

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

JAMES BELL)	
)	
Complainant,)	
)	
v.)	Case No. S-EA-2762-23
)	
MYEYEDR)	
Respondent.)	

MEMORANDUM DECISION AND ORDER

PRESENT:

Joseph Dawson, *Commissioner and Panel Chairperson*
Dwayne Bensing, *Commissioner and Panel Member*
Rosemarie Williams, *Commissioner and Panel Member*

APPEARANCES:

Kemba Lydia-Moore, Deputy Attorney General
Counsel for the Commission and Panel
James Bell
Complainant, pro se
Tamara S. Grimm, Esq., O’Hagan Meyer, PLLC
Counsel for the Respondent¹

INTRODUCTION

Pursuant to due notice of time and place of meeting served on all parties in interest, the above-stated cause came before a Panel of the Delaware Human and Civil Rights Commission (“Panel”) on Tuesday, February 6, 2024 via Microsoft

¹ Pursuant to Delaware Supreme Court Rule 72, on February 6, 2024, Ms. Grimm was granted *pro hac vice* admission to represent Respondent MyEyeDr in this matter.

Teams audio and video conference to determine whether a violation of Delaware Equal Accommodations Law (“DEAL”), 6 *Del. C.* Ch. 45, occurred.

The Panel convened to determine whether Respondent MyEyeDr violated 6 *Del. C.* § 4504 as alleged in the Complaint filed by Complainant James Bell (“Mr. Bell”) wherein Mr. Bell alleged Respondents discriminated against him on the basis of race/color (Black).

Immediately following the hearing, the Panel conducted deliberations in private and then returned to the public forum on March 14, 2024 to cast their decision votes. The Panel unanimously found in favor of Respondent MyEyeDr.

SUMMARY OF THE COMPLAINT

In his Complaint, Mr. Bell alleged that Respondent refused, withheld, and/or denied him accommodations, facilities, advantages, or privileges of a place of public accommodation because of his race/color (Black). According to Mr. Bell, on December 21, 2022, he went to MyEyeDr, located at 1301 Bridgeville Highway, Seaford, Delaware, to pick up his eyeglasses. Mr. Bell contends he was the only customer in the waiting room and then another customer, a White person, entered the building and was provided service before Mr. Bell. According to Mr. Bell, the MyEyeDr employee that provided the service had been informed that Mr. Bell was next to receive service, but the employee still helped the White customer first.

According to Mr. Bell, the White customer was afforded preferential

treatment and in turn Mr. Bell was refused, withheld, and/or denied accommodations, facilities, advantages, or privileges of a place of public accommodation.

PRELIMINARY MATTERS

On February 5, 2024, pursuant to Supreme Court Rule 72, Stephen Dargitz, Esq. filed *Motion and Order for Admission Pro Hac Vice* (“*PHV Motion*”) seeking to have Tamara Grimm, Esq. admitted *pro hac vice* for purposes of representing MyEyeDr in the instant matter. On February 6, 2024, before the hearing began, Chairperson Dawson GRANTED the *PHV Motion*.

Thereafter, Ms. Grimm made a motion to dismiss the case on the basis that Mr. Bell’s complaint failed to state a claim upon which relief may be granted.² Ms. Grimm explained that Mr. Bell failed to allege facts to support a finding that he was denied a public accommodation. Chairperson Dawson DENIED Ms. Grimm’s motion to dismiss because it had not been filed at least ten days prior to the hearing and was therefore untimely.³

² According to 1 *Del. Admin. C.* § 601-5.1.5.2, “[a] case may be dismissed upon written application to the Commission by the Respondent...when the facts alleged do not state a violation of the law.”

³ According to 1 *Del. Admin. C.* § 601-8.9, “[a]ll motions shall be delivered to the Division of Human Relations where the complaint was filed and to all Parties at least ten (10) days prior to the hearing. Motions filed beyond this time may not be considered at the discretion of the Panel.”

OPENING STATEMENTS

Both parties made brief opening statements which are part of the record but are not summarized here because such statements are not evidence to be considered by the Panel during deliberations.

