

**BEFORE THE HUMAN AND CIVIL RIGHTS COMMISSION
FOR THE STATE OF DELAWARE**

ROBERT P. BAUCHWITZ)	
)	
Complainant,)	
)	
v.)	Case No. NC-EA-2502-22
)	
HUMMINGBIRD TO MARS, <i>et al.</i>)	
)	
Respondent.)	

DECISION AND ORDER

Robert P. Bauchwitz, M.D., Ph.D. (“Bauchwitz” or “Complainant”) filed a Complaint with the Delaware Division of Human and Civil Rights (“DHCR” or “Division”) alleging that Respondents Hummingbird to Mars and Catherine Rooney’s Irish Pub & Restaurant, Inc. (collectively, “Respondents”) discriminated against him based on his national origin in violation of Delaware Equal Accommodation Law (“DEAL”), 6 *Del. C.* § 4500, *et. al.*

On February 8, 2023, a Delaware Human and Civil Rights Commission Panel (“Panel”) convened via videoconference for the evidentiary hearing in this matter. Complainant presented his case in chief and then Respondents orally made a motion to dismiss the Complaint.

On April 12, 2023, the Panel issued a Memorandum Decision And Order (“April 12th Order”) dismissing the Complaint pursuant to Respondents’ motion to dismiss. The Panel determined that Complainant failed to establish a *prima facie*

case. In Delaware, claims alleging a refusal or denial of public accommodation based upon unlawful discrimination are decided by applying the three-part analysis established in *McDonnell Douglas Corp. v. Green*.^{1,2} Part one of the analysis requires Complainant to establish a prima facie case of discrimination by showing that (a) he is a member of a protected class; (b) he was denied access to public accommodation; and (c) non-members of his protected class were treated more favorably.³ The Panel determined that Complainant proved the first two elements, but he failed to prove that non-members of his protected class were treated more favorably. Given the Panel's determination, Complainant cannot not prevail in this case and it was unnecessary for the Panel to apply parts two and three of the *McDonnell Douglas* analysis.

After the Panel dismissed the Complaint, the parties filed the following pleadings:

1. Complainant's "Motion to Continue Deadline and Produce Documents" ("Motion to Continue"),
2. "Respondent's Opposition to: Complainant's Motion to Continue

¹ 411 U.S. 792 (1973).

² See *DP, Inc. v. Harris*, 2000 WL 1211151, *6; *Uncle Willie's Deli v. Whittington*, 1998 WL 960709, *4 (Del. Super. Dec. 31, 1998).

³ *Boggerty v. Stewart*, 14 A.3d 542, 550 (Del. 2011) (citations omitted); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

- Deadline and Produce Documents” (“Opposition to Motion to Continue”),
3. Complainant’s “Response to Motion in Opposition: Motion for Reconsideration (Provisional)” (“Reply and Provisional Motion for Reconsideration”),
 4. “Respondent Objects and Requests Complainant’s Reply Be Stricken” (“Objection to Reply”),
 5. “Respondent’s Opposition to Complainant’s Motion for Reconsideration” (“Opposition to Motion for Reconsideration”)
 6. “Complainant’s Response to Respondent’s Opposition to Motion for Reconsideration (“Reply to Opposition to Motion for Reconsideration”)”,
 7. Complainant’s “Motion in Opposition and Resolution of Respondent Objections” (“Motion in Opposition and Resolution”), and
 8. Respondents’ counsel sent an email objecting to Complainant’s Reply to Opposition to Motion for Reconsideration. (“Email Objection”).

Here, the Panel issues a ruling fully addressing the pleadings identified in #1, #2, #4, and #8 and partially addressing the pleading identified in #3. As discussed below, the Panel is not addressing the pleadings identified in #5 - #7 or the portion of the pleading identified in #3 that pertains to Complainant’s request for reconsideration of the April 12th Order.

