IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DAVID STEWART and CARMIKE CINEMAS, INC., d/b/a/ CARMIKE 14,	) C.A. No. 09A-05-002 (JTV)
Appellants,	)
v.	)
HUMAN RELATIONS COMMISSION STATE OF DELAWARE, et al.,	)
Appellees.	)

Submitted: March 29, 2010
Decided: July 6, 2010

Umbreen S. Bhatti, Esq., American Civil Liberties Foundation of Delaware, Wilmington, Delaware. Attorney for Appellees.

Daniel W. Folt, Esq, and Mark Neiderman, Esq., Duane Morris, LLP, Wilmington, Delaware. Attorneys for Appellants.

Upon Consideration of Appellants' Appeal
From Decision of State Human Relations Commission
REVERSED

VAUGHN, President Judge

Stewart, et al., v. Human Relations Commission, et al.,
C.A. No. 09A-05-002 (JTV)
July 6, 2010

OPINION

The appellees, Jeff Blackledge et. al,[1] filed substantially identical complaints with the State Human Relations Commission (the "Commission") against David Stewart ("Stewart") and Carmike Cinemas, Inc., ("Carmike") alleging a violation of the Delaware Equal Accommodations Law, specifically 6 *Del. C.* § 4504(a). The appellees accused Stewart, manager of the Carmike movie theater, of denying the appellees access to public accommodations on the basis of their race or color. Specifically, the appellees claim that Stewart insulted, humiliated, and demeaned them when he made a public announcement before the movie began that they should turn off their cell phones, remain quiet, and stay in their seats in a manner that deprived them of their right to equal accommodations.

The Commission held a hearing on the matter and determined that Stewart's actions constituted a violation of § 4504(a). The Commission ordered Carmike to pay each of the appellees $1,500; to establish a clear chain of command and procedures concerning the announcement policy; to require all current and future employees to take "sensitivity, diversity, and stress management training"; and to pay $5,000 to the Special Administration Fund.

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[1] The named appellees include: Jeff Blackledge, Andre Boggerty, Kim Boggerty, Barbara Bryant, Larry Bryant, Kemmeisha Burris, Kemuel Butler, Andrea Carter, De'von Carter, Nicole Davis, Victoria Fuentes-Cox, Nichole Graves, Tracy Harvey, Chauntel Hayward, Kenneth Hutchinson, Mondaria Hutchinson, Brian Jordan, Delores Percy, William G. Mcculley, Sonji Mcculley, Chontel Mcmillan, Barbara O'Neal, Quetcy Rivera, Trisha Scott, Monica Sewell, Rosa Smith, Pamela Starling, Theresa Williams, Veronica L. Becton, Jameira Burke, Robert Waters, Harold Dixon, and Arnola Burke-Dixon. There is a total of 33 named appellees.

FACTS

On October 12, 2007, the appellees purchased tickets at Carmike to see a new Tyler Perry movie. Due to the high volume of ticket sales, the manager decided to show the movie in three auditoriums: one large auditorium (where the appellees were located) and two other, smaller auditoriums.[2]

After purchasing their tickets, the appellees handed their tickets to the ticket-taker, who handed back their stubs. They then proceeded to the theater. Two security officers were present, one of whom was outside the door to the large theater. This security officer requested to see the appellees' ticket stubs.[3] After displaying their ticket stubs, all of the appellees were admitted into the theater. One of the appellees testified that she had never before seen a security guard at the entrance to an individual theater. She also testified that she never before had to show her ticket stub to a security officer to gain admittance into an individual theater. Another appellee testified that there were three security guards present that evening.

Once in the theater, messages were displayed on the screen, reminding patrons to turn off their cell phones and to refrain from talking during the movie. Before the movie began, Stewart, a Caucasian male, introduced himself to the audience as the manager of Carmike. The audience was full that evening, with a majority of the patrons being African-American. Stewart announced that the patrons should turn off

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[2] Stewart testified that he intended to give the announcement in all three theaters, but was unable to do so because he returned to the first theater to apologize.

[3] One of the appellees testified that he did not see any security guards at any other theater doors.

their cell phones, stay quiet, and remain seated. Several of the appellees testified that Stewart's remarks were delivered in an offensive, condescending manner and tone, as if directed to children.[4] Stewart then exited the theater.

