

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**JUDITH A. NICHOLS,**

Complainant,

v.

**DIOCESE OF ROCHESTER; and SACRED HEART  
CHURCH OF AUBURN, N.Y.,**

Respondent.

**NOTICE OF FINAL  
ORDER AFTER HEARING**

Case No. 5752440

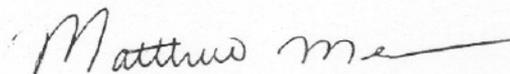
**PLEASE TAKE NOTICE** that the attached is a true copy of an Order issued by Matthew Menes, Adjudication Counsel, as designated by Kumiki Gibson, Commissioner of the New York State Division of Human Rights ("Division"), after a hearing held before Martin Erazo, Jr., an Administrative Law Judge of the Division. 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.

DATED: June 29, 2007  
Bronx, New York



---

MATTHEW MENES  
Adjudication Counsel

TO:  
Judith A. Nichols  
Post Office Box 498  
Jordan, NY 13080

Michael J. Lingle, Esq.  
Dolin, Thomas & Solomon, LLP  
693 East Avenue  
Rochester, NY 14607

Roman Catholic Diocese of Rochester  
Attn: Mr. William Olsen, Diocesan Director of Human Resources  
1150 Buffalo Road  
Rochester, NY 14624-1890

Gregory J. McDonald, Esq.  
Harris Beach PLLC  
99 Garnsey Road  
Pittsford, NY 14534

Hon. Andrew Cuomo, Attorney General  
Attn: Civil Rights Bureau  
120 Broadway  
New York, New York 10271

State Division of Human Rights  
Joshua Zinner, Deputy Commissioner for Enforcement  
One Fordham Plaza, 4th Floor  
Bronx, New York 10458

Caroline J. Downey  
Acting General Counsel

Sara Toll East  
Chief, Litigation and Appeals

Peter G. Buchenholz  
Adjudication Counsel

Matthew Menes  
Adjudication Counsel

Martin Erazo, Jr.  
Administrative Law Judge

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF  
HUMAN RIGHTS**

on the Complaint of

**JUDITH A. NICHOLS,**

Complainant,

v.

**DIOCESE OF ROCHESTER, and SACRED HEART  
CHURCH OF AUBURN, N.Y.,**

Respondents.

**FINAL ORDER**

Case No. 5752440

**SUMMARY**

Complainant claims she was unlawfully discriminated against by Respondents on the basis of her sex and marital status in the application of pension and health insurance benefits, was retaliated against, and was then constructively discharged. Respondents claim the Division does not have jurisdiction to hear the complaint under the “ministerial exception,” and that they did not act in any discriminatory manner against Complainant. After hearing and review, the New York State Division of Human Rights (“Division”) concludes it that it has jurisdiction over this matter, but that Complainant has failed to meet her burden of proving a violation of the New York State Human Rights Law.

**PROCEEDINGS IN THE CASE**

On May 18, 2000, Complainant filed a verified complaint with the Division, charging Respondent Diocese of Rochester (“Diocese”) and Respondent Sacred Heart Church of Auburn, N.Y. (“Sacred Heart”) with unlawful discriminatory practices relating to employment in violation of the Human Rights Law of the State of New York (“Law”).

On April 9, 2001, the Division dismissed the complaint for lack of jurisdiction due to the “ministerial exception,” as applied by federal law in Title VII civil rights cases.

On June 11, 2001, Complainant petitioned the NYS Supreme Court requesting judicial review of the Division’s dismissal order.

On July 27, 2001, the Division’s former General Counsel issued a reopening order. (ALJ Exhibit III) The former General Counsel determined that the lack of jurisdiction determination had been premature. The matter was reopened in order to consider subject matter jurisdiction under the Human Rights Law as applied by New York courts.

On February 20, 2002, the NYS Supreme Court denied Respondents’ CPLR Article 78, which sought a writ of prohibition against the Division barring the reopening on the grounds that the Division lacked jurisdiction to reopen the complaint and to investigate a religious institution.

On May 2, 2003, the NYS Appellate Division denied Respondents’ appeal of the NYS Supreme Court decision. The Appellate Division found that the Division had jurisdiction to reopen this matter. The Appellate Division also found that any other jurisdictional claim raised by Respondents must first be pursued by administrative review before seeking judicial review. (ALJ Exhibit IV)

After investigation, the Division found that it had jurisdiction over the complaint and probable cause existed to believe Respondents 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 of the Division. Public hearing sessions were held on December 12, 2005, through December 14, 2005, and January 11, 2006, through January 13, 2006.

