NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

DENISE GIROUX,

Complainant,

v.

NEW YORK STATE ELECTRIC & GAS
CORPORATION (NYSEG),

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10109136

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 January 13, 2009, by Migdalia Pares, 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: MAR 18 2009
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **DENISE GIROUX,** Complainant, v. **NEW YORK STATE ELECTRIC & GAS CORPORATION (NYSEG),** Respondent.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case No. **10109136**

SUMMARY

Complainant alleged discrimination based upon age, sex and disability in the selection of persons to attend training and in processing her reasonable accommodation request. Complainant failed to sustain her burden of proof. Therefore, the complaint should be dismissed.

Complainant alleged unlawful and continuing discrimination based on age, sex and disability dating back to 1993, 2001-2003. Complainant failed to sustain her burden of proof. Therefore, these claims should also be dismissed.

PROCEEDINGS IN THE CASE

On December 6, 2005, 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 Migdalia Parés, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on February 27, 2008, February 28, 2008 and April 11, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Sharon M. Sulimowicz, Esq. Respondent was represented by John C. Fish, Esq., and Leslie Prechtl Guy, Esq.

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

FINDINGS OF FACT

1. Complainant is a female who was born on May 31, 1952. On December 6, 2005, when Complainant filed the instant Complainant, she was 53 years of age. (A. L. J.' s Exhibit 1; Complainant's Exhibit 28; Tr. 101)

2. Complainant's medical records and the testimony of her doctors established that during the relevant time period 2004-2005, she was suffering with skin cancer and bipolar disorder. (Complainant's Exhibit 27; Tr. 48; 427-2, 431-32, 456, 502-05)

3. Respondent is a utility company that provides residential and commercial gas services through a large network of pipelines that require extensive and meticulous testing, inspection and maintenance. (A. L .J.' s Exhibit 1)

4. In 1973 Respondent hired Complainant. (Tr. 101)

5. Over the next 32 years, while employed with Respondent, Complainant held various positions and acquired extensive knowledge and experience in the natural gas industry including gas metering, gas regulator stations, gas piping, gas construction, gas operations, working with contractors and inspecting and testing gas pipelines for corrosion. (Tr. 103, 162, 170, 176)

6. Complainant's last position with Respondent was as a corrosion technician. The duties of this position were to test and evaluate Respondent's natural gas pipelines. The position required Complainant to drive to locations where the gas pipelines were located. (Respondent's Exhibit 34; Tr. 176)

7. Complainant's supervisor from 2003-2005 was Martin E. Carl ("Carl"). (Tr. 542)

Denial of 2005 NACE certification training

8. In 2004, Respondent sent Complainant to a certification training conducted by the National Association of Corrosion Engineers ("NACE"), a coveted training program designed to advance skills and lead to higher pay scales. In yearly evaluations of its employees Respondent included completion of NACE certification training courses as a performance goal. (Tr. 209)

9. In 2004, Complainant, and six male co-workers submitted requests to attend 2005 NACE training certification programs. (Respondent's Exhibit 10; Tr. 205, 291, 469) The six applicants were Richard Rivanera, Ray Wyant, Stephen Horvath, Ike Studgeon, Kevin Frank and Andrew Millen. The age of Rivanera, Wyant and Horvath was not disclosed in the record. Studgeon was 64 years of age. Kevin Frank and Andrew Millen were 25 years of age (Respondent's Exhibit 10; Tr. 469)

10. In January of 2005 Respondent reduced its training budget. The reduced budget only allowed three employees to attend the 2005 NACE certification trainings. (Respondent's Exhibit 34; Tr. 297, 311)

11. In January of 2005, the managers for Complainant's department, including Carl, reviewed the training budget and gave priority of attendance to NACE to those employees who did not have first level NACE training certifications, did not have the NACE level CP2 training certification, needed strengthening in certain areas in order to perform their assigned positions

successfully and had less experience. The managers involved in this decision were unaware of Complainant's disabilities. Ike Studgeon, male, 64 years of age, was selected to attend the NACE 1 training certification course. NACE 1 is the first level and a prerequisite for the progression of NACE training certifications. Kevin Fink and Andre Millen, males, 25 years of age each, were selected to attend the NACE level CP2 training and certification. Kevin Fink had two years of experience while Andre Millen had one. (Respondent's Exhibits 10, 34; Tr. 163-64, 296, 313, 448-49)

12. At the time of the selection the managers were not aware that Complainant suffered from bipolar disorder and skin cancer. (Tr. 303, 543)

