUM DECISION

The Complainant contends that the Respondent discriminated against her on the bases of race or sex in terminating her employment on May 23, 1991. The Respondent states that it terminated the Complainant's employment because she was not performing her job satisfactorily and that she was not following rules established by the Department of Agriculture for the Respondent's employees.

In support of her claim of discrimination, the Complainant testified on her own behalf but produced no documentary evidence. She was prevented from calling another employee as a witness because the Complainant had failed to file or exchange any witness lists as required by the Scheduling Order. In her testimony, the Complainant claimed differential treatment in three areas.

First, she asserts that the Respondent inconsistently applied a rule against the use of telephones by the employees of the Respondent. According to the contract between the Respondent and the Department of Agriculture, employees of the Respondent were to use only telephones in the coffee shop or in the first floor lobby. There was no clear evidence that the Complainant knew of this policy until early

May, shortly before her termination. The Complainant testified that prior to learning of this policy in early May of 1991, she only used a telephone in the fifth floor lobby to order dinner. Her testimony left the Hearing Examiner with the impression that she knew that she should not make such a call from that location but felt that because it was short, it would not hurt anyone. Accepting the Complainant's contention that she did not know of the policy until early May, it was the Complainant's testimony that she no longer used the fifth floor telephone to make calls. She further contends that a White male employee named Vic Carvello made telephone calls from the fifth floor telephone without consequence to his employment.

The Respondent failed to demonstrate that the Complainant made calls after being informed that she should not use the telephone in the fifth floor lobby. The Respondent sought to demonstrate that the Complainant made such calls by reference to a list of telephone numbers that were traced by the Department of Agriculture from the telephone in the fifth floor lobby and by the testimony of Milo Renolds. The Complainant denied making any calls and testified that the only numbers on the list provided by the Respondent with which she was familiar were those of her co-worker, Brigitte Franklin. The testimony of Renolds was directly contradicted by that of the Complainant. Renolds stated that he had seen the Complainant using the fifth floor telephone on a date after that on which the Complainant knew of the "no use" policy. The failure of the Respondent to connect that date or any number called to the Complainant indicates that the Respondent cannot show a violation of this policy by the Complainant.

However, the Complainant is unable to show that a white male was permitted to use the telephone without adverse consequence to his employment. The same exhibit listing the traced telephone calls is relied upon by the Complainant. The call relied upon by the Complainant is crossed off on the exhibit. Marshall Orris, the Respondent's on-site manager, denied crossing off the number called. It is as likely that the Department of Agriculture person who ran the check is responsible for crossing the number off. Given the different inferences that can be drawn from the exhibit, it cannot stand as proof of the proposition asserted by the Complainant. The Complainant fails, accordingly, to demonstrate that she was treated differently from a person not in her protected classes with respect to the use of the fifth floor telephone.

The second contention of the Complainant is that white males were allowed to park their vehicles in the upper parking lot without receiving discipline. The Complainant admits that she parked in the upper lot in violation of the parking restrictions from time to time. She seeks to excuse these violations by asserting that she did so only when there were no parking spaces in the lower lot. She also asserts that two white male employees parked in the upper lot and did not receive warnings or parking violations. The Complainant offered no proof other than her own testimony that she observed these other violations.

Marshall Orris on behalf of the Respondent denied that he permitted violations of the parking restrictions by anyone. Milo Renolds testified that when he observed a violation of the parking restrictions that he would report the violation to Marshall Orris at first. If there were additional violations, Renolds would issue a Notice of Violation. It was the essence of Renolds' testimony that the Complainant was the only person who had repeatedly violated the restrictions requiring a Notice of Violation.

The Complainant pointed out that during Renolds' testimony, he first indicated that he spoke to a parking violator instead of speaking with Orris. Renolds explained that he had misspoken at first. The Complainant did not assert that Renolds had spoken with her to give her first warnings. The Hearing Examiner is convinced that the difference in Renolds testimony is slight and unintentional. There is

nothing in the record that would substantiate a determination that Renolds was attempting to mislead the Hearing Examiner. Renolds was subpoenaed to appear at the hearing. There is nothing inherent in his position that would lead one to the conclusion that his testimony would be slanted towards one party or the other.

The Complainant is unable to substantiate that the Respondent treated white males more favorably with respect to enforcement of the parking restrictions. Failing in proof of this element, the Complainant cannot demonstrate discrimination with respect to this allegation.

