IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HADFIELD'S SEAFOOD	)	
	)	
Appellant,	)	C.A. No. 00A-07-008-JRJ
	)	
5.	)	
	)	
DOREEN AND GLEN ROUSER,	)	
	)	
Appellees.	)	

O R D E R

Submitted: July 18, 2001
Decided: August 17, 2001

Appeal from a decision of the State Human Relations Commission.
Decision **REVERSED**.

Gary W. Aber, Esq., of Heiman, Aber, Goldlust & Baker, Wilmington, Delaware, for Appellant.

Jeffrey K. Martin, Esq., Wilmington, Delaware, for Appellees.

JURDEN, Judge

I. INTRODUCTION

Appellees, Doreen and Glenn Rouser, husband and wife, filed a complaint with the State Human Relations Commission against Hadfield's Seafood, Inc., ("Hadfield's") alleging a violation of the Delaware Equal Accommodations Law, specifically 6 *Del. C.* § 4504(a). The Rousers accused Hadfield's of withholding service from Appellee Doreen Rouser based on racial and marital discrimination. A panel of the State Human Relations Commission ("the Panel") held a hearing, determined that the actions of a Hadfield's employee, Mathew Walker ("Walker"), constituted a violation of 6 *Del. C.* § 4504(a), and ordered Walker and all other Hadfield's employees to undergo "sensitivity training." Hadfield's filed a timely appeal. Because the decision of the Panel is not supported by substantial evidence, the decision of the State Human Relations Commission is **REVERSED**.

II. FACTS

On the evening of July 7, 1999, Glenn Rouser called Hadfield's Seafood to place a dinner order for pickup. He was informed that the kitchen was extremely busy and that the order would not be ready for about 45 minutes. Glenn and Doreen Rouser arrived at Hadfield's approximately 50 minutes later. Glenn Rouser went into the store while his wife waited outside in their vehicle. Mr. Rouser waited inside Hadfield's for

approximately 20 minutes before returning to his vehicle and telling his wife he would rather leave than wait any longer for their dinner order.

Doreen Rouser then went into the store to check on the order. When she entered, the cashier behind the counter called out the name "Glenn," and Doreen Rouser approached the counter. The cashier, Mathew Walker, immediately told Doreen Rouser that he wanted to explain the reason for the delay. Doreen Rouser said she needed no explanation. Walker insisted that she listen to his explanation. Doreen Rouser told him she wanted no explanation and demanded her food. An argument ensued.

Though the chronology of the "he said-she said" is in dispute, the Panel determined that it occurred in the following way: After Doreen Rouser repeatedly rebuffed Walker's attempts to explain the delay and then demanded her food, Walker called Rouser "white trash." She responded by telling him she would smack him in the mouth. At this point, the Panel found "the cashier placed the food down, not giving it to Mrs. Rouser and responded with the comment 'Go ahead and hit me.'"

Hearing the commotion, the assistant manager came to the counter and escorted Walker back into the kitchen, in accordance with store policy. When the assistant manager returned to the counter, he immediately apologized to Rouser and gave her the food. After arriving home with their dinner order, Doreen Rouser was so upset that she

called the store. She spoke to the assistant manager who apologized again. The next day she spoke to the owner, who also apologized.

Contrary to Doreen Rouser's testimony, Walker and several other employees testified that he made the "white trash" comment while Walker was being escorted into the kitchen, not while he was at the counter. Walker claimed it was Doreen Rouser's comments and admitted finger wagging that precipitated the confrontation. In addition to disagreeing about the timing of the "white trash" comment, the parties also disagreed on whether Hadfield's gave the Rousers a discount on their dinner order for the poor service they received.

The Panel issued its decision on June 7, 2000. The Panel unanimously found that: (1) Walker had ample opportunity to determine that the Rousers were an interracial couple; (2) the confrontation was prompted by "racial considerations" as evidenced by the remark "white trash;" and (3) Walker's conduct constituted a violation of 6 *Del. C.* § 4504(a).

