



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

LISA PANZICA and LAURA CHAMAIDAN,
Complainant,

v.

**TARGET BRANDS, INC. D/B/A/ TARGET, LEENA
MATHEW,**
Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10154037, 10154038

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 March 15, 2013, by Robert J. Tuosto, 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.

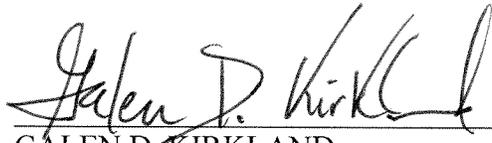
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: 5/13/2013
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

LISA PANZICA and LAURA CHAMAIDAN,
Complainants,

v.

**TARGET BRANDS, INC. D/B/A/ TARGET,
LEENA MATHEW,**
Respondents.

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

Case Nos. **10154037, 10154038**

SUMMARY

Complainants alleged that they were unlawfully discriminated against on the basis of their disabilities when they did not receive influenza vaccine injections by Respondent Mathew while patronizing a pharmacy inside Respondent Target's store. However, Complainants have not proven their cases and their complaints are hereby dismissed.

PROCEEDINGS IN THE CASE

On February 27, 2012 and March 26, 2012 Complainants filed verified complaints with the New York State Division of Human Rights ("Division"), charging Respondents with unlawful discriminatory practices relating to public accommodation in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaints and that probable cause existed to believe that Respondents had engaged in unlawful discriminatory practices. The cases were then heard together for public hearing.

After due notice, the case came on for hearing before Margaret A. Jackson, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on November 27-28, 2012.

Complainant and Respondents appeared at the hearing. Complainant were represented by Thomas Ricotta, Esq., of the law firm of Leeds Brown Law, P.C., Carle Place, New York. Respondents were represented by Steven D. Jannace and Joan M. Gilbride, Esqs., of the law firm of Simmons Janace, L.L.P., Syosset., New York.

Both sides timely filed post-hearing briefs.

This case was subsequently reassigned to ALJ Robert J. Tuosto pursuant to N.Y.C.R.R. § 465.12 (d)(2).

FINDINGS OF FACT

1. Complainants alleged that they were unlawfully discriminated against on the basis of their disabilities when they did not receive influenza vaccine injections by Respondent Mathew while patronizing a pharmacy inside Respondent Target’s store. (ALJ Exh. 1)

2. Respondents denied unlawful discrimination in their verified Amended Answers. (ALJ Exh. 1)

The Parties

3. Complainants are sisters who suffer from a neurological disorder known as Spinal Muscular Atrophy, Type III. Complainant Chamaidan ambulates with the aid of a motorized scooter, while Complainant Panzica utilizes an electric wheelchair. Pursuant to stipulation of the parties, Complainants are “disabled” as that term is used in the Human Rights Law.

(Respondent’s Exh. 8; Tr. 9, 116-17, 217)

4. Respondent Target operates a store located in the Broadway Mall in Hicksville, New York (“the store”). Respondent Mathew is a registered pharmacist, formerly employed by Respondent Target at the store during the relevant time period. (Tr. 9, 209, 228, 295-96)

Respondent Mathew’s Prior Training

5. In 2010 Respondent Mathew received extensive training in administering influenza vaccine injections (“flu shots”) including twenty hours of training under the auspices of the American Pharmaceutical Association. Several months later, Respondent Mathew also received additional training required by the State of New York in, among other things, basic life support and cardiopulmonary resuscitation (“CPR”). (Tr. 211, 279-80)

6. Prior to the incidents detailed in the complaints, Respondent Mathew had administered flu shots to patients in wheelchairs, as well as to patients using canes or walkers. (Tr. 228-29, 264-65)

Flu Shot Side Effects

7. Fainting is a possible side effect of being given a flu shot. All patients should be seated before having a flu shot administered and, in the event someone who receives an injection loses consciousness, they should be placed flat on their back on a hard surface in order to receive CPR. The physical space where a flu shot is administered should be arranged to allow for possible

fainting without injury, and a pharmacist administering the flu shot must have a plan for access to a hard surface in the event that CPR is needed. (Respondent's Exh. 11; Tr. 280-82)

Respondent Target's Policy

8. It is Respondent Target's policy to vest discretion in their pharmacists to insure optimal patient safety. (Tr. 242-43, 276)

The Events of October 9, 2011

9. On October 9, 2011 Complainants visited the store together and, during the course of shopping, decided that they would each get flu shots at the pharmacy located inside Respondent's store. (Tr. 9-12, 117-18, 234)

10. Respondent Mathew informed Complainants that it would take approximately thirty minutes to arrange for them to receive their flu shots. Complainants complained many times about having to wait for thirty minutes. (Tr. 212, 233, 248)

