

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**MICHELLE SULLIVAN,**

Complainant,

v.

**CENTRAL NEW YORK WEIGHT LOSS, LLC.,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10125679

**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 July 27, 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:

Bronx, New York

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GALEN D. KIRKLAND  
COMMISSIONER

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**MICHELLE SULLIVAN,**

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LLC.,**

Respondent.

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

Case No. **10125679**

**SUMMARY**

Complainant claims that Respondent subjected her to unlawful discrimination on the bases of sex and disability. However, Complainant failed to satisfy her prima facie burden and the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On May 19, 2008, Complainant filed a verified complaint with the New York State Division of Human Rights (“Division”), charging Respondent 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 Respondent 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 May 14, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq. Respondent was represented by Robert C. Whitaker, Jr., Esq. Complainant appeared pro se.

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

### **FINDINGS OF FACT**

1. Respondent is a limited liability corporation operating Jenny Craig franchises in Penfield, New York and other locations. Respondent employs approximately 50-55 individuals, all but two of whom are female. Richard Herring is Respondent’s manager. Michelle Wenzel is Respondent’s training manager. Anita Finnerty, Center Director, and Erin White, Assistant Center Director, both work out of Respondent’s Penfield office. (Tr. 140, 198-99, 236, 265, 286-7)
2. Complainant is female. (ALJ Exh. 3)
3. In January 2008, Respondent hired Complainant as a Client Care Coordinator (“CCC”) in its Penfield office. Respondent’s CCC’s perform administrative duties and do not engage in one-on-one interaction with Respondent’s clients. CCC’s are expected to exhibit professional and courteous behavior at all times. (ALJ Exhs. 3, 14, 15; Tr. 140-41, 166, 175, 265, 272, 277-78)

4. In March 2008, Complainant began training to become a Jenny Craig Consultant (“JCC”). The JCC position is a sales position involving significant client interaction. JCC’s are expected to exhibit professional and courteous behavior at all times. (Joint Exh. 6; Tr. 146, 166, 175)

5. While attending a week-long JCC training course, Complainant exhibited “disruptive and disrespectful” behavior. Wenzel verbally counseled Complainant after a fellow student reported that Complainant’s behavior was disruptive and demeaning. (Joint Exh. 4; Tr. 242-45)

6. On March 17, 2008, Complainant began working as a probationary JCC. (Joint Exh. 7; Tr. 142, 247)

7. Complainant exhibited unsatisfactory performance throughout her 30-day probationary period. Complainant failed to generate the expected sales figures for probationary JCC’s. Complainant demonstrated inappropriate behavior at staff meetings and provided incorrect advice, menus and food to clients. Three of Complainant’s clients requested and received transfers to other JCC’s because of Complainant’s poor performance. Finnerty counseled Complainant multiple times regarding her unsatisfactory performance. (Joint Exhs. 7, 9; Tr. 95-96, 142-43, 145-46, 158-160, 201, 270-72, 291)

8. On April 14, 2008, Complainant received her 30-day performance review. Finnerty discussed Complainant’s failure to generate the expected sales figures, her unprofessional behavior, her failure to provide correct advice, menus and food to clients, and other areas of concern. Finnerty granted Complainant a 30-day extension to her probationary period in order to allow Complainant an opportunity to improve her work performance. (Joint Exh. 14; Tr. 96, 164, 184, 189, 284)

9. Complainant's work performance declined following the initial 30-day performance review. (Tr. 164)

10. On April 15, 2008, Complainant prepared a weight chart for a client showing that the client was gaining weight when the client was actually losing weight. Respondent prepared a written counseling memorandum regarding this incident. Complainant refused to sign the memorandum. (Joint Exh. 11; Tr. 149-51, 164)

11. Complainant subsequently entered incorrect client information into Respondent's computer system, and misfiled client documents. On April 21, 2008, Finnerty prepared a written counseling memorandum regarding these incidents. Complainant refused to sign the memorandum. (Joint Exh. 10; Tr. 153-55)

12. On April 22, 2008, after working with an elderly woman, Complainant complained to a coworker that she gets all the "difficult" clients. The elderly woman heard Complainant's comment, felt offended, reported the comment to Respondent and stated that she no longer wanted to work with Complainant. Finnerty prepared a written counseling memorandum regarding this incident. Complainant refused to sign the memorandum. (Joint Exh. 12; Tr. 94-95, 155-57)

13. While working with a client, Complainant retrieved a file belonging to a different client, and then incorrectly told the client with whom she was working that the client was gaining weight. Complainant's actions offended the client and the client told Respondent that she no longer wanted to work with Complainant. (Tr. 147-48)

14. Complainant violated Respondent's confidentiality policy by disclosing a client's name to a local gymnasium. The owner of the gymnasium called Respondent and reported Complainant's misconduct. (Joint Exh. 8; Tr. 85-87, 143-44)

15. Respondent counseled Complainant for various other inappropriate workplace behaviors, including an incident where she agreed to meet a married, male client for drinks. Complainant responded to counseling by yelling, pointing her finger and other unprofessional behavior. (Tr. 165-67, 179, 199-201)

16. Throughout Complainant's initial and extended JCC probationary periods, she failed to generate the expected sales figures for probationary JCC's. During her highest-grossing sales week, Complainant's figures were more than 50% below the minimum sales level. (Joint Exh. 7; Tr. 158-60, 269-7, 291)