Motion to Continue (#1)

On April 17, 2023, Complainant filed his Motion to Continue seeking to enlarge the time for filing a motion to reconsider the April 12th Order. Pursuant to 6 *Del. Admin. C.* §601-9.3, Complainant was permitted to file a motion to reconsider within 5 days of receiving the April 12th Order. He received it on April 13, 2023 and consistent with the method of computing time, the deadline for filing a motion to reconsider was April 20, 2023.⁴ Because Complainant filed his Motion to Continue prior to April 20th, the Panel has authority to enlarge the time for filing a motion to reconsider.⁵

Complainant seeks to enlarge the time because he wants to first receive an official transcript of the evidentiary hearing and a statement written by his witness Joseph Teoli. Mr. Teoli's statement was referenced in Respondents' pre-hearing pleading, filed on February 3, 2023, that included multiple motions and an

⁴ "In computing any period of time prescribed or allowed, by these Regulations...the day of the act...after which the designated period of time begins shall not be included. The last day of the period...shall be included unless it is a Saturday or Sunday...in which event the period shall run until the end of the next business day. When the period of time...is less than eleven...days, intermediate Saturdays [and] Sundays...shall be excluded in the computation...." 6 *Del. Admin. C.* §601-11.1.1.

⁵ "When, by these Regulations...an act is required...within a specified time, the Panel Chair...for good cause shown, may, at any time, in its discretion: with or without a motion...order the period enlarged if the request therefore is made before the expiration of the period originally prescribed...." 6 *Del. Admin. C.* §601-11.1.2.1.

opposition to Complainant's pre-hearing Motion to Produce and Continue that was filed on January 20, 2023.⁶

Opposition to Motion to Continue (#2)

On April 22, 2023, Respondents filed Opposition to Motion to Continue wherein Respondents requested that Complainant's Motion to Continue be denied because by seeking enlargement of time to obtain the transcript, Complainant is attempting to twice appeal the April 12th Order. Respondents argued that motions to reconsider are for the purpose of addressing apparent errors whereas appeals, for which a transcript must be provided, are for the purpose of challenging the Panel's ruling. Respondents contend the Complainant has not identified any errors committed by the Panel and he has not offered a legitimate reason for the delay to obtain the hearing transcript.

Regarding Mr. Teoli's written statement, Respondents also argue Complainant's Motion to Continue should be denied because Complainant requested document production in his January 20th Motion to Produce and

⁶ On February 6, 2023, the Panel issued an Order addressing Complainant's January 20, 2023 Motion to Produce and Continue, Respondents' February 2, 2023 opposition thereto, as well as the multiple motions filed by Respondents on February 2, 2023. ("February 6th Order")

Continue, but that request was denied.⁷ Respondents also noted that Complainant spent two hours conducting a direct examination of Mr. Teoli during the evidentiary hearing and the record is now closed.

Reply and Provisional Motion for Reconsideration (#3)

On April 26, 2023, Complainant filed Reply and Provisional Motion for Reconsideration wherein he replies to Respondents' Opposition to Motion to Continue and submits what he identifies as a "provisional" motion to reconsider because he would like to receive the hearing transcript and Mr. Teoli's written statement before submitting a "final" motion to reconsider.

Objection to Reply (#4) and Email Objection (#8)

On May 4, 2023, Respondents filed an objection to the portion of Complainant's Reply and Provisional Motion for Reconsideration that directly replies to Respondents' Opposition to Motion to Continue. Respondents contend there is no rule that permits such a reply.

Likewise, on May 5, 2023, Respondents' counsel sent Email Objection which contains Respondents' objection to Complainant's Reply to Opposition to

⁷ See February 6th Order.

Motion for Reconsideration because it was a reply to Respondents' Opposition to Motion for Reconsideration and there is no rule that permits such a reply.

DISCUSSION

Consistent with 6 *Del. Admin. C.* §§601-9.3, 601-11.1.1, and 601-11.1.2.1, the Panel hereby grants Complainant's request to enlarge the time for filing a motion to reconsider on the basis that Complainant should have a full and fair opportunity to prepare his motion. While it is true that the hearing transcript would be part of the record and provided to the parties if an appeal is filed,⁸ according to 6 *Del. Admin. C.* §601-8.17, "[a] written transcript shall be prepared, if and as required, on the written request of any Party, provided that such Party pays for the cost of preparing the transcript...." This regulation explicitly permits parties to obtain a copy of the hearing transcript and places no limitation on when a party has authority to request a transcript. The Panel notes that obtaining a hearing transcript can be a lengthy process, hence it is unlikely that a party can exercise his right to obtain a transcript and timely file a motion to reconsider within 5 days of receiving notice of a panel's decision and order.