11. Complainant Panzica inquired as to the location where the flu shot would be administered. Respondent Mathew then showed her a vestibule with a plastic chair behind a privacy screen ("the flu shot area") in which all patients receiving flu shots are seated. (Respondent's Exh. 2b, 2d, 2e; Tr. 13, 15-17, 39, 124-25, 217-19, 231, 233, 237, 277)

12. Respondent Mathew inquired whether Complainants could transfer from their motorized scooter and electric wheelchair, respectively, to the plastic chair. Respondent Mathew noticed that Complainant Chamaidan's motorized scooter, unlike the plastic chair, did not have armrests. This was important as the plastic chair provides patients with a greater degree of stability. (Tr. 219, 221, 225, 237, 262, 266, 277)

13. In an emergency the plastic chair could be moved. Respondent Mathew was unsure if, during an emergency, she could move a motorized scooter. (Tr. 263, 265, 283)

14. Respondent Mathew was further concerned that, if the motorized scooter were in the flu shot area, there would be insufficient space to place Complainant on the floor. Also, there were syringes and sharp containers in the flu shot area which might pose a problem given the tight space. As a result, Respondent Mathew believed that having the motorized scooter in the flu shot area was an unsafe condition. (Tr. 225-26, 262-64, 271, 282-83)

15. Complainant Chamaidan told Respondent Mathew that she could not transfer to the plastic chair. (Tr. 249-50, 267-68)

16. Respondent Mathew was concerned about administering the flu shot while Complainant Chamaidan was seated in her motorized scooter as she could hurt herself by falling forward into the scooter if she fainted. (Tr. 281-82)

17. Respondent Mathew suggested that she administer the flu shots in a nearby private conference room. The conference room was larger than the flu shot area, had a window, and was arranged with tables and chairs. (Tr. 49, 219-23, 267, 271, 275-76, 282)

18. Complainants, agitated and upset at having to use the conference room for their flu shots, left the area. (Tr. 224, 268)

19. Respondent Mathew never refused to give flu shots to Complainants. (Tr. 225, 250)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for "...any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation... to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof... on account of...disability..."

Human Rights Law § 296.2 (a).

In discrimination cases a complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must produce evidence showing 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).

In order to make out a prima facie case on the basis of disability discrimination in a public accommodations context, Complainants must show that: 1) they each have a "disability" within the meaning of the Human Rights Law; 2) Respondents are the owners, lessees, proprietors, managers, superintendents, agents or employees of a place of "public accommodation"; 3) Respondents discriminated against Complainants on the basis of their disabilities by denying them a "full and equal" opportunity to enjoy the accommodations, advantages, facilities or privileges of their place of business. *Doe v. Deer Mountain Day Camp, Inc.*, 682 F. Supp.2d 324 (S.D.N.Y. 2010)¹

Here, the record shows that the first two prongs of the test were met. First, Complainants were disabled as that word is used in the Human Rights Law. Second, Respondents are both the owner/proprietor and the employee, respectively, of a place of public accommodation. However,

¹ While *Doe* is a matter involving the federal Americans with Disabilities Act ("A.D.A."), the elements of a prima facie case for A.D.A. claims are similar to claims made under the Human Rights Law. *Adams v. Master Carvers of Jamestown, Ltd.*, 91 Fed. Appx. 718, 725 (2d Cir. 2004); *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 154-57 (2d Cir. 1998)

Complainants did not establish the last prong of the test, i.e., that Respondents exposed them to unlawful discrimination because of their disabilities. The record shows that, rather than deny flu shots to Complainants, Respondent Mathew offered to accommodate them by administering the flu shots in the conference room. This was done after the possibility of administering same in the flu shot area became untenable for several reasons, not the least of which was that Complainant Chamaidan could not transfer herself from her motorized scooter to the plastic chair. Respondent Mathew was nonetheless at all times ready, willing and able to administer the flu shots to Complainants. However, upon being offered the accommodation of having the flu shots administered in the conference room, Complainants refused and left. None of this rises to the level of proving that Respondents were liable for unlawful disability discrimination.

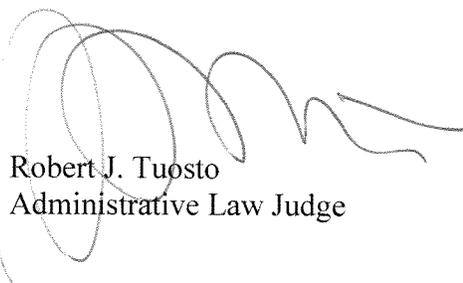
Therefore, the complaints must be dismissed.

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 complaints be, and the same hereby are, dismissed.

DATED: March 15, 2013
Bronx, New York



Robert J. Tuosto
Administrative Law Judge