The third claim of discrimination made by the Complainant is in regard to her termination of employment. As a black woman who had held the position of janitor for several months, she in most respects demonstrates a prima facie case of discrimination by showing that she was terminated and that other white males were not. It is open to question whether the Complainant has demonstrated a connection between her termination and her race or sex, but for purposes of this decision it is assumed that she has.

The burden of proof now shifts to the Respondent to demonstrate a legitimate, nondiscriminatory reason for its action. The Respondent in this case meets its burden by stating that the Complainant was terminated because of her poor work performance. Failure to adequately perform the requirements of one's job is a legitimate, nondiscriminatory reason for terminating one's position. In support of its contention, the Respondent through Marshall Orris testified that the Complainant had been warned on several occasions that her performance was below acceptable levels. He introduced exhibit 10 to demonstrate the extent and nature of the Complainant's deficiencies. Exhibit 10 is the Daily Diaries for most of May, 1991 maintained by the Respondent. This exhibit demonstrates that the Complainant along with one other employee who was terminated at the same time as the Complainant had the highest number of uncorrected work deficiencies during this period. The rest of the exhibits introduced by the Respondent show that the Department of Agriculture representative, Ilse Seeliger was concerned about the problems that Orris attributed to the Complainant.

The Complainant argued that the deficiencies in exhibit 10 that were attributed to her should have belonged to either other employees or were the result of conduct of employees of the Department of Agriculture using the facilities after the cleaning crew. The second contention of the Complainant was acknowledged by Orris but does not adequately explain why the deficiencies are not more uniformly distributed across the list of employees. The Complainant failed to demonstrate that the deficiencies credited to her were actually deficiencies of other employees. The example used by the Complainant was that of paper towel stocking. It was her contention that all paper towel dispensers were to be restocked by an employee named Bruce. She did not produce that employee or a statement by him to verify her testimony. On the other hand, Orris testified that it was and always had been the responsibility of each employee to restock paper towel dispensers in his or her areas of responsibility.

It is the Complainant's burden to establish her differential treatment or that the reason offered by the Respondent is either not credible or is a pretext for other discriminatory motives. The Complainant has failed in both of these proofs. The testimony of Orris was supported by documentary evidence. With such support the credibility of his testimony is not significantly in doubt. There is nothing in the record to lead one to the conclusion that a more sinister motive than poor work performance lay behind the Respondent's termination of the Complainant.

The Complainant also accused Orris of sexual harassment during her employment. She suggested that he made sexual advances towards her and engaged in discussions of explicitly sexual conduct concerning her. Orris denied such conduct. The Complainant failed to offer any corroborative

evidence and failed to make any allegation that Orris' supervisor was aware of the allegations of misconduct. Without demonstrating the knowledge of Orris' supervisor the Complainant cannot make out a claim of discrimination. It is true that Orris' position as a manager may impute knowledge of Orris' conduct to the Respondent, however, the Complainant's lack of proof precludes a finding of discrimination.

During her testimony, the Complainant made several allegations of illegal conduct on the part of Orris. These included the use of cocaine and other illegal drugs at the work site and the theft of material from the desks at the Department of Agriculture. Orris denied these allegations. The Complainant offered no proof other than her own statement. She did not indicate that she had told anyone at the Department of Agriculture or a supervisor above Orris. There is no indication that she reported the conduct of Orris to the police or any federal authority.

The Complainant's making of these allegations and failing to prove them has two consequences in this matter. First, it significantly weakens her credibility particularly with respect to her unsupported allegations of sexual harassment. It tends to show the Complainant as a person who is willing to make sensational claims but is unable to back them up. With this impression, like the little boy who cried wolf, it is not possible to separate the true claims from the untrue. Second, it dilutes her claims of discrimination because even if she had proven her claims of illegal conduct and further was able to prove that her knowledge of these illegal activities lead to her termination, it does not then follow that her termination was illegal under the ordinance. It may be morally reprehensible but it would not be illegal because such knowledge is not a protected class. Such an argument cannot be used to demonstrate a pretext for other discriminatory motives because termination for such knowledge is not protected by this ordinance.

For the above reasons, the Complainant has failed to prove a case of race or sex discrimination against the Respondent. The complaint is hereby dismissed.

Signed and dated this 7th day of May, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner