

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

MARGO C. MCCLOSKEY,

Complainant,

v.

**PROVIDENCE HOUSING DEVELOPMENT
CORPORATION, CATHOLIC CHARITIES
COMMUNITY SERVICES, ROMAN CATHOLIC
DIOCESE OF ROCHESTER,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10123543

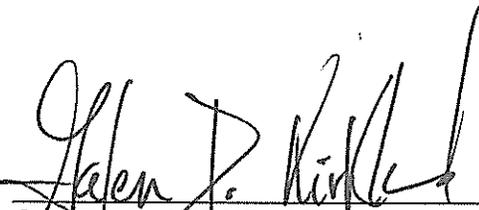
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on June 11, 2009, by Spencer D. Phillips, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, 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.

DATED: **SEP 21 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. 10123543

SUMMARY

Complainant claims that Respondents subjected her to unlawful retaliation by terminating her employment after she investigated an allegation of discriminatory conduct. Complainant failed to satisfy her prima facie burden and her complaint is dismissed.

PROCEEDINGS IN THE CASE

On February 14, 2008, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Spencer D. Phillips, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on April 16, 2009.

Complainant and Respondents appeared at the hearing. The Division was represented by Rosalind M. Polanowski, Esq. Respondents were represented by Roy R. Galewski, Esq.

Permission to file post-hearing briefs was granted and timely briefs were received from all parties.

FINDINGS OF FACT

1. Monica McCullough is the Executive Director of Respondent Providence Housing Development Corporation (“Providence”). (Tr. 96)
2. Helen Bianchi is Providence’s Director of Asset Management. (Tr. 179)
3. Providence is a non-profit real estate development corporation. Providence develops and manages affordable rental housing for seniors, persons with special needs and for individuals recovering from substance abuse. (Tr. 96-98)
4. Providence is a separate corporate entity from Respondent Catholic Charities Community Services (“CCCS”) and Respondent Roman Catholic Diocese of Rochester (“Diocese”). Neither CCCS nor the Diocese interviewed, hired, assigned work duties, paid, disciplined, or terminated Complainant. (Tr. 97-99)
5. In September 2007, Providence created a Regional Property Manager position to relieve Bianchi of certain duties, including: investigating resident complaints, supervising property managers, and ensuring that Providence’s properties were functioning safely and efficiently. (Tr. 22-24, 102-03)

6. On October 1, 2007, Providence hired Complainant into the new Regional Property Manager position. (Tr. 18, 22, 101-02)

7. In late October 2007, Complainant inappropriately disciplined one of her subordinates by telling him that he was on a “thirty-day warning” that could result in immediate termination if she felt he was performing any aspect of his job in an unsatisfactory manner. (Tr. 106, 191-92)

8. Providence does not have a thirty-day warning policy. Complainant had no authority to unilaterally implement such a policy. (Tr. 10, 192)

9. McCullough and Bianchi met with Complainant immediately upon learning that Complainant had given a thirty-day warning to a subordinate. During that meeting, McCullough and Bianchi reviewed Providence’s culture and discipline philosophy, and encouraged Complainant to be kinder and less condescending to her subordinates. (Tr. 107)

10. After meeting with McCullough and Bianchi, Complainant began complaining that she did not like having an office next to her direct supervisor, Bianchi. Complainant demanded to be moved into an office space far away from Bianchi and all of Providence’s employees. (Tr. 108)

11. In November 2007, Complainant became angry at a temporary employee after that employee forwarded several telephone messages to Complainant’s telephone mailbox. The temporary worker complained to McCullough about Complainant’s aggressive criticism. (Tr. 108-09)

12. In November and December 2007, Complainant made numerous complaints to her supervisors that she had too many work responsibilities and too little time to complete her assignments. (Tr. 111)

13. In late December 2007, Complainant contacted one of Providence's board members and expressed her dissatisfaction with the abilities and work performance of her own supervisors, McCullough and Bianchi. (Tr. 80-81, 103, 112-14)

14. On or about January 2, 2008, a resident at one of Providence's housing developments complained that one of Complainant's subordinate property managers, Camille Zuniga, had used the phrases "HIV bitch" and "nigger" to refer to that resident and her son (the "Zuniga incident"). (Tr. 30-32, 131-32)

15. Complainant relayed the resident's complaint to McCullough. McCullough stated "[t]his kind of behavior will not be tolerated" and directed Complainant to conduct an objective investigation on behalf of Providence to determine whether the allegations were credible. (Tr. 33, 133)

16. On January 10, 2008, Complainant traveled to the property where the Zuniga incident allegedly occurred. Complainant interviewed the resident who made the allegation and another individual who reported that he overheard Zuniga's discriminatory remarks. (Tr. 33-34)

17. Complainant returned to headquarters and sat in her office for three days, waiting for McCullough or Bianchi to come to her office and ask Complainant for an update on the investigation. Complainant did not prepare an investigation report or approach her supervisors to discuss the status of the investigation. (Tr. 37-38)

18. On January 15, 2008, Bianchi sent an email to Complainant regarding assignments that Complainant had failed to timely complete, including vacancy reports and a property fact sheet. Bianchi directed Complainant to promptly submit the outstanding documents. (Respondents' Exh. 3)

19. Complainant replied to Bianchi's email by requesting a meeting because Complainant was upset that she was expected to do tasks previously assigned to Bianchi when Complainant had "plenty of [her] own" work to do. (Respondents' Exh. 3)

20. On January 17, 2008, McCullough and Bianchi met with Complainant to discuss her workplace difficulties. At the meeting, the parties discussed Complainant's frustrations with the duties of the Regional Property Manager position and Providence's dissatisfaction with Complainant's attitude and demeanor. McCullough told Complainant "It's clear that you're not happy working here and things aren't working out between us" and invited Complainant to resign. (Tr. 41, 126-28)

21. When Complainant refused to resign, McCullough terminated Complainant's employment by stating: "We're interested in ending your employment. New York is an employment at will state and we're not interested in continuing your employment." (Tr. 42, 126-28)

22. Complainant's work in conducting an internal investigation of the Zuniga incident was not discussed at the January 17, 2008 meeting, and it was not a factor in McCullough's decision to terminate Complainant's employment. (Tr. 129)

OPINION AND DECISION

The Human Rights Law makes it an unlawful practice for an employer "to discharge... any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article." Human Rights Law §296.1(e).

Complainant alleges that her employment was terminated because she conducted an investigation of the Zuniga incident which McCullough assigned her to conduct. In order to establish a prima facie case of retaliation, a complainant must show that (1) she engaged in activity protected by Human Rights Law § 296; (2) the respondent was aware that she participated in the protected activity; (3) she suffered from an adverse employment action; and, (4) there is a causal connection between the protected activity and the adverse action. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999) (citing *Fair v Guiding Eyes for the Blind*, 742 F Supp 151, 154 (S.D.N.Y. 1990); *Matter of Town of Lumberland v New York State Div. of Human Rights*, 229 AD2d 631, 636 (3d Dept. 1996)).

Complainant failed to establish a prima facie case of unlawful retaliation. As a Regional Property Manager, Complainant was responsible for supervising subordinate employees and conducting objective investigations of complaints against them. Therefore, when a resident made allegations against Zuniga, McCullough directed Complainant to conduct an objective investigation. After Complainant investigated the incident, she did not prepare an investigation report, discuss the details of the investigation with her supervisors or any coworkers, or express any degree of opposition or protest to the allegations which she was investigating. Rather, Complainant simply returned to her office and resumed her other work assignments.

The proof demonstrates that Complainant did not oppose any practices forbidden by the Human Rights Law. Similarly, Complainant did not actively participate in a proceeding under the Human Rights Law. Complainant was a management-level employee carrying out her official work duties by conducting an objective investigation. Complainant's "admitted role of objectively" investigating an allegation against one of her subordinate employees does not constitute protected activity. *Correa v. Mana Products, Inc.*, 550 F.Supp.2d 319 (E.D.N.Y.

2008). Therefore, Complainant has failed to satisfy her prima facie burden because she did not engage in activity protected by the Human Rights Law.

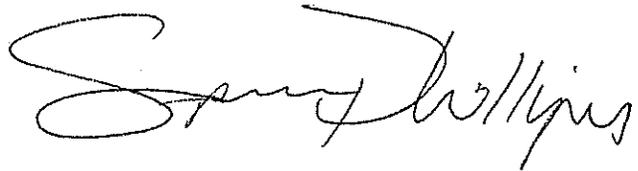
The proof also demonstrates that McCullough terminated Complainant's employment because of Complainant's poor attitude and workplace demeanor. Complainant inappropriately disciplined a subordinate by imposing a severe form of discipline not authorized by Providence. After learning of Complainant's inappropriate actions, McCullough and Bianchi promptly counseled Complainant, in keeping with Providence's culture and discipline philosophy, to be kinder and less condescending to her subordinates. Despite this informal counsel, Complainant then aggressively criticized a temporary worker because that worker forwarded several telephone messages to Complainant's voicemail. Next, Complainant began complaining that she did not like having an office near her supervisor, and demanded that she be given a new office far away from her supervisor and all other employees. Complainant also complained about having too many work responsibilities and not enough time to complete her assignments. Finally, Complainant personally contacted a member of Providence's board of directors and expressed her dissatisfaction with the abilities and work performance of her own supervisors.

The record establishes that Complainant failed to engage in activity protected by the Human Rights Law, and that Complainant's employment with Providence was terminated because of her poor attitude and workplace demeanor. Therefore, Complainant's retaliation complaint against all Respondents must be dismissed.

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 hereby is, dismissed.

DATED: June 11, 2009
Rochester, New York

A handwritten signature in black ink, appearing to read "Spencer D. Phillips". The signature is written in a cursive, flowing style with a large initial 'S'.

Spencer D. Phillips
Administrative Law Judge