Complainant and Respondents appeared at the hearing. Complainant was represented by Dolin, Thomas & Solomon, LLP, by Michael J. Lingle, Esq. and Kimberly A. Nichols, Esq., of Counsel. Respondents were represented by Harris, Beach PLLC, by Gregory J. McDonald, Esq., of Counsel. Permission to file post-hearing briefs was granted. Respondent and Complainant jointly requested extensions of time. Briefs were received on May 9, 2006.

On May 1, 2007, ALJ Erazo issued a recommended Findings of Fact, Decision and Opinion, and Order (“Recommended Order”). Objections were received to the Recommended Order by the Commissioner’s Order Preparation Unit from both Complainant’s and Respondent’s attorneys.

The caption of this complaint was amended in the Recommended Order to properly name “Sacred Heart” as “Sacred Heart Church of Auburn, N.Y.” *See* 9 NYCRR § 465.4(a).  
(Respondents’ Exhibits Y, Z)

### **FINDINGS OF FACT**

#### **I. The Parties**

1. In September 1996, Complainant began working as a pastoral associate for Sacred Heart.  
(ALJ Exhibit I)
2. Complainant is female and divorced. (ALJ Exhibit I)
3. Father Brennan (“Brennan”) was the pastor in charge of Sacred Heart. (Tr. 412; Joint Exhibit i)
4. Sacred Heart is within the Roman Catholic Diocese of Rochester. (Joint Exhibit i)
5. Complainant’s core responsibilities were to organize adult education programs and to support volunteers. (Respondents’ Exhibit E) The duties included organizing a bible study program, organizing baptismal and marriage programs, working with the social justice

committee, and establishing a system for visiting the sick.

6. Sacred Heart was Complainant's employer. Sacred Heart is a separate corporate entity from the Diocese of Rochester. (Respondents' Exhibits Y, Z; ALJ Exhibit II)

7. The Diocese assisted Sacred Heart in its search for potential candidates for pastoral associate. (Tr. 673, 675) However, Sacred Heart hired Complainant (Tr. 235, 416-19) Sacred Heart paid Complainant. (Respondents' Exhibits G, K, P) Sacred Heart set Complainant's job duties. (Respondents' Exhibits D, E) Sacred Heart supervised Complainant's employment. (Tr. 684, 685)

## **II. The Complaint**

8. Complainant alleges that Respondents denied her family health coverage and pension benefits provided to "a comparably situated male," and that Brennan told her "that it was a husband's responsibility to provide insurance for members of his family." (ALJ Exhibit I)

9. Complainant also alleges Brennan retaliated against her when she raised the issue of differential treatment. (ALJ Exhibit I) Complainant alleges she was forced to leave her employment. (Respondents' Exhibits N, P)

10. Respondents deny discriminating against Complainant. (ALJ Exhibit II)

## **III. Sacred Heart's Pension Plan**

11. Sacred Heart did not have its own pension plan. Individual employees could choose to participate or opt out of the Diocesan sponsored pension plan. (Tr. 664-667, 690)

12. Maureen Collins ("Collins"), who is female, and Vince DeWitt ("DeWitt"), who is male, opted out of the Diocesan plan. (Tr. 664, 571; Respondents' Exhibits V, AA)

13. DeWitt had been allowed to open an Individual Retirement Account. (Tr. 123-24, 558) Subsequently, DeWitt continued his pension vehicle through a 403b tax shelter annuity. (Tr.

563) DeWitt separated from employment in 1997. (Tr. 124)

14. Complainant and Sacred Heart researched the possibility of creating a Sacred Heart pension plan that would meet the needs of all Sacred Heart employees. (Tr. 434-36, 537-40)

15. Complainant was registered with the Diocesan pension plan throughout her employment. (Tr. 627-30)

16. Sacred Heart temporarily stopped contribution payments into the Diocesan pension plan pending the outcome of its own proposed plan. (Tr. 537-38) This did not affect Complainant's standing in the Diocesan pension. (Tr. 622-24) Sacred Heart resumed payment of contributions into the Diocesan pension plan as a result of Complainant's objections to the proposed alternative pension. (Tr. 494-96)

17. Complainant did not like the alternative proposals discussed by the Sacred Heart committee. (Tr. 538-39) Individual employees could still have chosen to participate or opt out of the Diocesan sponsored pension plan. (Tr. 664-667, 690)

