

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

GEORGE WITCHER,)
)
Appellant,)
)
v.) C.A. No. N11A-11-006 WCC
)
JAMES BREEDING and)
DELAWARE RACE TRACK &)
CASINO,)
)
Appellees.)

Submitted: April 3, 2012

Decided: July 31, 2012

On Appellant/Claimant's Appeal from the
Human Relations Commission – **AFFIRMED**

OPINION

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Wilmington, DE 19899. Attorney for Appellant George Witcher.

Wendy K. Voss, Esquire, and Michael B. Rush, Esquire. Potter Anderson &
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Wilmington, DE 19899. Attorneys for Appellees James Breeding and Delaware
Race Track & Casino.

CARPENTER, J.

While at Delaware Race Track & Casino, George Witcher, an African American paraplegic, asked teller James Breeding for assistance placing a bet. Breeding told Witcher he couldn't help because Breeding's large stomach made reaching the betting machine difficult. After being helped by another teller, Witcher filed a complaint alleging Breeding and Delaware Park discriminated against him on the basis of his race and physical disabilities.

The Human Relations Commission denied Witcher's claim and Witcher appealed. For the reasons discussed below, the Commission's decision is hereby **AFFIRMED**.

BACKGROUND

George Witcher is an African-American male paraplegic confined to a wheelchair. A frequent patron of Delaware Race Track & Casino ("Delaware Park"), Witcher uses a "player's club card" to place bets. In November 2010 Witcher was attempting to place a bet but could not reach the slot to insert his player's club card. He approached James Breeding's teller window for assistance.

Breeding, a Caucasian male with no apparent disabilities, advised Witcher that he could not provide assistance because Breeding had difficulty reaching the slot from his location on account of his large stomach.¹ Breeding attempted to

¹ App. to Appellant's Br. A0005.

make light of the situation by referring to his large stomach as a handicap.²

Witcher did not respond but moved to the teller window of Amy Schweitzer, who helped Witcher place his bet. Soon thereafter Witcher approached Kevin Casey, Breeding's supervisor, to file a formal complaint against Breeding.

Casey discussed the incident with Breeding while the two men were out of Witcher's presence but among other tellers. Breeding remarked that if Witcher "can't take a joke then fuck him."³ In addition, Witcher alleges Breeding derogatorily referred to him as "the other black man in a wheelchair."⁴ Breeding does not recall saying this, but notes that if he did, it was only because someone asked him which of two black men was angry with him.⁵

Breeding's superiors gave him a written warning for his conduct. They also sent Witcher a letter apologizing for the incident but, according to Witcher, sent "nothing of substance otherwise."⁶ Witcher filed a complaint with the Delaware State Human Relations Commission alleging that he was discriminated against by Breeding and Delaware Park on the basis of his physical disability and race. Breeding and Delaware Park moved to dismiss the complaint.

² *Id.*

³ *Id.*

⁴ App. to Appellant's Br. A0006.

⁵ *Id.*

⁶ App. to Appellee's Br. B31.

After considering the parties' pleadings, Delaware Park's responses to the Commission's questionnaire, and written statements from Witcher and Delaware Park employees, the Commission found that, although Witcher was a member of a protected class, he had not been discriminated against. Witcher appeals the Commission's decision and argues that it was not based on substantial evidence.

STANDARD OF REVIEW

When reviewing an appeal from an administrative agency, the Court evaluates the record to determine if it included substantial evidence that a reasonable mind could accept as adequate support for the agency's conclusions.⁷ Substantial evidence is evidence from which an agency could fairly and reasonably reach the conclusion that it did.⁸ The Court does not sit as trier of fact with authority to weigh evidence, determine questions of credibility, or make its own factual findings and conclusions.⁹ The Court also evaluates the record to verify that the agency's conclusions are free from legal error.¹⁰

⁷ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

⁸ *Id.*

⁹ *DuPont Hosp. for Children v. Pattie*, 2001 WL 588964, at *1 (Del. Super. May 24, 2001).