The Panel said Doreen Rouser was denied the "accommodations, facilities advantages and privileges" of Hadfield's Seafood because of her relationship with her husband who is African-American. The Panel did not find any violation of Glenn Rouser's rights under the statute. The Panel ordered "sensitivity training" for Walker and all employees of Hadfield's.

Hadfield's now appeals the State Human Relations Commission's decision, claiming the Rousers failed to establish a *prima facie* case of discrimination, and, therefore, the Panel's decision is not predicated on substantial evidence.

III. STANDARD OF REVIEW

This court's role in reviewing a decision of the State Human Relations Commission is limited to determining whether the Commission's decision is supported by substantial evidence and is free from legal error.[1] "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] 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

---

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

[2]*Domino's Pizza v. Marian Harris and the Human Relations Comm'n*, Del. Super., C.A. No. 99A-12-003, 2000 LEXIS 269, at *15, Ridgely, P.J. (July 31, 2000).

evidence is legally adequate to support the agency's factual findings."[3] If those findings are not supported by substantial evidence, "or are not the product of an orderly and logical deductive process, then the decision under review cannot stand."[4]

IV. DISCUSSION

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

---

[3] *Id* at *15.

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

> 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.[5]

---

[5] *6 Del. C.* § 4504(a).

Hadfield's 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."[6] 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.*[7] To prove the allegation, (1) the plaintiff first must set forth a *prima facie* case for discrimination, (2) the defendant then has an opportunity to offer some nondiscriminatory reason for the denial of the public accommodation, (3) if a reason is given, then the plaintiff has the burden to prove by a preponderance of the evidence that the proffered reason was a pretext for discrimination.[8]

Establishing a *prima facie* case is itself a three-part test: "a plaintiff can establish a *prima facie* case by showing that he is a member of a protected class, that he

---

[6] *6 Del. C.* § 4502(1).

[7] 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[8] *Id.* at 801-02.

was denied access to a public accommodation, and that non-members of the protected class were treated more favorably."[9]

A. First Element: Member of a Protected Class

The Rouser's complaint indicates they believe they were discriminated against because of race (Glenn Rouser is African-American) and marital status (the Rousers are an interracial couple). Marital status, as defined in 6 *Del. C.* § 4502(9), seems solely concerned with whether one is married or single and whether the complainant was discriminated against based on that single fact. In the case at bar, the Rousers do not allege that customers at Hadfield's are treated differently based upon their marital status. Nor is there any evidence showing that Walker or anyone on the Hadfield's staff could or did ascertain whether Doreen and Glenn Rouser were married. Setting aside for the moment the racial issue, but assuming *arguendo* that Walker knew that the Rousers were together, as far as the cashier knew, the Rousers may have been unmarried or they may have simply been friends.

[9] *Uncle Willie's Deli v. Whittington*, Del. Super., No. 98A-04-006, 1998 WL 960709, at *4, Lee, J. (Dec. 31, 1998).

Removing marital status from the equation leaves only race as a potential basis of discrimination. What the Rousers allege is that Doreen Rouser's relationship with an African-American man caused Walker to treat her in a manner in which she would not have been treated had she gone to the restaurant with a white man that night. Despite Doreen Rouser's tenuous membership in a protected class, neither appellants nor appellees view the "protected class" prong as an issue. Because the parties appear to be in agreement that the Rousers met the first prong, and because of the liberal definition[10] of "protected class" that the statute embodies, this court will limit its discussion to the second and third prongs of a *prima facie* showing of discrimination.

B. Second Element: Refusal of Service

[10]"This chapter 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." 6 Del. C. § 4501 (emphasis added).

