IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LINDA PLANQUE,

Plaintiff,

v.

THE TJX COMPANIES, INC., a Delaware Corporation; and HOMEGOODS, INC., a, Delaware Corporation,

Defendants.

No. 3:16-cv-01824-HZ

OPINION & ORDER

Shannon D. Sims
610 SW Alder St., Suite 502
Portland, Oregon 97205

Attorney for Plaintiff

Sharon C. Peters
David C. Campbell
Lewis Brisbois Bisgaard & Smith LLP
888 SW Fifth Avenue, Suite 600
Portland, Oregon 97204

Minh N. Vu
Seyfarth Shaw LLP
975 F. Street, N.W.
Washington, D.C. 20004

Attorneys for Defendant HomeGoods, Inc.

HERNÁNDEZ, District Judge:

Plaintiff Linda Planque brings this action against HomeGoods, Inc., alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181, 12182, and a state law negligence claim. [1] Before the Court is Defendant's Motion to Dismiss. ECF 10. Because Plaintiff has not satisfied Article III's standing requirements and failed to state a claim, Defendant's Motion to Dismiss is granted and this case is dismissed. The Court also grants Plaintiff leave to amend.

BACKGROUND

Plaintiff is disabled and uses a powered wheelchair. Compl. ¶¶ 4, 12, ECF 1. On September 17, 2014, she went shopping at Defendant's store. Id. at ¶ 11. She alleges that the checkout counter was too high for her to reach from her wheelchair. Id. at ¶ 12. Plaintiff gave her card to Defendant's employee to pay for her purchase. Id. at ¶ 13. Defendant's employee asked Plaintiff multiple times if she would like to open a store credit card and Plaintiff refused each time. Id. at ¶¶ 14–16. Defendant's employee was holding Plaintiff's card while asking if Plaintiff was interested in a store credit card. Id. When Plaintiff reached for the card reader, her

[1] Plaintiff has voluntarily dismissed The TJX Companies, Inc., as a defendant from this case. See Notice of Dismissal, ECF 6.

"wheelchair control was bumped sending her and the wheelchair into the counter." Id. at ¶ 17. Plaintiff alleges that as a result of the accident, she has suffered and continues to suffer severe injuries and her wheelchair was badly damaged. Id. at ¶¶ 18–19.

Plaintiff further alleges that her injuries were a direct result of Defendant's store being inaccessible to persons using wheelchairs and its failure to train its employees to properly handle customers with disabilities. Id. at ¶¶ 20–22. She seeks injunctive relief under the ADA, prohibiting Defendant from continuing discrimination against persons with disabilities. Id. at ¶¶ 24–27. Additionally, she claims that Defendant negligently failed to train its employees in handling customer issues and created hazardous conditions for persons using wheelchairs. Id. at ¶¶ 29–32.

STANDARDS

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a party may move to dismiss for lack of subject-matter jurisdiction.

> A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.

Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (internal citation omitted). The Court must accept the factual allegations contained in the Complaint as true when determining whether subject matter jurisdiction exists. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004). However, when resolving a factual attack on jurisdiction, the court may review extrinsic evidence without converting the motion to a motion for summary judgment and the court "need not presume the truthfulness of the plaintiff's allegations." Safe Air for Everyone, 373 F.3d at 1039. Once the motion has been converted into a factual motion, the plaintiff "must

furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." Id. (citation omitted).

Pursuant to Rule 12(b)(6), to survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face[,]" meaning "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Additionally, "only a complaint that states a plausible claim for relief survives a motion to dismiss." Id. at 679. A complaint must contain "well-pleaded facts" which "permit the court to infer more than the mere possibility of misconduct." Id. at 679. In evaluating the sufficiency of a complaint's factual allegations, the court must accept all material facts alleged in the complaint as true and construe them in the light most favorable to the non-moving party. Wilson v. Hewlett–Packard Co., 668 F.3d 1136, 1140 (9th Cir. 2012). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations and footnote omitted). However, the court need not accept unsupported conclusory allegations as truthful. Holden v. Hagopian, 978 F.2d 1115, 1121 (9th Cir. 1992). A motion to dismiss under Rule 12(b)(6) will be granted if a plaintiff alleges the "grounds" of her "entitlement to relief" with nothing "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555.

DISCUSSION

Defendant asserts that Plaintiff lacks standing to seek injunctive relief under the ADA because she does not face a real and immediate threat of repeated injury. To satisfy Article III's

standing requirements, a plaintiff must have suffered an injury in fact, which is "concrete and particularized, and actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). When a plaintiff seeks an equitable remedy such as injunctive relief under the ADA, she must show a "real or immediate threat that plaintiff will be wronged again—a 'likelihood of substantial and immediate irreparable injury.'" City of Los Angeles v. Lyons, 461 U.S. 95, 111 (2003) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). There must also "be a causal connection between the injury and the conduct complained of" and "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujans, 504 U.S. at 560–61(citations omitted).

Here, the speculative nature of Plaintiff's claim of future harm does not constitute an injury in fact and she fails to otherwise meet Article III's standing requirements. Plaintiff has not alleged a sufficient likelihood that she will be wronged again in a similar way or that she faces a real and immediate threat of repeated injury based on any practice that violates the ADA. Furthermore, Plaintiff has not alleged that the height of the counter or any act attributable to Defendant caused her accident. The Complaint does not describe a causal link between what "bumped" her wheelchair into the checkout counter and Defendant's conduct.

Regarding redressability, Defendant has submitted photographs of the checkout counter, demonstrating that it complied with the ADA's accessibility requirements. See Allen Decl. ¶¶ 5–6, Exs. A–D (demonstrating that the counter height and width satisfy the ADA's accessibility requirements); see also 2010 ADA Standards for Accessible Design, 28 C.F.R. part 36, subpart D, § 904.4.1 (2011) (stating that sales and service counters using a parallel approach such as the counters depicted in Defendant's pictures, shall be no higher than 36 inches above the floor and

must be at least 36 inches long). Plaintiff's argument that Defendant did not state when the pictures were taken is unavailing because if she were to return to the store at a future date, the counter would not be in violation of the ADA.

Even if the Court accepts all of Plaintiff's allegations as true, it cannot draw a reasonable inference from those allegations that Defendant is liable for her alleged injuries. The Court agrees with Defendant that Plaintiff's conclusory allegation that she could not reach the counter, by itself, does not establish that Defendant violated the ADA. See 42 U.S.C. § 12182(b)(2)(A) (enumerating prohibited forms of disability discrimination). Similarly, as pleaded in the Complaint, Defendant's employee's requests that Plaintiff sign up for a store credit card do not constitute ADA violations. It is difficult to comprehend, without speculation, how Defendant violated the ADA on the facts as alleged in the Complaint.

Because Plaintiff has not established standing and fails to state a claim, the Court dismisses her ADA claim. Moreover, because the Court is dismissing Plaintiff's only federal claim, it declines to exercise supplemental jurisdiction over her negligence claim. 28 U.S.C. § 1367(c)(3).

CONCLUSION

Defendant's Motion to Dismiss [10] is GRANTED and Plaintiff's Complaint [1] is DISMISSED. The Court also grants Plaintiff leave to amend her Complaint.

Dated this 3 day of April, 2017.

Marco Hernández

MARCO A. HERNÁNDEZ
United States District Judge