¹⁰ *Unemployment Ins. Appeal Bd. of Dept. of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

DISCUSSION

Witcher submitted a claim of unlawful discrimination under Delaware's Equal Accommodations Act.¹¹ To succeed on such a claim a plaintiff must first establish a *prima facie* case of discrimination by showing that (1) he is a member of a protected class; (2) he was denied access to a public accommodation; and (3) persons who were not a member of his protected class were treated more favorably.¹²

Once the plaintiff establishes this *prima facie* case the burden shifts to the defendant to produce evidence of a legitimate, non-discriminatory reason for denying the plaintiff access.¹³ If the defendant produces such evidence, the burden shifts back to the plaintiff to show by a preponderance of evidence that the defendant's proffered reason was merely pretextual.¹⁴

The Commission concluded that Witcher did not establish a *prima facie* case of discrimination and ended its analysis there. Specifically, the Commission found that although Witcher is a member of two protected classes—due to his race and physical disabilities—he was not denied access to public accommodations at

¹¹ See 6 Del. C. § 4504(a) (“No person being the owner, lessee, proprietor, manager, director, supervisor, superintendent, agent or employee of any place of public accommodation, shall directly or indirectly refuse, withhold from or deny to any person, on account of race, age, marital status, creed, color, sex, disability, sexual orientation or national origin, any of the accommodations, facilities, advantages or privileges thereof.”).

¹² *Boggerty v. Stewart*, 14 A.3d 542, 550 (Del. 2011).

¹³ *Id.*

¹⁴ *Id.* at 550-551.

Delaware Park and non-members of his protected class were not treated more favorably.¹⁵ On appeal Witcher contends that the Commission did not base its conclusions on substantial evidence. Because all parties agree that Witcher is a member of a protected class, the Court will only discuss the evidence the Commission considered with respect to the second and third elements of Witcher's *prima facie* case for discrimination.

1. Denial of Access to Public Accommodations

The purpose of Delaware's Equal Accommodations Act is "to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public."¹⁶ As such, Witcher must establish that he was denied access to Delaware Park's facility or services to succeed on his discrimination claim. Whether this element is satisfied depends on the characterization of Breeding's response to Witcher when Witcher asked him to help put his card in the slot. To discern whether this response amounted to a refusal, the Commission considered written accounts of the incident from Witcher, Schweitzer, and Breeding.

¹⁵ App. to Appellant's Br. A008-A009.

¹⁶ *Stewart v. Human Relations Commission*, 2010 WL 2653453, at *3 (Del. Super. July 6, 2010) (quoting *Daniel v. Paul*, 395 U.S. 298, 307-308 (1969)).

Schweitzer did not hear the exchange between Witcher and Breeding at the time it occurred, but when she asked Breeding about it later he explained that Witcher had tried to hand him his card and Breeding said he could not reach the slot because of his stomach.¹⁷ According to Schweitzer, the slot is at the front of the “bet jet,” and a teller must lean over a keyboard and machine in order to insert the card.¹⁸

Breeding says he asked Witcher to insert his own card because he has a hard time reaching the slot area on account of his large stomach.¹⁹ Witcher “was silent for a few seconds” and then backed his wheelchair to Schweitzer’s window.²⁰ When Witcher returned to ask Breeding for his name, Breeding reiterated that he was unable to reach the slot because of his large stomach.²¹ Breeding referred to his stomach as a handicap to make light of the situation, but noticed that that only made Witcher angrier.²²

The parties agree that Witcher was eventually helped by Amy Schweizer. The Commission therefore found that that, if anything, there was a delay of accommodation for Witcher, but not an outright refusal or denial.²³ The evidence

¹⁷ App. to Appellee’s Br. B11.

¹⁸ *Id.*

¹⁹ *Id.* at B12.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ App. to Appellant’s Br. A0008.

supporting this finding—from sources neutral to and on both sides of the incident—is largely consistent. It seems to the Court that Breeding would have helped Witcher if it weren't for Breeding's own size.

Nevertheless, Witcher argues on appeal that, first, Breeding's response was a direct denial of accommodation, and second, even if there was only delay in accommodation, that delay still amounted to a denial of services. The record cited above fails to support the first argument; as to the second, the Court acknowledges that, in some cases, something less than outright refusal will support a finding of denial of access. But this Court noted in *Stewart v. Human Relations Commission* that “there does not appear to be a precise legal rule which articulates what does or does not constitute a denial of access. Such a question may be fact-intensive, depending upon the circumstances of a particular case.”²⁴

Witcher compares the facts of his case to those in *Hadfield's Seafood v. Rouser*, where a cashier forced a customer to wait for her food while the cashier explained why the food had taken so long to prepare.²⁵ This Court found that, in delaying service, the cashier's conduct amounted to an indirect denial of service.²⁶ Yet *Hadfield's* does not stand for the proposition that any delay of service is a

²⁴ 2010 WL 2653453, at *6 (Del. Super. July 6, 2010).