#### **IV. Sacred Heart's Health Insurance Plan**

18. Sacred Heart paid 75% for an individual health insurance plan for its employees. (Respondents' Exhibit M, p.20) It did not provide family health coverage for anyone. Complainant charges that Sacred Heart did not pay for family coverage because she was divorced and female. Complainant compared herself with Vince Dewitt, who is male. (ALJ Exhibit I)

19. The documentary evidence shows that DeWitt and Complainant received the same health plan as all the other Sacred Heart employees. (Respondents' Exhibit U)

#### **V. Retaliation**

20. In November 1999, Complainant complained about her pension and health benefits.

(Complainant's Exhibits 10, 36) Complainant alleged that, since that time, Brennan retaliated for her "opposition to unlawful discrimination . . ." (ALJ Exhibit I) Allegedly Brennan's demeanor became hostile; he reduced her benefits; he monitored her e-mails and computer; and he began to question her job duties and how she used her time. (ALJ Exhibit I; Tr. 85-94) Complainant also alleged Brennan sent a parishioner, Martin Fanning ("Fanning"), to harass her.

21. Complainant contradicted her allegations of retaliation when she testified that her job duties, salary, benefits, and job status did not change from the time she complained in November 1999 to the time she went on a disability leave in December 1999. (Tr. 320-21)

22. There is no evidence that Complainant's e-mails and computer were monitored.

23. Brennan used Fanning's skills to mediate Complainant's concerns about benefits. (Tr. 865) Fanning was a retiree, with a management background, who had been a parishioner since 1967. (Tr. 865) Complainant contradicted herself when she testified that she was actually "happy" to talk with Fanning because she "wanted to have the issues resolved." (Tr. 328)

24. Complainant alleged that Brennan intimidated her during staff meetings, after Complainant's return from disability in February 2000. (Tr. 343) Complainant contradicted her allegations of retaliation when she testified that Brennan's demeanor was not retaliatory after she confronted him in November of 1999. She always found Brennan "as very gruff." (Tr. 90)

25. Complainant alleged that Brennan harassed her by raising "problematic" issues after Complainant's return from disability in February 2000. (Tr. 335-36) Brennan actually responded to Complainant's concerns about being overworked. (Tr. 342-43) Complainant complained to Brennan about being overworked, from the fall of 1999 to the time of her resignation in April 2000. Brennan attempted to help Complainant by having her narrow down her activities to core job duties. (Tr. 346-47)

## **VI. Constructive Discharge**

26. Complainant resigned on April 9, 2000. (Respondent's Exhibit N). Complainant expressed two main reasons why she left Respondent's employment: Brennan's alleged harassment, and her dissatisfaction with her health and pension benefits.

27. The final act of alleged harassment occurred when Brennan allegedly yelled at Complainant when the parish "ran out of coffee." (Respondents' Exhibit P). However, the evidence shows that Brennan actually asked Complainant to obtain more fair traded coffee when it had run low. It was part of Complainant's job duties to work "with the Social Ministry people facilitating [the coffee program]." (Tr. 348; Respondents' Exhibit E).

28. Complainant's primary reason for leaving her employment was her dissatisfaction with her medical and pension benefits. In her April 20, 2000, resignation letter to the Sacred Heart council, Complainant explained that she was resigning primarily because of issues surrounding "family medical coverage" and her pension. (Respondents' Exhibit N).

## **OPINION AND DECISION**

As noted above, the Division has determined that it has jurisdiction over this matter, and finds that Complainant has failed to prove that Respondents discriminated against her in violation of the Human Rights Law.

### **I. Jurisdiction**

Respondents challenge the Division's jurisdiction to hear and decide this Complaint based on a Federal common-law principle known as the "ministerial exception" doctrine, applicable in Title VII cases. This doctrine attempts to strike the proper balance between government and the First Amendment, as required under the U.S. Constitution. The so-called "exception" protects religious organizations from Title VII suits "by ministers against

the church or religious institutions employing them” for certain employment decisions and/or actions. *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 945 (9th Cir. 1999). It is not intended to, and does not act to, confer immunity from suit; rather, it “limit[s] Title VII to what is necessary to comply with the First Amendment.” *Id.* at 947.

Respondents urge the Division to blindly follow this Federal law exception, to ignore the differences between Title VII and the Human Rights Law, and to ignore a fuller First Amendment analysis. We decline to do so: The “ministerial exception” has never been applied to the New York State Human Rights Law by the Court of Appeals, and does not provide the most accurate analysis of whether a government action against a religious organization passes constitutional muster under the First Amendment. The tests used by courts to assess the constitutionality of a government action against a religious organization are well established -- for both the Free Exercise Clause and the Establishment Clause -- and those tests are appropriate here.