The Panel is aware that Complainant emailed the Division and requested the

⁸ See 6 *Del. C.* §4511; 29 *Del. C.* §10141(e); Super. Ct. Civ. R. 72.

hearing transcript on both February 10, 2023 and April 13, 2023. Although Complainant has not paid for a transcript, on May 3, 2023, the Division provided him an audio/video recording of the hearing and he can now review the hearing before filing a “final” motion to reconsider. Complainant is permitted to file a “final” motion to reconsider within 5 days from the date he receives a copy of this Order, which is consistent with the time permitted pursuant to 6 *Del. Admin C.* §601-9.3. Likewise, Respondents are permitted to file a response to Complainant’s motion within 5 days from the date they receive Complainant’s “final” motion to reconsider. It should be noted that §601-9.3 only provides for these two pleadings and does not permit Complainant to reply to Respondents’ response. Therefore, Respondents’ objections as espoused in the documents identified in #4 and #8 are sustained. The Panel will only consider Complainant’s newly filed “final” motion to reconsider and Respondents’ newly filed response thereto.

The Panel denies Complainant’s Motion to Continue on the basis that he wants to first obtain Mr. Teoli’s written statement. As Respondents contend, Complainant’s request for the production of documents was addressed in the February 6th Order, and if Complainant believed this specific request was not addressed in that order, he had ample opportunity to address it during the hearing. According to the February 6th Order, “[a]ny matter raised in the papers that is not addressed above is reserved for the hearing.” During the hearing, Complainant

never requested Mr. Teoli's written statement, and he did not raise this issue with the Panel or with Mr. Teoli during direct examination.

Respondents also correctly contend that motions to reconsider serve a limited purpose. According to *Desmond v. State*,

“A motion for re-argument (including a motion urging the Court to reconsider a motion which did not involve an oral argument or other in-person hearing) will only be granted if the Court has overlooked controlling precedent or legal principles, or if the Court has misapprehended the law or the facts in a manner that would [a]ffect the outcome of the case. A motion for re-argument is not an opportunity for a party to rehash arguments that it has made previously or to raise entirely new arguments.”⁹

However, the Panel will not address whether Complainant's Response and Provisional Motion to Reconsider satisfies or exceeds this standard of review until

he has filed his “final” motion to reconsider. If Complainant wishes to have the

Panel consider the arguments in his Response and Provisional Motion to

Reconsider, he must include them in his newly filed “final” motion to reconsider.

Likewise, if Complainant wishes to have the Panel consider his arguments in Reply

to Opposition to Motion for Reconsideration and Motion in Opposition and

Resolution, Complainant must include those arguments in his newly filed “final”

⁹ *Desmond v. State*, 2021 WL 488263, *1 (Del. Super. Feb. 10, 2021) (The *Desmond* Court considered the Defendant's Motion for Reconsideration that was filed pursuant to Super. Ct. Civ. R. 59(e). Regulation 9.3, which pertains to motions for reconsideration of SHRC Panel decisions, parallels Super. Ct. Civ. R. 59(e)).

motion to reconsider. If Respondents seek to have the Panel consider the arguments raised in their Opposition to Motion for Reconsideration, the arguments must be included in the newly filed response to Complainants newly filed “final” motion to reconsider.

ORDER

For the above reasons, the Panel hereby Orders the following:

- A. Complainant’s Motion to Continue is GRANTED on the basis that he wants to first obtain a hearing transcript before filing a motion to reconsider;
- B. Complainant’s Motion to Continue is DENIED on the basis that he wants to first obtain Mr. Teoli’s written statement before filing a motion to reconsider;
- C. Complainant may newly file a “final” motion to reconsider within 5 days from the date he is served with a copy of this Order;
- D. Respondents may file a response to Complainant’s newly filed “final” motion to reconsider within 5 days from the date they are served with a copy of Complainant’s motion;
- E. Complainant is not permitted to file a reply to Respondents’ response to the newly filed “final” motion to reconsider;

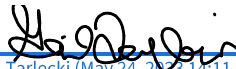
F. If the parties wish the Panel to address the content of the pleadings identified in #5 - #7 and the portion of the pleading identified in #3 that addresses Complainant's request for reconsideration of the April 12th Order, the parties shall include that content in their newly filed pleadings that are permitted pursuant to this Order.

IT IS SO ORDERED this 24th day of May, 2023.



[Dwayne Bensing \(May 24, 2023 13:05 EDT\)](#)

Dwayne J. Bensing, *Commissioner and Panel Chair*



[Gail Tarlecki \(May 24, 2023 14:11 EDT\)](#)

Gail Tarlecki, *Commissioner and Panel Member*



[Chok-Fun Chui \(May 24, 2023 19:25 EDT\)](#)

Chok-Fun Chui, *Commissioner and Panel Member*