

STATE DIVISION OF HUMAN RIGHTS
STATE OF NEW YORK: EXECUTIVE DEPARTMENT

Willie J. Trotman,

Complainant,

v.

The Ben Gilman Spring Valley Medical and Dental
Clinic, Mendel Hoffman and Sharon Milner,

Respondents.

VERIFIED ANSWER

Case No. 10113077

The Respondents, by the their attorneys, Storzer & Greene, P.L.L.C. and The Becket Fund for Religious Liberty, respond to the above-captioned complaint as follows:

1. This Complaint should be dismissed, because (1) the Complainant has no standing to bring the Complaint; (2) that portion of the Complaint that alleges that the closing of the clinic on Saturdays does not allege a violation of Article 15 of the Executive Law; (3) that portion of the Complaint that alleges that the closing of the clinic on Saturdays violates the free exercise of religion provisions of the United States Constitution; and (4) that portion of the Complaint that alleges that the Respondents segregate their patients based on race or color is entirely false. Various other miscellaneous statements in the Complaint are irrelevant to the public accommodation complained of and/or false.

The Complainant Lacks Standing To Bring This Complaint.

2. This Complaint is brought by Mr. Willie P. Trotman. While it states that Mr. Trotman is an officer of the Spring Valley NAACP, it does not allege that the Spring Valley NAACP is asking the Complaint, nor that that esteemed organization has authorized the filing of

the Complaint on behalf of its members. Thus, the Complaint must be considered based on Mr. Trotman's standing to bring it.

3. Mr. Trotman does not allege that he has ever sought or received or been denied services from the Respondents. He has no relationship with the Respondents nor has he sought one.
4. In order for an individual to make a complaint under New York's Human Rights Law, that individual must demonstrate that he or she is personally aggrieved by the action complained of. It is not sufficient to be a member of a class of individuals, some of whose other members may have been aggrieved. *See Gaynor v. Rockefeller*, 15 N.Y.2d 120, 130 (1965). The Complainant makes no allegation that he has been personally denied any public accommodation by the Respondents, and thus he has no standing to complain of their alleged treatment of other persons. On this basis alone the Complaint must be dismissed.

That Portion of the Complaint that Alleges that the Closing of the Clinic on Saturdays Does Not Allege a Violation of Article 15 of the Executive Law.

5. The Complainant objects to the fact that the Spring Valley Clinic is closed on Saturdays, which is the Jewish Sabbath and a day on which practitioners of certain branches of the Jewish religion are forbidden to engage in a wide variety of activities, including operation of the clinic.
6. The Complaint states that "many of our members would like to visit doctors for non-emergency medical issues" (Complaint ¶ 7), and "the aiders and abettors clearly invoke the own religion to discriminate the patients [sic] who practice any religion other than Hasidic Judaism, which is in violation of NYS Human Rights Law by (a) engaging in

disparate treatment of people who believe in a religion other than Hasidic Judaism and (b) failing to accommodate other religious beliefs.” (Complaint ¶ 12.)

7. This allegation entirely fails to set forth a violation of the Human Rights Law for several reasons.
8. New York Executive Law § 296(2)(a), the Public Accommodation provision of the Human Rights Law, states:

It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof

Unlawful public accommodation discrimination consists solely of: refusing, withholding or denying the accommodations, advantages, facilities or privileges. It does not require that a public accommodation be open on all days of the week, or indeed at any time at all, just that it be open to all when it is (as the Clinic is). If it did, all governmental offices (including the Human Rights Division), schools, businesses, etc., would have to be open seven days a week. There is absolutely no such requirement in law. Any public accommodation may choose its hours of operation. The only requirement of Human Rights Law § 296(2)(a) is that when the public accommodation is open, it offers services to all regardless of their race, creed, etc. This the Respondents do.

9. Nor does the statute ban accommodation of some religious observances but not others. If it did, then no place of public accommodation could close on any religious holy day, for example Christmas, unless it closed on absolutely every holy day of any possible religion. This is essentially the argument that the Complaint makes.

10. Nor does the Complaint allege that Mr. Trotman's (or any one else's) religious observances are violated by the Respondents. Respondents are unaware of any religion that requires its members to go to the doctor on Saturday only. No patient is forced to obtain services in a way that violates their religion. No patient has ever suggested that their own religious observances are violated by the fact that the clinic is closed on Saturdays.
11. Nor can a claim of a violation of the Human Rights Law be made out because a respondent's actions is based on the respondent's religious beliefs, rather than those of the complainant. *See Hudson v. Goldman Sachs & Co.*, 283 A.D.2d 246, 247 (1st Dept. 2001) (Decision to terminate employee based on violation of supervisor's religious beliefs does not violate Human Rights Law).
12. In short, the Complaint is based on nothing but a series of false and frankly absurd premises: (1) that accommodation of a religious need is somehow a violation of the needs of other religions; (2) that accommodation of a religious need somehow forces others to violate their religion; (3) that the religious needs of some persons are being violated because they cannot obtain medical services on Saturday; (4) that New York's Human Rights Law requires that no religious needs be accommodated unless some speculative list of all religious needs of unidentified persons in unidentified religions are accommodated; and finally (5) that the Human Rights Law imposes upon all public accommodations the duty to be open at all times that might be convenient for anyone. None of these concepts are rational or required by the Human Rights Law.

