IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

OTAC #4, INC.,	:	
	:	C.A. No. 03A-11-004 WLW
Respondent-Below, Appellant,	:	
	:	
v.	:	
	:	
LARRY WATERS,	:	
	:	
Complainant-Below, Appellee.	:	

Submitted: April 21, 2004
Decided: July 28, 2004

ORDER

Upon Appeal of a Decision of the State
Human Relations Commission. Reversed and Remanded.

Daniel P. Bennett, Esquire of Heckler & Frabizzio, Wilmington, Delaware; attorneys for the Appellant.

Mr. Larry Waters, *pro se*.

WITHAM, J.

Introduction

Before this Court is OTAC #4's[1] ("OTAC" or "Hardee's") appeal of a decision of the State Human Relations Commission ("Commission") finding that OTAC indirectly refused equal accommodations to Larry Waters based on Waters' race and awarding Waters $2,500.00 for emotional distress and humiliation. In addition, OTAC has requested that the Court award it attorney's fees. Waters has answered the appeal and has requested that his award be increased to $85,000.00.

Background

Appellee Larry Waters filed a complaint with the Commission following an experience at the Hardee's Restaurant on U.S. 113 in Dover, Delaware, owned by OTAC. A hearing was held on the matter on May 14, 2003, at which Waters and several Hardee's employees appeared. At the hearing Waters testified that he and his friend Ralph Elzey, two African-American males, were driving a tractor trailer through Dover early in the morning on August 1, 2002. According to his testimony, the pair stopped for food at Hardee's at approximately 3:45 a.m. After parking their truck behind the restaurant, the two men approached the drive-through window on foot. Under cross-examination, Waters acknowledged that the truck was parked in a location where the Hardee's employees could not have seen it. When Waters and Elzey saw two Hardee's employees standing inside the restaurant near the drive-through window, Elzey asked, "What time do you open?" According to

[1] OTAC owns the Hardee's Restaurant in Dover, Delaware on U.S. 113.

Waters, the employees said something to each other, but did not acknowledge Waters or Elzey. Elzey asked the question again, to which one of the employees inside raised his hand holding up five fingers, which Elzey and Waters took to mean 5:00 a.m. There seems to be a dispute as to how close Elzey and Waters were to the window and whether Lawrence Bremer, the overnight manager, actually opened the window during this exchange.

As Elzey and Waters were walking away, Elzey noticed a man in a vehicle getting food from the drive-through window and said, "I thought you said you didn't open until five." According to Bremer's testimony, he did not hear if Elzey or Waters said anything else because the drive-through speaker was loud in his ear. Waters turned to look and noticed that the driver of the vehicle was white. Waters became angry and wanted to go back to the window, but Elzey said to forget about it. Waters and Elzey did not return to the restaurant but left to go to another restaurant for food. Waters filed a complaint with the State Human Relations Commission alleging that he and Elzey did not receive service at Hardee's because of their race.

Following the hearing, the Commission concluded that OTAC had indirectly refused equal accommodations to Waters based on Waters' race in violation of 6 Del. C. § 4504. In addition, the Commission found that OTAC was liable to Waters for emotional distress and humiliation in the amount of $2,500.00. Finally, the Commission concluded that no civil penalty was appropriate under 6 Del. C. § 4508(h) and denied OTAC's request for attorney's fees. However, a dissenting

opinion was filed by Commissioner James E. Gray in which he stated that he found insufficient evidence to establish that OTAC's conduct amounted to discrimination.

OTAC filed this appeal contending that the Commission's decision was not supported by substantial evidence. In addition, OTAC asserts that it is entitled to attorney's fees pursuant to 6 Del. C. § 4508(g). Waters has answered the appeal, stating that he did present substantial evidence demonstrating that Hardee's failure to provide service was due to his race. Further, Waters argues that his damages award should be increased from $2,500.00 to $85,000.00 based on the embarrassment and humiliation he suffered.

Discussion

In handling an appeal from the State Human Relations Commission, this Court's review is limited to whether the decision is supported by substantial evidence and free from legal error.[2] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[3] This Court does not weigh the evidence, determine questions of credibility, or make its own factual findings, but rather determines if the evidence is legally sufficient to support the Commission's factual findings.[4]

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[2] 29 Del. C. § 10142(a) (2004).

[3] *Olney v. Cooch,* 425 A.2d 610, 613 (Del. 1981) (citing *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620 (1966)).

[4] *Russo v. Corbin*, 2002 Del. Super. LEXIS 49, *19-20.