At some point during this sequence of events, an audience member stood up and said that she felt Stewart's comments were racist. She identified herself as an attorney, or a person working for an attorney, and circulated a paper in the crowd, requesting contact information of any patron who was offended.[5] All of the appellees signed the paper and watched the movie in its entirety. Two African-American audience members, who testified on behalf of Carmike, refused to sign the paper because they were not offended by the announcement.[6]

After Stewart left the theater, one of the appellees followed Stewart and told him that he was uncomfortable with what Stewart had said. Stewart told him that he made the announcement at all sold out movies. Stewart then immediately returned to the theater and apologized to the audience, stating that he did not mean to offend anyone and that he was required to make the statement at all new releases. Several of the appellees, however, testified that they had never heard such an announcement made at a first-run or sold out movie previously. One of the appellees testified that

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[4] Five out of the 33 appellees testified at the hearing.

[5] The person in the audience who rose was the Director of the Human Relations Division. She later withdrew her own complaint "so that the Respondent will not be able to use my inclusion in this case to distract from the Respondent's discriminatory conduct." Ltr. from Dir. of the Div. of Human Relations, April 14, 2008.

[6] Their averments are also contained in nearly identical affidavits. App. of Exhibits Cited in Appellants' Op. Br., A0134-A0150.

she later saw Stewart at a convenience store, and he told her that he had never made the announcement prior to that night.

Stewart had, in fact, made such an announcement once before at the Dover Carmike. He testified that in the four months that he had been the manager of Carmike, he had made similar announcements the opening weekend of a movie entitled *Halloween*, which drew a predominately teenaged crowd. In response to the question, "So what made you decide to do it in the 'Halloween' movie?" Stewart testified:

> [Making the announcement] was a policy that I hadn't been implementing in Dover yet. And that was because for the first month I was in Dover I was also helping out in Ocean City.
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> And after I was helping out in Ocean City, I had to get used to the new environment, more customers, more responsibilities, a larger customer flow. And then once I felt comfortable with that, and the employees that were working there, I [w]ould not have to have constant supervision on them, I decided, well, this is something I did [at another Carmike location]. It helped with the cell phone usage and talking during the movie. Why don't I try to implement it here, since we are having some customer complaints on it. Then I decided this was a good movie. It's a teenage movie. So then I did it in 'Halloween.'
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> Then after that, I was planning on doing it on a weekly basis. The busiest movie the next week was Tyler Perry's 'The Family That Preys.' I did it in there, very bad

reaction. I didn't want to do it again after that, so I didn't.[7]

The Commission unanimously found that Stewart's conduct constituted a violation of § 4504(a). Carmike now appeals the decision, contending that the appellees failed to establish a *prima facie* case of discrimination, and, therefore, the Commission's decision is not supported by substantial evidence.

STANDARD OF REVIEW

This Court's role in reviewing a decision of the Commission is limited to determining whether the Commission's decision is supported by substantial evidence and is free from legal error.[8] "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[9] In its appellate role, "[t]his Court does not weigh the evidence, determine questions of credibility, or make its own factual findings. It merely determines if the evidence is legally adequate to support the agency's factual findings."[10] If those findings are not

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[7] App. of Exhibits Cited in Appellants' Op. Br., A0081. In the proceedings before the Commission, there was considerable discussion about whether Carmike had a "policy" regarding announcements before first-run or sold out movies. The Commission found that the testimony of Mr. Bridgman, Division Manager for Carmike, concerning such a policy was not credible. *If* such a policy existed, it was discretionary with the branch manager and applied only sporadically or non-uniformly, if at all.

[8] *Quaker Hill Place v. State Human Relations Comm'n*, 498 A.2d 175, 178 (Del. Super. 1985) (citing 29 *Del. C.* §§ 10142, 10161(5)).

[9] *Domino's Pizza v. Marian Harris and the Human Relations Comm'n*, 2000 WL 1211151, at *6 (Del. Super. 2000).

[10] *Id.*

supported by substantial evidence, "or are not the product of an orderly and logical deductive process, then the decision under review cannot stand."[11]

DISCUSSION

The relevant statute, 6 *Del. C.* § 4504(a), provides as follows:

> No person being the owner, lessee, proprietor, manager, 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, handicap or national origin, any of the accommodations, facilities, advantages or privileges thereof.[12]

The purpose of Delaware's Equal Accommodation Law is "to prevent . . . practices of discrimination against any person because of race, age, marital status, creed, color, sex, handicap or national origin."[13] The statute "shall be liberally construed to the end that the rights herein provided for all people, without regard to race, age, marital status, creed, color, sex, handicap or national origin, may be effectively safeguarded."[14] As 6 *Del. C.* § 4501 explains, this Court may look to

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[11] *Quaker Hill Place*, 498 A.2d at 179 (citing *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985)).

[12] § 4504(a).