13. Complainant was not selected for the NACE training because she was performing well in her position, had certifications that were comparable to the NACE level CP2 training she requested, had a higher level of experience than many of the co-workers who also requested training and had expertise which allowed her to participate in training co-workers. Co-workers frequently requested to partner with Complainant precisely because of her experience. (Tr. 163-64, 303, 543, 448-49, 454)

14. On April 9, 2005, Complainant's supervisor, Carl, sent an e-mail message to his subordinates advising that, due to budget constraints, only three employees were to attend NACE 2005 training and certification courses. (Respondent's Exhibit 22, 24, 34; Tr. 210, 219, 293)

15. In her 2005 performance evaluation Carl specifically noted that Complainant did not have to meet the training goal because she was not allowed to attend NACE training due to budget constraints. (Complainant's Exhibit 17; Tr. 210, 301)

Failure to provide a pickup truck with air conditioning as an accommodation

16. Complainant claimed that Respondent failed to accommodate her disability of skin cancer when it did not assign her a pickup truck with air conditioning. (A. L. J.' s Exhibit 1)

17. In January of 2004, Respondent replaced three of its 40 pickup trucks with new ones that had air conditioning. The three new pickup trucks belonged to three supervisors, two male and one female. (Respondent's Exhibits 34, 36)

18. In October of 2004, Respondent's managers recommended a total of 18 of the 40 pickup trucks for possible replacement based on mileage and mechanical problems. Complainant's supervisor, Carl, recommended Complainant's pickup truck for replacement. The decision as to which of the 18 pickup trucks would be replaced with new ones was based on budget constraints, and the urgent need for replacement due to mechanical problems. (Respondent's Exhibits 5, 17, 34, 36)

19. Respondent selected 8 of the 18 pickup trucks for replacement with new ones that had air conditioning. Complainant's pickup truck was not one of the eight selected for replacement. Replacement of Complainant's pickup truck was deferred to later in 2005. (Respondent's Exhibit 6; Tr. 543)

20. The eight pickup trucks that were selected for replacement had higher mileage and had more mechanical problems than Complainant's pickup truck. (Respondent's Exhibit 36)

21. In January of 2005, Carl, sent Complainant an e-mail message advising that her pickup truck was not selected for replacement. Carl advised Complainant that there was a possibility that she would receive a vehicle in the 2005 time frame. (Respondent's Exhibits 34, 36; Tr. 543)

22. In January of 2005, Complainant replied to Carl's e-mail message advising that she needed a pickup truck with air conditioning because of medical reasons. (Respondent's Exhibits 5, 34, 36)

23. Respondent's fleet manager, John Jensen ("Jensen"), advised Complainant to submit a doctor's note in support of her accommodation request. (Respondent's Exhibits 5, 34, 36; Tr. 432, 464

24. Jensen's request for a doctor's note was consistent with Respondent's policy which requires documentation of a disability in order to justify the accommodation of taking a limited resource, such as a pickup truck with air conditioning, from one employee to another. (Respondent's Exhibit 36; Tr. 467-68, 486)

25. Complainant advised Jensen that she would provide the medical documentation after the next doctor's appointment. (Respondent's Exhibits 5, 34; Tr. 389, 464)

26. On April 25, 2005, Complainant's physician gave her a medical note stating that she should be allowed to drive in an air-conditioned truck due to health reasons. (Complainant's Exhibit 27, Respondent's Exhibit 6; Tr. 13)

27. The doctor's note did not disclose that Complainant had skin cancer and how the accommodation requested would allow her to perform the functions of her title. Therefore the only medical note submitted by Complainant to Respondent did not disclose the disability which needed an accommodation in the form of a pickup truck with air conditioning. (Complainant's Exhibit 27; Respondent's Exhibit 6)

28. The doctor's note was submitted to Respondent's third party benefits provider, Corporate Care Management, ("CCM"). (Complainant's Exhibit 27, Respondent's Exhibit 6; Tr. 13)

29. On April 26, 2005, CCM sent a letter to Complainant's physician requesting an explanation for the April 25, 2005 medical note. (Tr. 512-13).