SUMMARY OF THE EVIDENCE

A. Complainant's Case

1. James Bell

Mr. Bell, duly sworn, testified that he entered MyEyeDr and checked in with the female employee at the counter, "Ms. Samantha." Mr. Bell said he informed Ms. Samantha that he was picking up eyeglasses and that he wanted to pick out frames. Mr. Bell said Ms. Samantha directed him to where the frames were located and instructed him to have a seat at the dispense table where someone would assist him.

Mr. Bell testified he saw another customer, a White male, enter MyEyeDr and that customer received service from a MyEyeDr employee before Mr. Bell received service. According to Mr. Bell, the MyEyeDr employee first helped the White customer although the employee was informed that Mr. Bell was next to receive service.

Mr. Bell testified that as he was leaving MyEyeDr, the employee who first helped the White customer asked if she could assist Mr. Bell, but Mr. Bell replied

that she had an opportunity to assist him but chose to help someone else.

According to Mr. Bell, he was denied service based on his race/color because he should have been helped before the White customer.

Mr. Bell testified that since this incident he has attended ten counseling sessions with Mind and Body Counseling, located in Milford, DE, and the sessions are ongoing. Mr. Bell said he began counseling before this incident, but he has repeatedly discussed this incident during counseling because it harmed him.

2. Exhibits

Mr. Bell admitted into evidence, without objection, the following documents: (a) a written statement electronically signed by Amy Jean, General Manager for MyEyeDr,⁴ (b) a written statement manually signed by Samantha Simile, Patient Services Coordinator for MyEyeDr,⁵ and (c) a written statement manually signed by Taylor Downes, Eyewear Consultant for MyEyeDr.⁶

B. Respondents' Case

1. Samantha Simile ("Ms. Simile")

Ms. Simile, duly sworn, testified that she has been employed with MyEyeDr since December 2022 as the Patient Services Coordinator. Ms. Simile said she was

⁴ Admitted as Complainant's Exhibit 1.

⁵ Admitted as Complainant's Exhibit 2.

⁶ Admitted as Complainant's Exhibit 3.

working on December 21, 2022, recalls Mr. Bell checking in with her at the front desk, and was informed by Mr. Bell that he was there to pick up eyeglasses. Ms. Simile said she instructed Mr. Bell to have a seat after informing him that his name would be placed on the waiting list. Ms. Simile said Mr. Bell complied and she did put his name on the waiting list. Ms. Simile said her actions were consistent with MyEyeDr's policy/procedure—place customer's names on a waiting list and then instruct them to have a seat and wait for their name to be called.

Ms. Simile testified that another employee, Taylor, who had been working in the lab “came out” and proceeded to help a customer that was seated at the dispense table. Ms. Simile said she did not see when that customer arrived and the customer had not checked in with her. Ms. Simile said she informed Taylor that Mr. Bell had arrived before the customer at the dispense table and Taylor responded she would first help the customer at the dispense table and then help Mr. Bell. Ms. Simile said Taylor only spent 1 to 1.5 minutes helping the customer at the dispense table and then Taylor informed Mr. Bell she could help him. According to Ms. Simile, Mr. Bell responded by putting up his hand, stating he did not want Taylor's help, and leaving MyEyeDr.

Ms. Simile testified that Mr. Bell's race had no bearing on the December 21, 2022 incident at MyEyeDr.

2. Taylor Downes (“Ms. Downes”)

Ms. Downes, duly sworn, testified that she is employed with MyEyeDr and

currently serves as General Manager, but in December 2022 she served as an Eyewear Consultant. Ms. Downes said that on December 21, 2022, she was working in the lab “checking in jobs” when she was informed that a customer was present to pick up eyeglasses. Ms. Downes said she exited the lab and went to the dispense area, which is where customers pick up eyeglasses. Ms. Downes said she saw a customer sitting at the dispense table and assumed he was first to receive service so she assisted him. Ms. Downes said she retrieved his eyeglasses and ensured he was satisfied with them. Ms. Downes said as she was helping the customer at the dispense table, Ms. Simile pointed toward the waiting area and informed her that another customer was actually next to receive service. Ms. Downes said she responded that she would finish with the customer at the dispense table and then help the other customer in the waiting area. Ms. Downes said she continued helping the customer at the dispense table because she knew it would not take long and it did only take a minute. Ms. Downes said the waiting area was not within her view and she did not know the gender or race of the customer that Ms. Simile indicated was in the waiting area.