That Portion of the Complaint that Alleges that the Closing of the Clinic on Saturdays Violates the Free Exercise of Religion Provisions of the United States Constitution.

13. Even if the Human Rights Law could somehow be interpreted to prohibit a private medical clinic's operating schedule that accommodates religious belief and exercise, such an interpretation, enforced by the power of the State, would violate the First Amendment of the United States Constitution.
14. Forcing the Clinic to remain open on the Jewish Sabbath would violate religious beliefs that require observance of the Sabbath. This necessitates closing of the Clinic on Saturdays, as the Complainant admits. *See* Complaint ¶ 11 (“Mr. Mendel Hoffman, President and CEO of the clinic, indicated that they couldn't open the clinic as he did not get permission from his rabbinic authority.”).
15. The First Amendment to the U.S. Constitution as extended to the States by the Fourteenth Amendment prohibits all governments from making laws that abridge the free exercise of religion. Where government action targets and burdens religious exercise, the First Amendment's Free Exercise Clause is implicated.
16. Were the Clinic to be closed on Saturdays in order to allow its clinicians to play golf, or to go shopping, or to spend time with their families, there would be no complaint here. It is only because the reason for closing on Saturdays is religious observance that Complainant filed this action. *See generally* Complaint ¶¶ 14-19. This would treat religious belief on less than equal terms as other secular values, in violation of the First Amendment. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872, 877-78 (1990) (“It would doubtless be unconstitutional, for example, to ban the casting of ‘statues that are to be used for worship purposes’ . . .”).

17. Furthermore, even if such an application of the Human Rights Law would be seen as “neutral”—which it would not be—the burden on Respondents’ religious exercise would still be subject to strict scrutiny review:

Where there is no indication that a restriction of a plaintiff’s religious activities was the defendant’s actual objective, but only that its actions, neutral on their face, had a restrictive effect, the proper inquiry is “whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.” *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384-85, (1990) (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)); see *Wisconsin v. Yoder*, 406 U.S. 205, 220-221 (1972).

Altman v. Bedford Cent. School Dist., 245 F.3d 49, 79 (2d Cir.) (emphasis added), cert. denied, 534 U.S. 827 (2001). Here, restriction of Respondents’ religious activities is the actual objective. See Complaint ¶ 14 (noting that the only purpose that the Clinic is closed on Saturdays is because of “their own religious beliefs in Hasidic Judaism”).

18. Moreover, observance of the Sabbath is recognized as a “central religious belief or practice.” See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.” (emphasis added)). Yet this is exactly what Complainant asks for, a “fine imposed against [Respondents] for [their] Saturday worship.”

19. There is no compelling interest that can justify such a burden here. The Clinic is discriminating against no one. Anybody can visit the Clinic on Mondays, Tuesdays, Wednesdays, Thursdays, Fridays, and Sundays, regardless of creed. The medical services not available on Saturdays are non-emergency services. Complaint ¶ 7 (describing members that “would like to visit doctors for non-emergency medical issues”). There is no Christian or other religious doctrine—and Complainant does not

suggest that any exist—that requires individuals to visit doctors and dentists on Saturday. Certainly, the Clinic does not target such any individual for inferior treatment.

20. A similar fact scenario was presented to the Court of Appeals of Minnesota, where claimants alleged that a restaurant owner discriminated on the basis of creed by refusing to deliver food to medical facility where abortions were performed. The court held that requiring the owner to do so, even if it was a public accommodation, would violate his constitutional rights, and therefore the Minneapolis Civil Rights Ordinance could not be applied against him:

Next, we must determine whether the enforcement of the Minneapolis ordinance burdens the exercise of relators' religious beliefs. *Id.* There can be no question that it does. Under the provisions of the Minneapolis ordinance, relator Glass has two choices. He can either associate with an entity that engages in conduct which he finds to be morally offensive, thus compromising his conscience, or he can refuse and be found guilty of discrimination and fined.

Under the third part of the test, this court considers whether the city of Minneapolis has a compelling or overriding interest in the enforcement of the ordinance at issue. *Id.* at 866. We hold that it does not. . . . To the extent that this was not an emergency situation, relators' refusal to enter upon the Midwest premises does not create a threat to either peace or safety, nor does it constitute an act of licentiousness.