30. Complainant's medical chart confirms that Complainant was suffering from skin cancer during the relevant time. The medical record included a letter from the doctor to CCM stating that Complainant did not grant him authority to release any of her medical history to CCM or Respondent. (Complainant's Exhibit 27; Respondent's Exhibit 36; Tr. 514-17)

31. The medical records show that none of the notes given by the doctor to be given to Respondent disclosed the specific nature of Complainant's disability. (Complainant's Exhibit 27)

32. On May 2, 2005, Complainant submitted her doctor's note to Jensen in fleet management (Respondent's Exhibits 6, 34, 36; Tr. 389-464)

33. In May of 2005, Jensen, advised Geneva Operations Manager, Michael Rumancik, ("Rumancik") that more new pickup trucks with air conditioning were scheduled for delivery to the fleet, and that Complainant's pickup truck would be swapped for one of the new ones with air conditioning. (Respondent's Exhibits 18, 36)

34. On May 12, 2005, Respondent's Human Resources department, by Joanne Whalen ("Whalen"), was already working with CCM to obtain more information from Complainant's physician. On May 12, 2005, Rumancik submitted Complainant's medical note for processing to CCM. (Respondent's Exhibit 36)

35. On May 23, 2005, CCM, by Debbie Clough-Gitchell ("Clough-Gitchell"), advised Rumancik that they had already contacted Complainant's doctor requesting medical documentation but the doctor did not have a signed medical records release authorization from Complainant. Clough-Gitchell told Rumancik not to take action regarding Complainant's request for an accommodation. (Respondent's Exhibits 25, 36)

36. In June of 2005, Whalen advised Carl that Complainant's doctor was not cooperating with CCM. (Respondent's Exhibit 34)

37. On June 1, 2005, Rumancik explained to Complainant what Clough-Mitchell indicated. Complainant advised that she would discuss the problem with her doctor on June 5, 2005. (Respondent's Exhibit 36; Tr. 436-37, 631)

38. On June 3, 2005, Complainant's doctor sent a letter to Clough-Mitchell indicating that his office staff misunderstood the original conversation with Complainant. He indicated that it was his practice to send to employers his determination and only send medical records with prior HIPPA authorization if the determination is not sufficient. Complainant advised his staff that she would speak to Respondent prior to the release of medical information. (Complainant's Exhibit 27)

39. On June 6, 2005, Clough-Mitchell retransmitted to Complainant's doctor the request for medical information, indicating her belief that Complainant signed a medical release but she did not attach a HIPPA release. The doctor was unable to provide the information requested because he did not have a HIPPA release. (Complainant's Exhibit 27, 28; Respondent's Exhibits 26, 36; Tr. 439, 522)

40. In the middle of June of 2005, Respondent received a shipment of new pickup trucks with air conditioning. Respondent by Jensen and Rumancik assigned one of the new vehicles to Complainant. (Respondent's Exhibit 34; Tr. 441, 549, 565, 642, 644-45, 649)

41. The new vehicle still needed to be retrofitted with equipment and licensed. (Respondent's Exhibit 34)

42. On July 5, 2005, Respondent, by Transportation Supervisor Robert Moish, requested that Complainant bring her pickup truck to the shop for a radio swap. The new pickup truck with air conditioning was ready on July 8, 2005. (Respondent's Exhibits 19, 34, 36; Tr. 443-44, 647)

1993 Claim of disability discrimination

43. During the public hearing in 2008 Complainant claimed that in 1993 Respondent downgraded her position and transferred her work location because of her disability of bipolar disorder. Complainant further claimed that Respondent's actions were a continuing violation and therefore fell into the exception to the statute of limitations.

44. I find that the claims regarding the 1993 downgrading incident and transfer are discrete actions that ended in 1993. (Tr. 106-7, 110-14)

2001-2003 Claim of Hostile Work Environment

45. During the public hearings in 2008 Complainant raised the claim that from 2001 to 2003 she was subjected to a hostile work environment by co-worker Lee Robbins. Complainant claimed that Robbins, an employee of over 30 years with Respondent, made threatening remarks of doing harm, frequently interfered with her assignments, and made one comment about sex. (Tr. 170)

46. I find that the claims of a hostile work environment were discrete incidents that ended in April 2003.

2003 Claim of age and disability discrimination

47. In February 2003, Complainant applied for an available position in Respondent's Auburn, New York facility (Tr. 149, 170, 471)

48. During the public hearing in 2008 Complainant raised the claim that Respondent did not select her for the Auburn position because of age and the disability of bipolar disorder. (Tr. 149, 170, 471-72)

49. I find that the 2003 claim that Respondent unlawfully discriminated against Complainant because of her age and disability of bipolar disorder was a discrete incident that ended in 2003.