Ms. Downes testified that when she completed servicing the customer at the dispense table she apologized to Mr. Bell, informed him that she could assist him, and Mr. Bell refused service. According to Ms. Downes, Mr. Bell said she had helped the White customer first although she knew Mr. Bell was next to receive service and then Mr. Bell left MyEyeDr. Ms. Downes said she never denied

service to Mr. Bell.

Ms. Downes testified that MyEyeDr's practice is to first provide service to the customer seated at the dispense table and then serve customers on the waiting list in the order that they arrived. Ms. Downes said the employee at the front desk tells customers to sit at the dispense table.

3. Amy Jean ("Ms. Jean")

Ms. Jean, duly sworn, testified that she has been employed with MyEyeDr for approximately three years and currently serves as a Consultant. Ms. Jean said on December 21, 2022, she was serving as the General Manager and saw Mr. Bell on that day. Ms. Jean said she was helping a customer and heard Ms. Simile tell Mr. Bell he would be next. Ms. Jean said when Ms. Downes came in the room and proceeded to assist the customer that was seated at the dispense table, Ms. Simile informed Ms. Downes that another customer was next to receive service.

According to Ms. Jean, Ms. Downes responded that it would not take long to assist the customer at the dispense table and then Mr. Bell commented that although he was next, the White customer at the dispense table was helped first, which was racist.

Ms. Jean testified that the customer at the dispense table was not instructed to sit there. Ms. Jean said MyEyeDr did not refuse service to Mr. Bell. Ms. Jean said she heard Ms. Downes apologize to Mr. Bell, but Mr. Bell refused service and left MyEyeDr.

C. Complainant's Closing Arguments

In closing, Mr. Bell said MyEyeDr's witnesses provided conflicting testimony but he asserted that there was no conflict in the testimony pertaining to the White customer receiving service before Mr. Bell although Mr. Bell had arrived before the White customer. Mr. Bell requested compensation for the ongoing treatment that he receives related to this incident.

D. Respondent's Closing Arguments

In closing, Ms. Grimm said there is no evidence that MyEyeDr servicing the White customer before Mr. Bell was anything other than a mistake and there is no evidence that race factored into the White customer first receiving service. Ms. Grimm argued that Ms. Downes was following the policy that customers seated at the dispense table are first to receive service and when Ms. Downes learned she made a mistake, she quickly completed the service being provided the White customer, apologized to Mr. Bell for the mistake, and tried to assist Mr. Bell. Ms. Grimm noted that Ms. Downes' mistaken assumption about the White customer being the next person to receive service and the few minutes that Mr. Bell had to wait until the White customer's service was completed are contrary to a finding that Ms. Downes treated Mr. Bell in a hostile manner that amounted to a denial of service.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mr. Bell alleges Respondents violated DEAL and denied him access to public accommodation because of his race/color (Black). According to DEAL,

no person being the owner...manager...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, gender identity, or national origin, any of the accommodations, facilities, advantages, or privileges thereof.⁷

“The ultimate purpose [of DEAL] is to eliminate the inconvenience, unfairness, and humiliation of...discrimination.”⁸ The provisions of DEAL are to be “liberally construed” to safeguard the rights set forth therein. Under Delaware law, claims alleging a direct or indirect refusal or denial of public accommodations based upon unlawful discrimination are decided pursuant to the U.S. Supreme Court’s three-part analysis in *McDonnell Douglas Corp. v. Green*.^{9,10} This analysis requires the following steps:

- (1) The Complainant must establish a *prima facie* case of discrimination.
- (2) Once a *prima facie* case is established, the burden shifts to the respondent to present evidence of a legitimate, non-discriminatory

⁷ 6 Del. C. § 4504(a)(1)a.

⁸ *Uncle Willie’s Deli v. Whittington*, 1998 WL 960709, at *4 (Del. Super. Dec. 31, 1998) (citations and internal quotation marks omitted).

⁹ 411 U.S. 792 (1973).