Most Delaware cases cited by the parties involve situations that can easily be characterized as a denial of service. In *Domino's Pizza*, residents of a group home were denied pizza delivery. In *Quaker Hill Place*, an applicant was not permitted to rent an apartment. In *Uncle Willie's*, convenience store customers were told to leave. Because the alleged denial of service in this case is not so blatant, the court will look outside Delaware law for assistance defining "accommodations, facilities, advantages and privileges."[11] Though Hadfield's sought to limit the Delaware statute's embrace to the ability to "make and enforce contracts," the actual words of the statute — accommodations, facilities, advantages or privileges — encompass much more than the textbook question of whether someone exchanged goods or services for consideration. "A contract formed between a restaurant and a customer has been found to include all of the accoutrements that are ordinarily provided with a restaurant meal. This includes more than just the food served."[12]

---

[11] *Uncle Willie's* at *3 (the court relied upon federal case law interpreting the Federal Civil Rights Act to aid in its analysis of public accommodations law in Delaware.)

[12] *Bethea v. Michael's Family Rest. & Diner*, E.D. Pa., C.A. No. 00-6216, 2001 LEXIS 8665, at *8, Hutton, J. (June 26, 2001) (internal quotations and citations omitted).

The Maryland District Court, in a similar case concerning customer dissatisfaction, discussed the scope of the Delaware statute's federal counterpart:

> [L]imiting the right of recovery ... to instances where there was an outright denial of services or of the right to contract for services ... is impractical given contemporary manifestations of discrimination... By encompassing the deprivation of services (rather than simply the denial of services or the right to contract for those services), [courts can protect] against discriminatory conduct by retailers which ... nevertheless impinges on the "benefits, privileges, terms, and conditions of the contractual relationship."[13]

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 Rousers 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

---

[13] *Callwood v. Dave & Buster's, Inc.*, D. Md., 98 F. Supp. 2d 694, 707 (2000) (citations omitted). See H. Rep. No. 102-40, pt. I, at 92 (1991), reprinted in 1991 U.S.C.C.A.N. at 630 (stating that the list of terms "is illustrative rather than exhaustive," "intended . . . to bar all race discrimination in contractual relations."); H. Rep. No. 102-40, pt. II, at 37, reprinted in 1991 U.S.C.C.A.N. at 730-31 (same).

to listen to the explanation. In most situations, an apology or explanation for poor service is a part of the transaction, not in lieu of it, as alleged here.

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 Doreen Rouser 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 Mrs. Rouser and responded with the comment 'Go ahead and hit me.'" Admittedly, it is a close call as to whether Walker affirmatively or inadvertently denied service. However, "it is the role of the [Panel], 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."[14] Therefore, substantial evidence exists to support the Panel's finding on the second element of a *prima facie* discrimination case.

C. Third Element: Were Others Treated More Favorably

The third element of a *prima facie* showing of discrimination is traditionally set out in terms of comparison. Specifically, the court must determine whether non-members of the protected class were treated more favorably than members of the

[14] *Mooney v. Benson Management Co.*, Del. Super., 451 A.2d 839, 841 (1982).

protected class. The theory is that "because the classes are similarly situated in most relevant respects except their protected status (e.g., gender or race), there arises a rational inference of discrimination on the basis of status."[15]

[15] *Callwood*, 98 F. Supp. 2d at 707.

Many courts have discussed the difficulty of proving the third element. "[I]t may be wholly unrealistic to require a member of the protected class ... to identify victims of such outlandishly horrendous service who are not members of the protected class...."[16]

In order to alleviate the difficulty of establishing disparate levels of service, the *Callwood* court restated the third prong as:

> (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.[17]

---

[16] *Callwood*, 98 F. Supp. 2d at 706 (citing *Stevens v. Steak n Shake, Inc.*, M.D. Fla., 35 F. Supp. 2d 882 (1998) ("Of course, evidence of how the defendant treated others outside the protected group is not always available."); *Hampton v. Dillard Dept. Stores, Inc.*, D. Kan., 985 F. Supp. 1055 (1997) ("Evidence regarding the treatment of others outside the protected group is not present in every case of discrimination . . . Moreover, the elements of a *prima facie* case are flexible and are not intended to be rigidly applied.")).

[17] *Callwood*, 98 F. Supp. 2d at 707.