OPINION AND DECISION

Statute of Limitations

The Human Rights Law provides for a one-year statute of limitations. N.Y. Exec. Law §297 (5). Complainant filed her complaint on December 6, 2005. Acts that occurred between December 6, 2004 and December 6, 2005 fall within the statutory time period. Complainant claimed that in 1993, Respondent unlawfully discriminated against her based on disability when it downgraded her position and transferred her. Complainant further claimed that from 2001-2003 she was exposed to a hostile work environment. Those claims had, and as the record demonstrated, their cessation well beyond the one year statutory time period. As such these claims are only viable to the extent that Complainant can show a continuing violation. *See* 9 N.Y.C.R.R. § 465.3(e).

Complainant claimed that discriminatory acts that occurred prior to December 6, 2004, fell within the exception to the Statute of Limitations under the theory of a continuing violation.

"[A] continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." *Clark v. State,* 302 A.D. 2d 942, 945 (4th Dep't 2003).

Each of the alleged incidents, that occurred prior to December 6, 2004, is a discrete event and none of them fell within the one-year statute of limitations. Complainant failed to show that all the acts that occurred prior to December 6, 2004 were related or continued long enough to establish that Respondent had a policy of discriminating against her. Therefore, Complainant failed to establish a continuing violation and these claims should be dismissed.

Denial of Equal Terms and Conditions of employment

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "because of . . . age... gender...disability ...of any individual...to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1(a).

Complainant claimed that Respondent denied her equal terms and conditions of employment because of her age, gender and disability of bipolar disorder and skin cancer when it denied her the opportunity to attend a 2005 NACE Certification Training course.

In discrimination cases a complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. In order to establish a prima facie case of employment discrimination based on protected class membership, a complainant must show: 1) membership in a protected class; 2) that she was qualified for the position; 3) an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y. 2d 623, 629-630 (1997) *See, Matter of Milonas v. Rosa,* 217 A.D.2d 825, 825-26, 629 N.Y.S.2d 535 (1995), *lv. denied* 78 N.Y.2d 806, 641 N.Y.S.2d 597 (1996)

No inference of discrimination arises, however, unless Complainant is able to demonstrate that a similarly situated employee not in the protected class benefited from terms

and conditions of employment that were denied to her. *See, Weit v. Flaum,* 258 A.D.2d 286, 685 N.Y.S.2d 654 (1999). Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must articulate, via admissible evidence, that its action was legitimate and nondiscriminatory.

Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.,* 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

The Division will not act to second-guess a personnel decision of an employer as long as the decision is not based on unlawful criteria. *New York Telephone Co. v. State Division of Human Rights*, 222 A.D.2d 234, 634 N.Y.S.2d 691 (1st Dept. 1995). An employer may exercise business judgment in making personnel decisions that are poor, unwise, bad, based on erroneous facts or for no reason at all, and such judgment will not be second-guessed as long as the reason is not discriminatory. *See, Visco v. Community Health Plan,* 957 F.Supp. 381 (N.D.N.Y. 1997); *Dister v. Continental Group, Inc.,* 859 F.2d 1108 (2nd Cir. 1988); *Mesnick v. Gen. Elec. Co.,* 950 F.2d 816 (1st Cir. 1991), *cert. denied,* 504 U.S. 985 (1992).

In the instant matter Complainant established the first element of the prima facie case. She is a member of each protected class. Complainant is a female. In 2005 she was 53 years of age. Complainant established that during the relevant time period she suffered from bipolar disorder and skin cancer. Complainant established the second element of the prima facie case that she was qualified to hold her position.

Complainant failed to establish the third element of the prima facie case, that she suffered an adverse employment action. Complainant is required to show "an adverse change in [ ] employment" in order to sustain a claim. *Belle v. Zeimannowicz*, 305 A.D. 2d 272, 273 (1st Dept. 2003), citing *Ferrante,* 90 N.Y. 2d at 269. An adverse action can be a "demotion, decrease in salary, loss of privilege, diminution of responsibilities or loss of benefits . . . *"Ponterio v. Kaye*, 2008 NY Slip Op 72, *3* (3rd Dept. 2006*)* citing *Forrest v. Jewish Guild for Blind*, 3 N.Y. 3d 295, (306) (2004). The change must be "materially adverse." *DuBois v. Brookdale Univ. Hosp. & Med. Ctr.* 2004 N.Y Slip Op 518192, 8 (N.Y. Sup. Ct. 2004) (citing cases).