¹⁰ *See DP, Inc. v. Harris*, 2000 WL 1211151, at *6 (Del. Super. July 31, 2000) (“Delaware Courts have applied the standard articulated in *McDonnell Douglas Corporation v. Green* for cases alleging unlawful discrimination.”) (citations omitted); *Uncle Willie’s Deli*, 1998 WL 960709, at *4 (applying the *McDonnell Douglas* analysis to a case brought under DEAL).

reason for denying plaintiff access.

- (3) After this production of evidence, the complainant retains the burden of persuading by a preponderance of the evidence that the respondent's proffered reason was a pretext for discrimination.¹¹

To meet the initial burden of going forward and establishing a *prima facie* case of discrimination, Mr. Bell must show: (a) he is a member of a protected class; (b) he was denied access to public accommodation;¹² and (c) non-members of his protected class were treated more favorably. Further, because equal accommodations hearings before HCRC are subject to the provisions of Delaware's Administrative Procedures Act,¹³ "the burden of proof shall always be upon the applicant or proponent."¹⁴

¹¹ *Salty Sam's Pier 13 v. Washam*, 2000 WL 1211227, at *2 (Del. Super. Aug. 3, 2000) (citations omitted).

¹² According to DEAL, it is illegal to "directly or indirectly refuse, withhold from, or deny [members of the specified protected classes] any of the accommodations, facilities, advantages, or privileges" of a place of public accommodation. 6 *Del. C.* § 4504(a)(1)a. The Panel uses the term "denied" to encompass "refuse, withhold from, or deny" and uses the term "access" to encompass "accommodations, facilities, advantages, or privileges."

¹³ 29 *Del. C.* Ch. 101.

¹⁴ 29 *Del. C.* § 10125(c).

McDonnell Douglas Test – Part I
Prima Facie Case

There is no dispute that Mr. Bell has proven by a preponderance of the evidence the first and third prima facie elements. Regarding the first element, Mr. Bell, a Black person, is a member of the protected class race/color. Regarding the third element, Mr. Bell was next in line to receive service from MyEyeDr, but a White person received service before him.

There is dispute about whether Mr. Bell has proven by a preponderance of the evidence the second prima facie element—denied access to public accommodation. A place of public accommodation is “any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public....”¹⁵ As a business that solicits patronage from the general public, MyEyeDr is clearly a place of public accommodation.

Denial of access to a place of public accommodation can be proven by evidence of an outright denial or an indirect denial. An indirect denial can occur even if a protected class member ultimately receives access.¹⁶ A delay that results

¹⁵ 6 Del. C. § 4502(14).

¹⁶ *Hadfield’s Seafood v. Rouser*, 2001 WL 1456795, *4 (Del. Super. Aug. 17, 2001). (A customer filed a DEAL complaint against a restaurant after its cashier withheld the food order and insisted on explaining the reason for the long wait despite the customer’s repeated request to just provide the food. In considering the second *prima facie* element, the Court concluded that the delay resulted in an indirect denial of service and said, “If used to frustrate the customer,...a lengthy explanation takes on a different tone, especially when the explanation was repeatedly rebuffed.”).

in “something less than an ‘outright denial...’”¹⁷ can be a denial if there is “an intentional delay...used to frustrate the [protected class member], especially when the delay tactic is repeatedly rebuffed....”¹⁸ Determining if a delay that results in something less than an outright denial satisfies the second *prima facie* element is fact-intensive and dependent upon the circumstances of a particular case.¹⁹

Mr. Bell contends he was denied service outright because he did not receive service before the customer who arrived after him. MyEyeDr contends Mr. Bell was not denied service but instead he refused service by rejecting Ms. Downes’ offer to assist and then leaving MyEyeDr. A majority of the Panel agrees with Mr. Bell and finds by a preponderance of the evidence that MyEyeDr denied Mr. Bell access to public accommodation by not adhering to its “first come first serve” policy and instead serving a customer who arrived after Mr. Bell.²⁰

McDonnell Douglas Test – Part II
Legitimate Non-Discriminatory Reason

Having found that Mr. Bell has established a *prima facie* case, there is a

¹⁷ *Id.*; See also *Stewart v. Human Relations Commission*, 2010 WL 2653453, *3 (Del. Super. July 6, 2010); *Witcher v. Breeding*, 2012 WL 3518079, *3 (Del. Super. July 31, 2012).

