

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

JONATHAN J. ELEY)	
)	
Complainant,)	
)	
v.)	Case No. S-EA-2378-21
)	
PNC BANK, <i>et. al.</i>)	
)	
Respondent.)	

MEMORANDUM DECISION AND ORDER

PRESENT:

Martin Rendon, *Commissioner and Panel Chairperson*
Gail Launay-Tarlecki, *Commissioner and Panel Member*
Dwayne Bensing, *Commissioner and Panel Member*
Kemba Lydia-Moore, *Deputy Attorney General, Counsel for the
Commission and Panel*

APPEARANCES:

Jonathan J. Eley, *Complainant, pro se*
Petal Reddick, K&L Gates, LLP, *Counsel for Respondent*¹

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, October 11, 2022 via Microsoft

¹ Ms. Reddick was granted *pro hac vice* admission for this hearing.

Teams audio and video conference² to determine whether a violation of Delaware Equal Accommodations Law (“DEAL”), codified at 6 *Del. C.* Ch. 45, had occurred.

The Panel convened to determine whether PNC Bank, located in Lewes, DE, (“PNC Lewes” or “Respondent”) violated 6 *Del. C.* § 4504 as alleged in the Complaint filed by Jonathan J. Eley (“Mr. Eley” or “Complainant”). Mr. Eley alleged Respondent discriminated against him on the basis of race/color (Black).

The panel conducted its deliberations on October 11, 2022, October 13, 2022, and November 22, 2022.

SUMMARY OF THE COMPLAINT

In his Complaint, Mr. Eley alleged that PNC Lewes 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. Eley, on April 20, 2021, he went to PNC Lewes and presented two checks, drawn on PNC Bank,³ for cashing. Mr. Eley contends he provided the requisite identifications for cashing checks, but he was not permitted to cash the checks. Mr. Eley described the bank teller to whom he presented the checks and identifications as a Caucasian woman. When Mr. Eley was precluded

² Mr. Eley participated in the hearing solely by audio conference.

³ Herein, “PNC Bank” refers to the bank in its entirety and not a specific branch.

from cashing the checks at PNC Lewes, he went to the PNC Bank branch located in Georgetown, DE (“PNC Georgetown”) and was permitted to cash the two checks without incident.

According to Mr. Eley, he was discriminated against and precluded from cashing the checks at PNC Lewes because of his race/color (Black).

PRE-HEARING MATTERS

Commissioner Bensing informed the parties that Mr. Eley contacted Commissioner Bensing’s employer, American Civil Liberties Union of Delaware, for legal assistance but Commissioner Bensing did not have direct correspondence or communication with Mr. Eley, and he did not have prior knowledge of Mr. Eley’s Complaint. Commissioner Bensing stated he could participate in an unbiased and fair manner but offered to recuse himself if either party believed that was necessary. Neither party requested that Commissioner Bensing recuse himself.

OPENING STATEMENTS

Both parties made 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. Complainant Jonathan J. Eley

Mr. Eley, duly sworn, testified that he did not believe the PNC Lewes teller made an error when she refused to cash his checks. He said she was fired because PNC Lewes knows she discriminated against him, and PNC Lewes later admitted to him and the Delaware Division of Human and Civil Rights ("Division") that he was discriminated against.

Mr. Eley testified that being discriminated against made him feel crazy and later the same day he was mentally affected by what occurred. Mr. Eley said he wanted to harm people for no reason.

During cross examination, Mr. Eley confirmed he did not have a PNC Bank account when he attempted to cash his checks. He said he tried to cash two unemployment checks and he provided eight forms of identification (i.e., two state identifications, five debit cards, and a piece of mail containing his name and address). Mr. Eley clarified that neither of the state identifications were a driver's license.

Mr. Eley testified that when he provided the debit cards, the teller put her finger on each card, shoved each card across the counter back towards him, and said, "We don't accept this. We don't accept that." Mr. Eley described the teller as "real ignorant" and rude when she returned the debit cards in that manner. He said

he looked at the teller, grabbed his belongings, said a curse word, then left and drove twenty minutes to PNC Georgetown where he was able to cash the checks with one identification. Mr. Eley said the PNC Lewes teller did not inform him about primary and secondary forms of identification.

Mr. Eley inquired what other reason is there to explain the PNC Lewes teller's treatment given that he was able to cash the checks at PNC Georgetown by presenting one identification to a Caucasian woman teller who did not have an attitude.

In response to Panel questions, Mr. Eley described himself as a Black and Indian male with black, short, wavy hair. Mr. Eley testified he went to PNC Lewes to cash two checks. There were other bank tellers present, one or two other customers, and a Black security guard. According to Mr. Eley, the other customers did not appear to have difficulty with their transactions.