Both the U.S. Constitution and the N.Y. State Constitution prohibit the government from making any laws that prohibit the free exercise of religion. *See* U.S. Const. amend I; N.Y. Const. art. I, § 3. The Free Exercise Clauses ensure that religious organizations are allowed to “decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *See Kreshik v. St. Nicholas Cathedral of the Russian Orthodox Church of North America*, 363 U.S. 190, 191 (1960) (*per curiam*); *Catholic Charities of the Diocese of Albany v. Serion*, 7 N.Y.3d 510, 825 N.Y.S.2d 653 (2006). Courts employ a three-part test to assess whether a statute violates the Free Exercise Clause, weighing “(1) the magnitude of the statute’s impact on the free exercise of the religious belief, (2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and (3) the extent

to which recognition of an exemption from the statute would impede the objectives sought to be advanced." *Sherbert v. Verner*, 374 U.S. 398, 403-07, 83 S.Ct. 1790 (1963); *see also Ware v. Valley Stream High School Dist.*, 150 A.D.2d 14, 545 N.Y.S.2d 316 (2d Dept. 1989).

When applying that test here, it is clear that this employment discrimination action does not violate the Free Exercise Clause. As an initial matter, Respondents proffer nothing to show that its benefits and pension plan were structured to further a religious belief or value. Nor do Respondents show how punishing an employee who complains about discrimination -- via purported harassing acts or constructive discharge -- is or could be connected to their religious mission. In addition, any burden experienced by Respondents by holding them answerable under the Human Rights Law is justified given New York's compelling interest in eradicating discrimination. Finally, allowing religious organizations to immunize themselves from employment decisions that are not shown to further their religious belief and values would undermine completely the mandate and spirit of the Human Rights Law,<sup>1</sup> not to mention the constitutions. In short, this action passes muster under the Free Exercise Clause of both the U.S. Constitution and the N.Y. Constitution.<sup>2</sup>

This discrimination action also passes muster under the Establishment Clause, which bars government from infringing impermissibly on the establishment of religion. *See* U.S. Const. amend. I; N.Y. Const. art. I, § 3. Courts have consistently used a three-part test to assess

---

<sup>1</sup> New York was the first state to enact an anti-discrimination law, signing it into law in 1945, and the Division was the first State agency created solely to enforce such a law. Its mission is to eradicate discrimination so to ensure that "every individual . . . has an equal opportunity to participate fully in the economic, cultural and intellectual life of the State." N.Y. Exec. Law § 290.

<sup>2</sup> The "ministerial exception" would not have shielded Respondents from this action, even if the Division had concluded that it would adopt the Federal exception and apply it here, as Complainant is not a minister and does not perform ministerial functions. The evidence in this

whether a statute violates the Establishment Clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.” *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Grumet v. Board of Educ.*, 81 N.Y.2d 518, 618 N.E.2d 94, 601 N.Y.S.2d 61 (1993). Here, the purpose of the Law is clearly, and by its own terms, secular. *See* N.Y. Exec. Law § 290. Moreover its principal effect is to promote equality and opportunity in all spheres of life, expressly rejecting the notion of disparate treatment. *See* N.Y. Exec. Law § 290. Finally, it cannot and does not foster excessive entanglement with religion, and carefully and expressly exempts certain religious activities from its reach. *See* N.Y. Exec. Law § 296 (11). In short, applying the Human Rights Law to this case is constitutionally permissible under the Establishment Clause of the U.S. and New York constitutions.

Having found that this employment discrimination action does not violate the U.S. or New York Constitution, we turn to Complainant’s claims of discrimination.

## **II. Complainant’s Claims of Discrimination**

### **A. Employer**

Complainant argues that the Diocese of Rochester was her employer for purposes of this action. Respondents argue that her employer was Sacred Heart. The Division finds that Complainant was employed by Sacred Heart.

When assessing the existence of an employer-employee relationship, courts look at several factors, most notably who selected and engaged the employee; who paid the employee; who had the power to control the employee’s work and conduct; and who had he power to

---

case establishes that Complainant was a lay person whose core responsibilities were

terminate the employee. *See State Div. of Human Rights v. GTE Corp.*, 109 A.D.2d 1082, 487 N.Y.S.2d 234 (4<sup>th</sup> Dept. 1985). The touchstone of the analysis is who “exercised sufficient control” over Complainant. *In re Claim of Montalto*, 263 A.D.2d 736, 696 N.Y.S.2d 308 (3<sup>rd</sup> Dept. 1999).