[13] 6 *Del. C.* § 4501.

[14] *Id.*

similar federal and state statutes for guidance in defining the scope of § 4504.[15] In doing so, this Court recognizes that the ultimate purpose of public accommodation laws is to remove "'the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public.'"[16]

Carmike is a "place of public accommodation," which is defined as "any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public."[17]

The *McDonnell Douglas* three part test

In deciding cases alleging unlawful discrimination, Delaware Courts apply a three-part burden-shifting analysis articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*.[18] To prove the allegation:

> (1) the plaintiff must set forth a *prima facie* case of discrimination;
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> (2) once the *prima facie* case is established, the burden shifts to the defendant to produce evidence of a legitimate, non-discriminatory reason for denying plaintiff access; and
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> (3) if the defendant meets that burden, the plaintiff must

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[15] "[I]n defining the scope or extent of any duty imposed by [§ 4504] . . . applicable federal, state, or local enactments may be considered." § 4501.

[16] *Daniel v. Paul*, 395 U.S. 298, 307-308 (1969) (quoting H.R.Rep. No. 914, 88th Cong., 1st Sess., 18).

[17] 6 *Del. C.* § 4502(1).

[18] 411 U.S. 792 (1973).

> carry the burden of proving, by a preponderance of the evidence, that the defendant's proffered reason was a pretext for discrimination.[19]

The first part of the *McDonnell Douglas* test

The first part of the *McDonnell Douglas* test, establishing a *prima facie* case, is itself a three-element test. A plaintiff establishes a *prima facie* case by showing that:

> (1) he is a member of a protected class;
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> (2) he was denied access to a public accommodation; and
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> (3) non-members of the protected class were treated more favorably.[20]

**Element one of the *prima facie* case:
member of a protected class**

Both parties agree that the appellees are members of a protected class, and no further discussion of that element is necessary.

**Element two of the *prima facie* case:
denied access to a public accommodation**

The second element of the *prima facie* case analysis typically involves a direct

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[19] *Thompson v. Dover Downs, Inc.*, 887 A.2d 458, 461 (Del. 2005) (citing *McDonnell Douglas*, 411 U.S. at 802-803)).

[20] *Uncle Willie's Deli v. Whittington*, 1998 WL 960709, at *4 (Del. Super.).

refusal or a direct denial of service.[21] However, § 4504(a) prohibits the *direct or indirect refusal, withholding, or denial* of any of the accommodations, facilities, advantages or privileges of the public accommodation. In *Hadfield's Seafood v. Rouser*,[22] the court recognized that a denial of access may take the form of something less than an outright denial of service.[23] A detailed explanation of that case is helpful.

In *Rouser*, the complainants placed an order for take-out. The husband (African-American) waited twenty minutes to pick up the food, while his wife (Caucasian) waited in the car. The husband then returned to the car, telling his wife that he would rather go home than continue to wait. His wife then went into the restaurant, and immediately heard their food order being called. When the wife went to pick up the food, the cashier attempted to explain the food's delay. The wife repeatedly rebuffed the cashier's attempts to explain the delay and then demanded her food. A verbal altercation arose between the cashier and the wife, wherein the cashier allegedly called the wife "white-trash," and the wife then threatened to hit the cashier.

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[21] *See Thompson v. Dover Downs, Inc.*, 887 A.2d 458, 459 (Del. 2005) (refusing entry into casino); *Boscov's Dep't Store v. Jackson*, 2007 WL 542159 (Del. Super.) (cancelling courses which were instructed by complainants); *OTAC No. 4, Inc. v. Waters*, 2004 WL 1790124 (Del. Super.) (refusing to serve drive-thru patrons who were on foot); *Russo v. Corbin*, 2002 WL 88948 (Del. Super.) (denying service at restaurant); *DP Inc. v. Harris*, 2000 WL 1211151 (Del. Super.) (refusing to deliver pizza to address); *Salty Sam's Pier 13 v. Washam*, 2000 WL 1211227 (Del. Super.) (expelling patrons from restaurant); *Uncle Willie's Deli v. Whittington*, 1998 WL 960709 (Del. Super.) (demanding customer leave store after he and an employee had a verbal altercation).

[22] 2001 WL 1456795 (Del. Super.), *aff'd,* 2002 WL 384415 (Del. 2002) (hereinafter "*Rouser*").

[23] *Id.* at *4.