Rasmussen v. Glass, 498 N.W.2d 508, 515-16 (Minn. App. 1993) (footnote omitted).

The principles at issue here are identical, and the same result should follow.

21. Sunday closing laws have long been upheld by the Supreme Court and lower courts. *See McGowan v. State of Md.*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961). It cannot be suggested that the State itself may do what a private entity cannot do. If shutting down on Saturday would constitute illegal discrimination on the basis of creed, then “blue laws” (which are enforceable by the State) would likewise violate the Establishment and Free Exercise Clauses of the First Amendment and the Equal

Protection Clause of the Fourteenth Amendment, by preferring citizens of one faith over those of another. *See McGowan; Braunfeld*. Yet they do not, and the Clinic should certainly not be held to a more exacting standard.

22. It is, in fact, the Complainant's requested relief—to force the Clinic to remain open on Saturdays—that would constitute illegal discrimination under the Free Exercise and Equal Protection Clauses. Complainant would have no problem with the Clinic remaining closed on Sundays, the traditional Christian day of rest. Neither could the Human Rights Law be contrary, as countless public accommodations are closed for business on Sundays. To prefer Christianity over Judaism (by permitting one religion's Sabbath to be observed but not another's) would constitute unconstitutional favoritism of one religion over another. “Neither a state nor the federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.” *McGowan*, 366 U.S. at 443 (emphasis added). *See also City of Boerne v. Flores*, 521 U.S. 507, 514, 117 S. Ct. 2157 (1997) (“[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason.” (citations omitted)).
23. Finally, where the terms of a statute could be reasonably interpreted in such a manner as to avoid constitutional difficulties, they should be given such an interpretation.

[I]n the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.

N.L.R.B. v. Catholic Bishop of Chicago, 449 U.S. 490, 507 (1979). Here, too, the Human Rights Law can easily be read to permit the closing of a private business, including a

public accommodation, on the Jewish Sabbath. As a matter of statutory construction, the “difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses” that the Commission would have to delve in to force the Clinic to remain open on the Sabbath should be avoided. There is no evidence that the Clinic is refusing any person its facilities on the basis of race or creed (or any other basis). The Complaint does not even make any such allegation. Christians, Jews, Muslims and persons of any other faith are welcome to visit the Clinic six days a week. Closing the facility on Saturdays has nothing to do with the race or creed of any person seeking its services, but rather the faith of those at the Clinic.

24. According to Complainant’s theory, a Muslim restaurant owner (a public accommodation) would not legally be permitted to refuse to serve alcohol to his patrons, because doing so accommodates his religious beliefs. Neither could a Catholic shopkeeper shut down her store for Good Friday for the same reason. These are not reasonable interpretations of the Human Rights Law. At the very least, the opposite conclusion—that the Human Rights Law is not implicated by such behavior—is also reasonable, and should be adopted by the Commission pursuant to the principles of *Catholic Bishop*.

That Portion of the Complaint that Alleges that the Respondents Segregate their Patients Based on Race or Color Is Entirely False.

25. The allegations of ¶ 20 of the Complaint that African-American patients of the Monsey clinic were transferred to the Spring Valley clinic against their will in order that all African-American patients will be served at the Spring Valley clinic and only “White” or “Jewish” patients will be served at the Monsey clinic are entirely false.

26. The Monsey clinic has served patients of all races, religions and national origins side by side since 1993. When the new clinic was opened in 2005, the decision was made to assign patients to it based on geographic division, not race. Spring Valley, being to the east, was assigned to patients living to the east, and patients living to the west were assigned to the Monsey clinic. However, all patients were given the choice as to which clinic they preferred to be seen at and many patients of various races chose clinics other than the one to which they were assigned.
27. Patients of all races are seen at both clinics, and patients requiring medical specialties or services that are only available at one clinic go to that clinic.
28. The Monsey clinic continues to serve many patients of all races, as does the Spring Valley clinic.
29. These allegations are entirely false.

Various Miscellaneous Statements in the Complaint Are Irrelevant to the Public Accommodation Complained of and/or False.

30. This is not a complaint of employment discrimination, and given the absence of any complaining employee there would be no standing for such a complaint. However, ¶ 10 ostensibly alleges discriminatory treatment of non-Hasidic Jewish employees. Such an allegation is irrelevant to the claim of public accommodation discrimination and entirely false. Nor does the Complaint set forth any factual allegations as to what form of different treatment is involved.

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VERIFICATION

I, Mendel Hoffman, a Respondent in this matter, have read the foregoing and it is true to the best of my knowledge.

Mendel Hoffman