In this particular matter, Sacred Heart exercised such control. Sacred Heart hired Complainant. Sacred Heart paid Complainant, set her job duties, and supervised Complainant’s employment. And, Sacred Heart made the final decisions that Complainant found discriminatory. In sum, Respondent Sacred Heart was Complainant’s employer.

**B. Disparate Treatment**

Complainant charges that she was discriminated against because she is female and divorced. She alleges that she was treated differently than males in terms of pension plan and health benefits.

Human Rights Law § 296.1(a) states that “it shall be an unlawful discriminatory practice ... for an employer ..., because of the ... sex ... or marital status...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 under this provision, 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).

---

administrative in nature.

Here, Complainant's allegations raised an inference of discriminatory conduct. However, Sacred Heart articulated legitimate non-discriminatory reasons for its actions. Complainant has failed to offer any convincing evidence that these reasons are a pretext for unlawful discrimination.

Specifically, the evidence supports that Sacred Heart paid only for individual health coverage for all employees. The evidence shows that no employee received a greater health benefit than Complainant, based on their sex or marital status. There is no evidence to support that Sacred Heart paid for family coverage for any employee. Nor does the evidence support Complainant's claim that she was denied or treated differently with respect to Sacred Heart's involvement in the Diocesan pension plan. All parishes, including Sacred Heart employees, could make use of the Diocesan pension plan. Individual employees could opt out of the Diocesan plan if the individual employee chose to do so. Complainant was enrolled in the Diocesan plan throughout her employment. Two similarly situated employees, one male and the other female, chose to opt out. Complainant could have done the same. The evidence simply does not support Complainant's claim of disparate treatment in the terms and conditions of her employment.

### **C. Retaliation**

Nor does the evidence support Complainant's claim of retaliation.

Under Human Rights Law §296.1(a), it is "an unlawful discriminatory practice...for an employer...to...otherwise discriminate against any person because ...she has opposed any practices forbidden under this article or because ...she has filed a complaint, testified or assisted in any proceeding under this article." In order to establish a prima facie case of retaliation, Complainant must show that she engaged in protected activity, that Respondent was aware that

she had engaged in the protected activity, that Complainant suffered an adverse employment action, and that there is a casual connection between Complainant's engagement in the protected activity and her adverse treatment by Respondents. *See Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3<sup>rd</sup> Dept. 1999). Complainant has made no such showing.

In November 1999, Complainant informed Brennan that she had complained to the Diocese about her dissatisfaction with her benefits. Complainant charges that Brennan became hostile towards her; reduced her existing benefits; monitored her e-mails and computer; sent parishioner Fanning to harass her; and began to question her job duties.

In each case, Complainant failed to prove that there was a causal connection between Complainant's engagement in protected activity and her alleged treatment by Respondents. Complainant spoke with Father Brennan in November 1999, and then went out on disability leave in December 1999. Complainant herself testified that Brennan's demeanor had not changed after she confronted him in November of 1999. Complainant always found Brennan "as very gruff." Moreover, during this one-month time period, there was no change in Complainant's job status, job duties, salary, or benefits. And, there was absolutely no evidence that Complainant's e-mails and computer were monitored. Finally, Complainant testified that she was actually "happy" to talk with Fanning because she "wanted to have the issues resolved" regarding Complainant's concerns about being overworked. This evidence does not support (indeed, it completely undermines) Complainant's claim of retaliation.

#### **D. Constructive Discharge**

Complainant's claim of constructive discharge fails as well. Constructive discharge occurs under the Human Rights Law when the discriminatory actions attributable to the

N.Y.S.2d 231 (1980) (“complainant was compelled to quit her job as a result of the employer’s discriminatory conduct”). Complainant has not and cannot, as a matter of law, establish a constructive discharge claim under the Human Rights Law because she failed to show that Sacred Heart’s actions were discriminatory or that a reasonable employee would resign over the conditions or actions.

**ORDER**

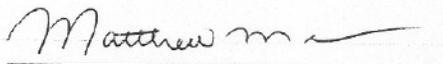
Pursuant to 9 NYCRR § 465.17(c)(3), Adjudication Counsel Matthew Menes has been designated by Commissioner Kumiki Gibson to issue this Final Order. The Adjudication Counsel has not taken any part in the prior proceedings with respect to this case.

On the basis of the foregoing Findings of Fact, Opinion and Decision, and the laws applicable to this case, it is hereby

ORDERED, that the complaint be, and hereby is, DISMISSED.

DATED: June 29, 2007  
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS

  
\_\_\_\_\_  
MATTHEW MENES  
Adjudication Counsel