Ultimately, the assistant manager removed the cashier from the lobby, apologized to the wife, and the wife returned to the complainants' car. The *Rouser* court determined that:

> Because withholding 'accommodations, facilities, advantages or privileges' can take the form of something less than an 'outright denial of service,' Hadfield's assertion that the [married couple] left with the food and therefore were not denied service must fail. It is true the alleged denial of service was only for a few minutes-and that the delay was caused by a harried cashier trying to explain the wait and a frustrated customer refusing to listen to the explanation. In most situations, an apology or explanation for poor service is part of the transaction, not in lieu of it, as alleged here.
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> If used to frustrate the customer, however, a lengthy explanation or apology takes on a different tone, especially when the explanation was repeatedly rebuffed. If [the wife] demanded her food and the cashier refused to give it to her until she permitted him to explain, then the second element of the test was met. The Human Relations Commission evidently found that to be the case, stating 'the cashier placed the food down, not giving it to [the wife] and responded with the comment 'Go ahead and hit me.' Admittedly, it is a close call as to whether [the cashier] affirmatively or inadvertently denied service. However, 'it is the role of the [Commission], not this Court, to resolve conflicts in testimony and issues of credibility and to decide what weight is to be given to the evidence presented.' Therefore, substantial evidence exists to support the [Commission's] finding on the second

element of a *prima facie* discrimination case.[24]

Element three of the *prima facie* case:
non-members of the protected class were treated more favorably

As mentioned, the third element of a *prima facie* case is that non-members of the protected class were treated more favorably.[25] The standard for establishment of element three was set forth in *Rouser* as follows:

> In order to alleviate the difficulty of establishing disparate levels of service, the *Callwood* court restated the third [element] as:
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> (3) they did not enjoy the privileges and benefits of the contracted for experience under factual circumstances which rationally support an inference of unlawful discrimination in that (a) they were deprived of services while similarly situated persons outside the protected class were not deprived of those services, and/or (b) they received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable.[26]

Factors relevant to determining whether behavior is "markedly hostile" include "whether the conduct is so (1) profoundly contrary to the manifest financial interests of the merchant and/or her employees; (2) far outside of widely-accepted business

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[24] *Id.* at *4.

[25] *Uncle Willie's Deli*, 1998 WL 960709, at *4.

[26] *Hadfield's Seafood,* 2001 WL 1456795, at *5 (quoting *Callwood v. Dave & Busters, Inc.*, 98 F. Supp. 2d 694, 707 (D. Md. 2000)).

norms; and (3) arbitrary on its face, that the conduct supports a rational inference of discrimination."[27]

In *Rouser,* the court found that element three of the *prima facie* case was not satisfied because "[n]either the Rousers, nor the [Commission], were able to substantiate [subpart (3)(a)]."[28] Likewise, the court found that the Rousers' claim failed on subpart (3)(b) because the cashier's conduct could not be said to be "markedly hostile."[29]

The Commission committed legal error in its analysis of the second element of a *prima facie* case

Carmike contends that the Commission erred in finding that the appellees had been denied access to a public accommodation. In support of this argument, Carmike contends that the appellees were not denied access because they were admitted to the theater and, in fact, stayed to watch the entire movie. I am not persuaded by this contention. As the *Rouser* court explained, leaving with the benefit of the transaction, in and of itself, is not conclusive evidence that the appellees were not denied some access or privilege of the accommodation.

Carmike next contends that the Commission improperly relied upon the "markedly hostile" test in its analysis of the second element of a *prima facie* case. The Commission's finding that the appellees met the second element of a *prima facie*

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[27] *Callwood*, 98 F. Supp. 2d at 708.

[28] *Hadfield's Seafood,* 2001 WL 1456795, at *5.

[29] *Id.* at *5-6.

case appears at the end of their analysis of that element, and reads, in pertinent part:

> [T]he Complainants were permitted to watch the movie they had paid to attend. However, the circumstances under which they were permitted to watch the movie were hostile, humiliating, and demeaning. While the Complainants did receive service in that they were allowed to watch the movie, 'they received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable.' Accordingly, the second element of the *prima facie* case has been met.[30]

Carmike's contention on this point has merit. After a careful review of the case law, I conclude that the Commission erred as a matter of law when it applied the "markedly hostile" test to the second element of a *prima facie* case. The "markedly hostile" test is an alternative avenue to establish unlawful discrimination under the third element of a *prima facie* case, namely, whether non-members of the class were treated more favorably. In finding that denial of access occurred because the services were delivered in a markedly hostile and objectively unreasonable manner, the Commission applied a third element analysis to the second element and, in substance, collapsed the two separate elements into one.