Under the traditional test of subpart (3)(a), the Rousers would be required to compare the treatment Doreen Rouser (a white woman with an African-American husband) received with the treatment of a similarly situated person outside the protected class (a white woman with a white husband) to establish the third element of the *prima facie* case. Neither the Rousers, nor the State Human Relations Panel, were able to substantiate this element.

The addition of subpart (3)(b), however, provides another avenue by which to establish unlawful discrimination. The court assumes the members of the Human Relations Panel meant to avail themselves of this alternative in finding that:

> The racial overtones to the disparaging remarks of Mr. Walker, to which he admitted existed, lead the panel to conclude that there were 'racial considerations' that prompted the confrontation.

The Court finds that, despite the less stringent criteria of subpart (3)(b), the Panel's conclusion on this element is not supported by substantial evidence.

Whether the racial remark was made *during* the heated argument (Rouser's testimony) or *after* the heated argument (Walker's testimony) is not significant. The substantial evidence shows it was not race that gave rise to the argument that in turn caused the brief denial of service. Rather, it was the busy night at the restaurant that resulted in an undue delay, that in turn, caused the argument that motivated the racial

comment. No one alleged the food was withheld for 20 minutes in an effort to discourage Glenn Rouser, an African-American, from patronizing the store. Nor did appellees allege that, upon discovering that Doreen Rouser was white, in the midst of the transaction, the cashier refused to serve her. The substantial evidence shows that the dinner order was almost half an hour late. Understandably, Glenn Rouser decided not to wait any longer or reward Hadfield's poor service with his hard-earned money. He was simply a dissatisfied customer who was tired of waiting. His wife, equally unhappy with the wait, went in to check on the order one last time. Upon hearing her husband's name, she approached the counter. Her demeanor at the counter was understandably intolerant. Walker was intolerant as well, as an inexperienced and harried cashier would be on a busy night. The combination was volatile, but the facts indicate it was the argument that led to the racial comment, not the other way around.

Under the Panel's reasoning, Walker's single remark was enough to meet the "markedly hostile" threshold necessary for subpart (3)(b) of the third element of a *prima facie* case. The connection, however, between the comment and Doreen Rouser's marriage to an African-American man is far too attenuated. Granted, in choosing his offensive remarks, Walker included the word "white" — a reference to Rouser's race.

But Walker could have made the same ignorant comment regardless of whether Doreen Rouser's husband was white or black.

Also working against the inference that Doren Rouser "received services in a markedly hostile manner" is the reaction of management and the repeated apologies offered to the Rousers. As the Court in *Callwood* noted in similar circumstances:

> While I do not mean to endorse a tenet of law which would permit a simple apology to absolve the intentional discriminator of responsibility for acts of unlawful discrimination, on this record, I am convinced that in addition to the fairly weak evidence of discrimination offered by the [plaintiffs], the acts of apology and accommodation on the parts of [defendants] ... would dispel any residual suspicion in the minds of reasonable persons that intentional racial discrimination, rather than misjudgment or poor judgment animated the actions of those employees. The suggestion that the overall treatment of the members of the [plaintiff's] party amounted to a "constructive eviction" is nothing more than a conclusory assertion lacking any evidentiary support.[18]

Like the *Callwood* Court, this Court finds the evidence of discrimination wanting. Having cleared the first two hurdles by the narrowest of margins, the Rousers cannot establish that they received services in a such a "markedly hostile manner" as to give rise to the inference that discrimination was the motivation. On the issue of bias — the factor which sets apart desperately poor service from racially motivated poor service — the facts clearly fall short. While the crude treatment the Rousers received

[18] *Callwood*, 98 F. Supp. 2d at 721.

at Hadfield's Seafood, Inc. is hardly an example of good business conduct, it simply does not rise to the level of racial discrimination. Accordingly, I hold that the decision of the Panel is not supported by substantial evidence.

V. CONCLUSION

For the foregoing reasons the decision of the Panel is hereby **REVERSED**.

IT IS SO ORDERED.

____
Jan R. Jurden, Judge