Title 6, section 4504 of the Delaware Code prohibits owners or employees of places of public accommodation from directly or indirectly denying service or use of the facility to any person on the basis of race, age, marital status, creed, color, sex, handicap, or national origin. A place of public accommodation is defined as "any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public."[5] The authority for administering these sections is vested in the State Human Relations Commission.[6]

Delaware Courts have applied the standard set forth in *McDonnell Douglas Corp. v. Green*[7] in cases alleging improper discrimination.[8] In *McDonnell Douglas*, the United States Supreme Court held that the complainant carries the initial burden at trial to establish a *prima facie* case of racial discrimination.[9] If the respondent asserts a non-discriminatory reason for the denial of the public accommodation, the complainant then must prove, by a preponderance of the evidence, that the proffered

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[5] 6 Del. C. § 4502(1) (2004). The parties do not dispute that this Hardee's restaurant is a "place of public accommodation."

[6] 6 Del. C. § 4505(a) (2004).

[7] 411 U.S. 792, 802 (1973).

[8] *Quaker Hill Place v. State Human Relations Commission*, 498 A.2d 175, 182-183 (Del. Super. Ct. 1985); *Uncle Willie's Deli v. Whittington*, 1998 Del. Super. LEXIS 463, *11-12; *Russo*, 2002 Del. Super. LEXIS 49, at *21.

[9] *McDonnell Douglas,* 411 U.S. at 802.

reason for the denial was a pretense.[10]

"The [complainant] can establish a *prima facie* case by showing that he is a member of a protected class, that he was denied access to public accommodation, and that non-members of the protected class were treated more favorably."[11] The evidence presented at the hearing clearly established that Waters is a member of a protected class because he is African-American. The evidence showed that when Waters and Elzey approached the drive-through window and asked what time the restaurant opened, Bremer held up five fingers indicating 5:00 a.m. However, Waters and Elzey did not attempt to order food or make any additional requests; they simply walked away. This barely supports the Commission's conclusion that Waters was denied access to a public accommodation. Waters' undisputed testimony that a white male in a vehicle was getting served at the drive-through window after he and Elzey walked away appears to constitute evidence that a non-member of the protected class was treated more favorably. Thus, there is evidence supporting the Commission's conclusion that Waters established a *prima facie* case of improper discrimination.

However, the burden then shifts to the respondent, here OTAC, to demonstrate by a preponderance of the evidence that a non-discriminatory purpose

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[10] *Quaker Hill Place*, 498 A.2d at 183.

[11] *Uncle Willie's Deli*, 1998 Del. Super. LEXIS 463, at *12 (citing *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 522 (3rd Cir. 1992)).

for the refusal of service exists. OTAC's general manager, Fred McConnell, testified that when people walk-up to the drive-through window at Hardee's they do not get service because of potential safety hazards. He stated that at night, the employees are told to not even open the window when someone walks up because of the risk of a robbery. However, McConnell admitted that a sign is not posted on the drive-through indicating that walk-up service is not available. In addition, McConnell stated that a prior robbery attempt he described to the Commission was committed by someone in a car.[12]

Lawrence Bremer, the overnight manager at Hardee's on the night in question, testified that when the dining room is closed he does not serve walk-up customers at the drive-through unless he recognizes them as a regular customer. He further testified that when Waters and Elzey asked what time the restaurant opened, he said 5:00 a.m. because they were on foot, not in a vehicle. Thus, Bremer assumed they were asking what time the dining room opened. He stated that he held up five fingers to indicate 5:00 a.m. rather than talking to Waters and Elzey because they were so far away. On cross-examination by Waters, Bremer stated that he felt nervous and uneasy when he saw Waters and Elzey because he did not recognize them and because they were not walking together. Bremer testified that he has never chosen not to serve someone based on their color. In response to a question from

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[12] McConnell testified regarding an incident when the driver of a vehicle at the drive-through window used a gun to attempt to rob the restaurant. However, the employee was able to squat down below the window to safety.

the Hearing Officer, Bremer stated that the difference in risk between a customer in a car and walk-up customer is that the walk-up can not only pull a gun, like a person in a car, but can also come through the window into the restaurant.