The Commission's finding that the appellees were denied access is not supported by substantial evidence

Carmike contends that "subjective perception[s] of discrimination do not give

[30] Decision, at 47 (internal citations omitted).

rise to a viable claim."[31] That is, Carmike maintains that the appellees' testimony does not support a discrimination claim because it establishes only that the appellees were offended by the announcement's tone - not the words used in the announcement. The appellees, on the other hand, contend that Carmike's argument fails to address the objective evidence that the announcement was not made in any other theater that evening, and only one other time during *Halloween*. In support of their contention, the appellees argue that "while [they were] not denied service outright, [they] were denied the privileges and advantages thereof through the tone and manner of the delivery of a pre-show announcement chosen to be delivered in their theater and their theater alone, based solely on the composition of the audience."[32] In sum, the appellees claim that, as patrons, it was a privilege and an advantage *not* to be subjected to a condescending verbal announcement, and that Carmike's actions denied them this privilege and advantage.

I am not persuaded that the making of the announcement in this case, although done in a condescending and humiliating tone, and in the presence of security officers and/or other attendants, constituted a denial of access.[33] While it is well-established

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[31] Op. Br. at 19.

[32] Ans. Br. at 11.

[33] As § 4501 explains, this Court may look to similar federal and state statutes for guidance in defining the scope of § 4504. In *Rouser*, this Court looked to *Callwood* as a source of persuasive authority. *Callwood* involved claims under 42 U.S.C.A. § 1981 and Title II of the Civil Rights Act. This Court finds that the following cases are persuasive authority for the case at bar: *Colenburg v. Starcon Intern, Inc.*, 2009 WL 1536503 (D. Minn.) (conduct that is merely rude, abrasive, unkind, or insensitive does not come within the scope of the Minnesota Human

that an outright denial of service is not necessary, 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. Thus, in the restaurant context, for example, poor service may or may not be a denial of access, depending upon the circumstances. Here, the appellees have failed to cite any case in which a subjectively rude announcement constituted a denial of access.[34] In *Rouser,* for example, it was not the condescending remark "white trash" which constituted the denial of access, rather it was the cashier's refusal to give the wife her food when she demanded it.[35] Likewise, in *Uncle Willie's Deli*

Rights Act); *Stephens v. Shuttle Associates, LLC*, 547 F. Supp. 2d 269 (S.D.N.Y. 2008) (legislation such as the ADA cannot regulate individuals' conduct so as to ensure that they will never be rude or insensitive to a person with disabilities); *Bentley v. United Refining Co. of Pa.*, 206 F. Supp. 2d 402 (W.D.N.Y. 2002) (mere delay in servicing customer, even coupled with discourteous treatment, poor service, or racial animus is insufficient to sustain § 1981 claim); *Turner v. Wong*, 832 A.2d 340, 355 (N.J. Super.) (2003) ("The statutory protection has been interpreted to reach situations where customers are merely discouraged from using a public facility because of verbal comments made to them *about their protected status*.") (emphasis added); *Turner v. Wong*, 832 A.2d 340 at 357 ("Although poor service, hostile treatment or rudeness alone *may* not be sufficient to establish a 1981 claim, nevertheless, if race-based harassing conduct becomes so extreme as to prevent a plaintiff from enjoying the benefits of his or her contract, it may be actionable, even absent proof of disparate, superior treatment accorded members of a non-protected class.") (emphasis added) (internal citations omitted); *Turner v. Wong*, 832 A.2d 340 at 359 ("We do not suggest that a racial epithet alone, no matter how offensive, suffices to establish a cause of action under § 1981, since there must be interference with the contractual relationship beyond the mere expectation of being treated without discrimination while using the retail facility.") (internal citations omitted).

[34] At oral argument, the appellees advanced the argument that the totality of the circumstances that evening constituted a denial of access. I have considered this argument as it relates the facts of this case, and I find it unpersuasive.

[35] *Hadfield's Seafood,* 2001 WL 1456795, at *4.

v. Whittington, it was not the allegedly rude remarks of the store's clerk that constituted the denial of access; it was the manager's request that the patron leave the store.[36] I conclude that the making of the announcement in the manner as found by the Commission, along with the attendant facts and circumstances of this case, are legally insufficient to constitute a denial of access.

Conclusion

For the foregoing reasons, I find that the Commission committed legal error in its analysis of the second element of a *prima facie* case and that the Commission's decision that the appellees were denied access is not supported by substantial evidence. The decision of the Commission is ***reversed***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

JTVJr:dfm
oc: Prothonotary
cc: Order Distribution
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[36] *Uncle Willie's Deli*, 1998 WL 960709, at *4.