There were three male employees who were also denied the NACE training. Respondent had a limited training budget and was unable to accommodate all the requests made for training. Respondent made a business decision to send only three individuals to the NACE training, and selected those individuals with the least amount of experience. Respondent did not select Complainant because she had many more years of experience than the ones selected.

In the instant case, the denial of training is not a materially adverse change in the terms and conditions of employment. It was not a demotion, it did not affect salary benefits, it did not decrease her salary, it did not result in a loss of privilege, and it did not entail a diminution of responsibilities or loss of benefits. Therefore, as a matter of law, Complainant failed to make out a prima facie case of sex, age and disability discrimination and this claim should be dismissed.

Failure to Accommodate a Disability

Complainant alleged that Respondent discriminated against her when it failed to accommodate her disability of skin cancer by giving her an air conditioned vehicle once she provided a medical note.

In order to state a claim for failing to accommodate a disability, Complainant has the burden of showing that she "was disabled within the terms of the statute, [her] employer had notice of [her] disability, [she] could perform the essential functions of the job, with reasonable accommodation, and the employer failed to make such an accommodation." *Pimentel v. Citibank, N.A.*, 29 A.D. 3d 141, 148 (1st Dept. 2006)

Complainant established that she had skin cancer. Complainant established that she could perform the essential functions of the job with reasonable accommodation. Complainant established that she requested an accommodation in the form of a pickup truck with air conditioning. This request was made via e-mail message in January 2005. The regulations adopted pursuant to the Human Rights Law require the employer to "move forward to consider accommodation once the need for accommodation is known or requested." 9 N. Y. C. R. R §466.11 (j) (k).

Complainant has the burden of showing that she proposed a reasonable accommodation and that it was Respondent who refused to make an accommodation. *Pimentel v. Citibank N.A.* 2006 N.Y, Slip Op 1911, 6 (N. Y. App. Div. 1st Dep't 2006) citing *Pembroke v. New York State Office of Court Administration,* 306 A.D. 2d at 185.

Complainant failed to show that Respondent had knowledge of her skin cancer condition and that it failed to make an accommodation by providing her a pickup truck with air conditioning. Respondent had a process of replacing vehicles based on mileage and mechanical problems. From December 2004 to mid June 2005, only eight of the 40 pickup trucks in the fleet had been replaced with new ones that had air conditioning. All eight of the new pickup trucks were assigned, most of them to supervisors. Complainant's pickup truck had been selected for

the regular replacement process and she was advised that her vehicle would be replaced in the 2005 time frame.

Respondent engaged in an interactive process as it considered the accommodation. In January 2005, in response to Complainant's request for an accommodation, Respondent advised her that she needed to submit a letter from her physician. The Human Rights Law states that "[o]nce an accommodation is under consideration, the employer has the right to medical or other information that is necessary to verify the existence of the disability or that is necessary for consideration of the accommodation." 9 N.Y.C.R.R. §466.11 (j) (5) It also provides that the "employee must cooperate in consideration and implementation of the requested reasonable accommodation" and the "employee must cooperate in providing medical or other information that is necessary to verify the existence of the disability or that is necessary for consideration of the accommodation." 9 N. Y. C. R. R. §466.11 (k) (3) (4)

Complainant submitted a doctor's note on May 2, 2005. This was five months after it was requested from her. The physician's letter did not verify the existence of the disability, the nature of the disability, the diagnosis of the disability or any medical information necessary for consideration of the accommodation. The doctor's note did not provide a reason as to why a pickup truck with air conditioning was a necessary accommodation. Respondent's third- party contractor, CCM, considered the doctor's note to be insufficient to justify the accommodation. In May and June 2005, CCM staff made repeated efforts to obtain additional information from Complainant's doctor without success. Respondent advised Complainant that her doctor was not cooperating because she did not sign the appropriate medical records release. As a result of the lack of cooperation CCM instructed Fleet management not to grant Complainant's request.

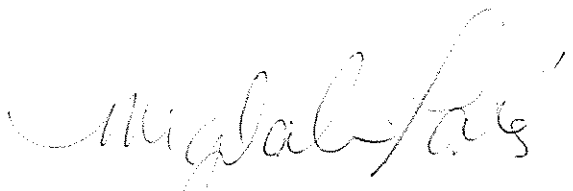
Complainant failed to meet her burden of showing that she proposed a reasonable accommodation and that it was Respondent who refused to make an accommodation. *Pimentel, supra.* Therefore, Complainant failed to establish a claim of failure to accommodate and this claim should be dismissed.

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: January 13, 2009
Bronx, New York



Migdalia Parés
Administrative Law Judge