¹⁸ *Witcher*, 2012 WL 3518079, at *3 (internal quotation marks omitted).

¹⁹ *Stewart*, 2010 WL 2653453, at *6.

²⁰ One panelist agrees with MyEyeDr’s contention that Mr. Bell refused service when he left MyEyeDr. Nevertheless, the majority view prevails because “[d]ecisions of the panel must be made by a majority of the members of the panel.” 6 *Del. C.* § 4508(f)(3).

presumption that MyEyeDr unlawfully discriminated against Mr. Bell²¹ and according to part two of the *McDonnell Douglas* analysis, the burden now shifts to MyEyeDr to present evidence of a legitimate, non-discriminatory reason that Mr. Bell was denied service. MyEyeDr's burden is one of production, not persuasion. MyEyeDr only needs to produce evidence of a legitimate, nondiscriminatory reason and is not required to persuade the Panel that its actions were non-discriminatory.²²

The evidence is clear that the White customer was seated at the dispense table where customers pick up eyeglasses. The evidence is clear that MyEyeDr's policy is to first provide service to customers seated at the dispense table and then assist customers based on their position on the waiting list. MyEyeDr contends the White customer received service before Mr. Bell because Ms. Downes mistakenly believed the White customer, seated at the dispense table, was next to receive service. The Panel finds that MyEyeDr has satisfied its burden of producing a legitimate, nondiscriminatory reason for the denial of service—Ms. Downes made a mistake.

McDonnell Douglas Test – Part III **Pretext for Discrimination**

Turning to part three of the *McDonnell Douglas* analysis, Mr. Bell must

²¹ See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 502-503 (1993).

²² *Boggerty v. Stewart*, 14 A.3d 542, 552 (Del. 2011).

prove by a preponderance of the evidence that MyEyeDr’s proffered reason was pretext for discrimination. “[Mr. Bell’s] burden is twofold. [He] must convince the [Panel] that the...stated reason was false...[and he] must prove discrimination was the real reason...”²³ for the denial. The law requires “...specific and significantly probative evidence that [MyEyeDr’s] alleged purpose is a pretext for discrimination.”²⁴ Mr. Bell “must point to weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the...proffered reasons such that a reasonable fact-finder could rationally find [the reason] unworthy of credence.”²⁵

The Panel finds that Mr. Bell has not proven by a preponderance of the evidence that MyEyeDr’s proffered reason was pretext for discrimination. Mr. Bell has not supplied specific and significantly probative evidence. He has not identified any persuasive weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the proffered reason and therefore he has failed to convince the Panel that MyEyeDr’s stated reason is pretext. Instead, the Panel finds the proffered reason to be credible. It is believable that Ms. Downes began assisting the White customer because he appeared to be the next customer to receive service. It is believable that once Ms. Downes learned Mr. Bell was

²³ *Ennis v. Del. Transit Corp.*, 2015 WL 1542151, at *7 (Del. Super. Mar. 9, 2015).

²⁴ *Boggerty*, 14 A.3d at 554.

²⁵ *Ennis*, 2015 WL 1542151, at *8 (citing *Keller v. Orix Credit Alliance Inc.*, 130 F.3d 1101, 1108-1109 (3rd Cir. 1997) (internal quotation marks omitted)).

actually the next customer to receive service she completed assisting the White customer because it would only take a few minutes longer.

CONCLUSION

After careful consideration of the evidence presented, the Panel, by unanimous vote, concludes that Mr. Bell has failed to prove by a preponderance of the evidence that MyEyeDr violated DEAL, 6 *Del. C.* § 4504.

ORDER

Pursuant to 6 *Del. C.* § 4508(g), the Complaint against MyEyeDr is **DISMISSED**.

IT IS SO ORDERED this 14th day of March, 2024.



Joseph J. Dawson (Mar 15, 2024 10:13 EDT)

Joseph Dawson
Commissioner and Panel Chair



Dwayne J. Bensing (Mar 15, 2024 10:56 EDT)

Dwayne Bensing
Commissioner and Panel Member



rosemarie williams (Mar 15, 2024 16:14 EDT)

Rosemarie Williams
Commissioner and Panel Member