The majority of the Commissioners concluded that because Hardee's no walk-up policy at the drive-through window is not posted, customers are not aware of the rule. In addition, the Commissioners concluded that because Hardee's gives their employees discretion as to who they may serve at the drive-through, because they serve customers they recognize, it leaves open the possibility that a situation like this one will happen. However, the Commission bases its decision on what Waters assumed happened that night, not on what the evidence actually shows. That is, the Commission found that because the no walk-ups policy is not posted for customers to view, a walk-up may not understand why he or she is being refused service. This leaves open the possibility that a walk-up will think he or she is being refused service based on a prohibited factor, rather than because he or she is a walk-up. However, in reaching this conclusion, the Commission made a number of assumptions, but failed to consider the evidence actually presented at the hearing.[13]

The evidence that OTAC had a policy in place which denied service to walk-up customers at the drive-through is undisputed. The non-discriminatory reasons given for the policy were not disputed. Thus, OTAC presented evidence that its

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[13] It should be noted that apparently neither Waters nor Elzey chose to follow up and ask why the man in the vehicle was served at the drive-through window. Perhaps if they had done so and understood the reasoning for it, this would not have been a problem.

denial of service to Waters was for a valid non-discriminatory reason.

After OTAC presented evidence regarding its policy against serving walk-ups at the drive-through, the burden then shifted back to Waters to prove by a preponderance of the evidence that the reason OTAC gave for the denial of service was a pretext or a sham. Waters testified that the white male who was served at the drive-through, after Waters was told the restaurant opened at 5:00 a.m., was in a vehicle, not on foot. Bremer testified that he only serves customers in vehicles at the drive-through or walk-up customers that he recognizes as regular customers. In addition, Bremer testified that he did not recognize Waters or Elzey, and Waters admitted that he had never been to that restaurant before the night in question. No evidence was presented showing that Waters was denied service for any reason other than the fact that he walked-up to the drive-through window. Waters' assumption that his race was the reason he was denied service is not sufficient to prove that this was the case. He failed to establish a factual basis for finding that he was denied service based on his race.

Waters did not present any evidence establishing that the policy was a sham. In fact, all of the evidence establishes that the Hardee's employees followed the company's policy that night. Waters failed to demonstrate that Bremer refused service to Waters and Elzey and then served a white male walk-up customer. Rather, the white customer who received service was in a vehicle. This clearly falls within OTAC's policy of only serving customers in vehicles at the drive-through window or walk-ups that the employee recognizes.

The mere fact that OTAC' s policy allows the employees to exercise discretion in serving customers at the drive-through window is not sufficient to establish that this policy is a pretext or that Bremer' s denial of service to Waters was racially motivated as the Commission seems to believe. The Commission concluded that because in this instance the walk-up customers were African-American males who were not prior customers and the driver of the vehicle was a white male is proof that Bremer' s actions were based on improper discrimination. However, simply because in this case an African-American on foot was denied service, while a white male in a vehicle received service, is not sufficient to show that the policy or its application is racially motivated. Based on Hardee' s policy, the reverse situation easily could have occurred. That is a white male on foot could have been denied service while an African-American male in a vehicle was served.

The Commission seems to have assumed that the reason for the denial of service was racially motivated. However, an assumption is not an evidentiary finding. The Commission must make factual findings based on the evidence presented at the hearing. Waters presented no evidence that the Hardee' s policy was a pretense. The Commission must make factual findings based on the evidence presented at the hearing. However, in this case the Commission' s limited factual findings do not support its conclusion. The undisputed testimony established that the customers were treated differently, not because of race, but because one was in a vehicle and the others on foot. This falls within Hardee' s policy. The evidence

simply does not support the Commission's conclusion that the application of the policy in this instance was based on improper discrimination against a protected class.

OTAC also seeks an award of attorney's fees under 6 Del. C. § 4508(g) which states, "The panel may award reasonable attorneys' fees, costs and expenses to the respondent pursuant to this subsection if it determines the complaint was brought for an improper purpose, such as to harass or embarrass the respondent."[14] Because the Commission found in favor of Waters, it did not make factual findings with respect to an award of attorneys' fees for OTAC. Therefore, the matter must be remanded to the Commission to decide the issue of attorneys' fees consistent with this opinion.

Conclusion

The Court finds that the Commission's conclusion that Waters was denied service based on his race is not supported by substantial evidence. Accordingly, the decision of the Commission concluding that OTAC, doing business as Hardee's, violated 6 Del. C. § 4504 by indirectly refusing service to Waters on the basis of Waters' race is ***reversed***. In addition, the Commission's decision that OTAC is liable to Waters in the amount of $2,500.00 for emotional distress and humiliation is ***reversed***. Because Waters failed to establish a violation of Title 6, Chapter 45 of the Delaware Code, Waters' cross-appeal requesting an award of $85,000.00 is

[14] 6 Del. C. § 4508(g) (2004).

dismissed as moot. However, the case is ***remanded*** to the Commission to address whether to award attorneys' fees and costs to OTAC pursuant to 6 Del. C. § 4508(g).

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution
File