17. On May 6, 2008, Complainant was absent from work for gall bladder surgery. (Joint Exh. 16; Tr. 99)

18. On May 7, 2008, Complainant attempted to return to work without medical authorization. Finnerty insisted that Complainant obtain medical authorization prior to returning to work. (Joint Exh. 1; Tr. 105, 226)

19. On May 9, 2008, Complainant returned to work with medical authorization limiting Complainant to four hours of work per day. Respondent complied with Complainant's medical restriction, limiting Complainant to four hours of work per day. (Joint Exh. 2; Tr. 104-05, 173)

20. At the conclusion of Complainant's extended 60-day probationary period, Finnerty reviewed Complainant's performance, including her failure to generate expected sales levels, her unprofessional behavior, her inability to keep clients, and the volume of client complaints generated by her workplace conduct. Finnerty informed Complainant that she would no longer work as a JCC, but that she would be returned to her former CCC position. (Joint Exh. 15; Tr. 184, 189, 224, 269, 284)

21. On the morning of May 10, 2008, Complainant used a loud, negative voice in front of several of Respondent's clients to state that she was no longer a JCC and was only a CCC. White took Complainant to a non-public area and asked Complainant not to speak about her job status in front of Respondent's clients. In a loud voice, Complainant responded "I'm going to say what I want to [say] and do what I want to do, and there's pretty much nothing [you can do] about it" because she "ha[d] an attorney." Complainant then left the area and slammed the door. (Joint Exh. 20; Tr. 209-12)

22. In the afternoon of May 10, 2008, White asked Complainant to compile food items for a client's order. Complainant said in a stern voice "No." White reiterated her request, to which Complainant replied, in front of Respondent's clients, "Do you want my stitches to come open? What part of "No" don't you understand?" (Joint Exh. 20; Tr. 213-14)

23. White notified Finnerty of Complainant's insubordinate behavior. When Finnerty met privately with Complainant to obtain her side of the story, Complainant denied that anything occurred between herself and White. After consulting with Wenzel, Finnerty sent Complainant home until further notice. (Tr. 174-76)

24. On May 12, 2008, members of Respondent's senior management team reviewed a statement from White regarding Complainant's insubordination on May 10, 2008, as well as Complainant's work history and performance. The senior management team decided to terminate Complainant's employment based on poor performance, lack of professionalism, and insubordination. (Joint Exh. 20; Tr. 216-18, 250-51, 272, 290-92)

25. On May 12, 2008, Respondent terminated Complainant's employment. (ALJ Exh. 3; Tr. 250, 267)

## OPINION AND DECISION

Complainant claims that Respondent subjected her to unlawful discrimination on the basis of sex and disability. To make out a prima facie case of unlawful discrimination under the Human Rights Law, Complainant must show that she is a member of a protected class; that she was qualified for the position; that she suffered an adverse employment action; and that the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

As a female, Complainant belongs to a protected class. Human Rights Law § 296.1(a). Following gall bladder surgery in May 2008, Complainant returned to work with medical restrictions and was therefore protected from discrimination on the basis of disability. Human Rights Law § 292.21; *Nowak v. EGW Home Care, Inc.*, 82 F.Supp.2d 101, 111 (W.D.N.Y. 2000), *citing State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 218-19, 491 N.Y.S.2d 106 (1985).

In January 2008, Respondent hired Complainant as a CCC, an administrative position with no client interaction. Complainant performed the administrative duties of this position in a satisfactory manner, and was therefore qualified for this position. In March 2008, Respondent allowed Complainant to begin working as a probationary JCC, a sales position involving significant client interaction. Throughout her extended 60-day probationary period, Complainant was unable to generate the minimum sales figures expected of probationary JCC's, and she consistently failed to demonstrate professional and courteous behavior as required for the position. Therefore, Complainant was not qualified for the JCC position and she returned to her previous CCC position.

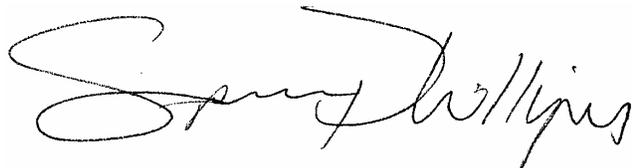
Complainant suffered an adverse employment action when Respondent terminated her employment. However, Complainant's termination did not occur under circumstances giving rise to an inference of sex or disability discrimination. The proof demonstrates that, on May 10, 2008, Complainant exhibited insubordinate behavior toward Wenzel on two separate occasions. When questioned by Finnerty later that day, Complainant denied that anything occurred between herself and Wenzel. On May 12, 2008, members of Respondent's senior management team reviewed Complainant's insubordination toward Wenzel, as well as Complainant's work history and performance. The management team ultimately decided to terminate Complainant's performance based on poor performance, lack of professionalism and insubordination. Therefore, because Complainant failed to demonstrate that she was terminated under circumstances giving rise to an inference of sex or disability discrimination, her complaint 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: July 27, 2009  
Rochester, New York

A handwritten signature in black ink, appearing to read "Spencer D. Phillips". The signature is fluid and cursive, with a large initial "S" and "P".

Spencer D. Phillips  
Administrative Law Judge