²⁵ 2001 WL 1456795, at *4 (De. Super. Aug. 17, 2001).

²⁶ *Id.*

denial of service. Extending the analysis in *Hadfield's* to its broadest reach, one could only say it implies that an intentional delay of service “used to frustrate the customer,” especially when that delay tactic is “repeatedly rebuffed,” is in fact a denial of service.²⁷ *Hadfield's* involved a heated back-and-forth between the customer and the cashier, whereas here Breeding showed no animus toward Witcher and Witcher never attempted to ask Breeding for help a second time.²⁸ The Commission has the authority to weigh the evidence and decide which legal conclusion that evidence most supports. The Commission’s conclusion that Breeding and Delaware Park did not deny access to Witcher is based on substantial evidence and the Court will not disturb it.

2. Favorable Treatment of Non-members of Protected Class

To meet the third element of a *prima facie* case of discrimination Witcher must show that non-members of his protected class were treated more favorably than he at Delaware Park. A plaintiff satisfies this element if he can show either that he was deprived of services while similarly situated persons outside his

²⁷ *Id.*

²⁸ Federal case law even suggests that a delay of service motivated by racial animus still does not equal a denial of services. See *Bentley v. United Refining Co. of Pennsylvania*, 206 F. Supp. 2d 402, 406 (W.D.N.Y. 2002) (“[M]ere delay, even coupled with discourteous treatment, poor service, or racial animus, is insufficient to sustain a § 1981 claim”).

protected class were not or that he received services in a markedly hostile manner.²⁹

a. *Deprivation of Services*

Witcher presents no evidence that African American patrons were denied services that non-African Americans were granted, and all Witcher does to show that handicapped patrons were denied services is attest that they had a more difficult time using betting machines and accessing facilities than non-handicapped patrons. To the extent that non-handicapped patrons can more easily reach certain machines or parts of the park, Delaware Park indicates it is always prepared to move chairs and otherwise accommodate handicapped patrons.³⁰ This is normally a responsibility of Delaware Park's security personnel, and not its tellers, for liability reasons.³¹ As the Commission stated in its decision, "[t]he mere fact that people who are not physically challenged can more easily move about the casino does not show they are somehow treated more favorably."³²

b. *Hostile Treatment*

Witcher alleges Breeding treated him in a markedly hostile manner on account of his race and physical disabilities and bases these allegations on remarks

²⁹ *Hadfield's Seafood*, 2001 WL 1456795, at *4 (quoting *Callwood v. Dave & Busters, Inc.*, 98 F.Supp. 2d 694, 707 (D. Md. 2000)).

³⁰ App. to Appellee's Br. B06.

³¹ *Id.*

³² App. to Appellant's Br. A0009.

made by Breeding both at the time Witcher sought his help and later, when Witcher was not within hearing distance. The Commission found that Breeding's reference to his stomach as his own handicap was not motivated by discrimination and this finding is supported by the written evidence previously discussed. Similarly, the Commission found that Breeding's profane remark about Witcher's inability to "take a joke" did not amount to discrimination. On its face, the remark relates not at all to Witcher's race or physical disabilities. Moreover, the record shows that Breeding didn't make this statement in Witcher's presence.³³ Finally, Breeding's reference to Witcher as "the other black man in the wheelchair"—if Witcher said this at all—was meant to identify Witcher when Breeding was asked which of two black men was angry with him: the one standing before him or the one in the wheelchair.³⁴ The Commission found no trace of animus in this statement and the record supports this finding

CONCLUSION

The exchange between Breeding and Witcher at Delaware Park seems to have been the result of unintentional insensitivity and miscommunication, but not discrimination. The Commission found that Witcher failed to establish a *prima*

³³ See App. to Appellee's Br. B13 (Breeding's letter explaining that this statement "was not directed at Mr. Witcher nor meant for him to hear. The only persons within hearing range . . . were Kevin and two other employees").

³⁴ *Id.*

facie case of discrimination because he couldn't prove that he was denied accommodation nor that non-members of his protected class were treated more favorably. This conclusion is based on substantial evidence. Therefore, the decision of the Commission is AFFIRMED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.