Mr. Eley testified that the two state identifications he presented to the PNC Lewes teller have his picture and an address consistent with the address on the piece of mail. Mr. Eley said the debit cards only had his name and were not expired.

Mr. Eley requested that the Panel view the PNC Lewes surveillance videos. The videos consists of footage from April 20, 2021 between 9:00 A.M. and 11:00 A.M. that was recorded by fifteen surveillance cameras located throughout PNC Lewes. The surveillance videos were admitted into evidence as Complainant's

Exhibit 1 (“CP Ex. 1”). Upon review of CP Ex. 1., the following was observed on cameras 3, 5, 8, 9, 10, and 15 between 9:51:34 A.M. and 10:06:56 A.M.:⁴

- Between 9:51:34.48 and 10:00:46.92, a Caucasian man was at the teller 3 counter. He handed the teller two blue zippered pouches. The teller’s movements can be seen in the reflection in the plexiglass that separates her and the man. The teller removed papers from the pouches and then sorted and reviewed the papers. The teller also removed and counted currency from the pouches. There is additional movement observed in the plexiglass reflection, but it is difficult to determine what the teller is doing. Ultimately, the teller returned the two blue pouches, and the man left the counter. This is the only period of time that CP Ex. 1 contains footage of this man at teller 3.
- At 09:59:08.31, Mr. Eley entered the bank.
- Between 10:00:53.92 and 10:01:37.29, a Caucasian man was at the teller 3 counter with a document that appears to be a check and a debit or credit card. The man endorsed the document and gave it to the teller. He then gave the teller a photo identification. The teller returned the identification and gave the man a slip of paper. The man left the counter. This is the only period of time that CP Ex. 1 contains footage of this man at teller 3.
- Between 10:01:39.24 and 10:01:56.40, Mr. Eley was at the teller 3 counter with two photo identifications and two checks. He gave the teller one identification and the two checks. He then gave the teller the second identification which she immediately returned. Mr. Eley left the counter without retrieving the first identification and two checks as they can be seen in the plexiglass reflection laying on teller’s side of the counter.
- At 10:02:03.29, Mr. Eley exited the bank.
- At 10:02:50.68, Mr. Eley re-entered the bank.
- Between 10:03:11.21 and 10:03:33.71, Mr. Eley was at the teller 3 counter. The plexiglass reflection reveals that Mr. Eley’s photo identification is laying on the counter in front of the teller and the teller had the checks in hand. At 10:03:14.53, Mr. Eley gave the teller at least one credit or debit

⁴ The Panel utilized the clock that can be seen at the bottom of the screen when the videos are enlarged to fit the screen.

card and then removed from his wallet another card that he gave the teller at 10:03:20.01. The teller returned the cards at 10:03:28.89 and then she returned the checks. It took 14.36 seconds for the teller to review Mr. Eley's debit cards (i.e., between 10:03:14.53 and 10:03:28.89). Mr. Eley left the counter.

- Between 10:03:49.44 and 10:06:56.02, a Caucasian woman was at the teller 3 counter. The woman removed from an envelope and handed to the teller documents that appear to be checks and a debit or credit card. The teller returned the documents and provided a slip of paper that the woman began to write on. After the woman looked at each check she wrote on the slip of paper that the teller had provided. The woman used her cell phone and input information as she looked back and forth from her phone to the checks, and then again wrote on the slip of paper. The woman gave the checks and the slip of paper to the teller who can be seen in the plexiglass reflection reviewing the items. Then, the teller handed the woman two other slips of paper, and the woman left the counter. This is the only period of time that CP Ex. 1 contains footage of this woman at teller 3.

Mr. Eley testified in response to Panel questions during and after viewing CP EX. 1.⁵ Mr. Eley confirmed he was the Black male seen wearing a white shirt and blue pants. Mr. Eley stated he entered and exited the bank twice. Mr. Eley explained that during his initial contact with the teller she requested additional identification, so he exited the bank and returned with his five debit cards. Mr. Eley said he provided the debit cards, but the teller asked for something else which he vaguely recalls being his car title. Mr. Eley said the piece of mail that he had was probably in his pocket. Mr. Eley testified he did not produce his car title, the teller returned his checks, he said a curse word, he left the bank for the second and

⁵ Although Mr. Eley participated in the hearing solely by audio conference and could not see the video as it played, the Panel members described the content of the video relevant to their questions which enabled Mr. Eley to respond.

final time, and he went to PNC Georgetown.

The Panel asked Mr. Eley why he felt he was discriminated against on the basis of his race and Mr. Eley stated, “if you were standing behind me that day you probably would have looked at her like...you probably would have looked at her like ‘bitch what is your problem?’ She took her finger on each one of my debit cards and slid them across that counter...this is exactly how she said it ‘We don’t accept this. We don’t accept that. We don’t accept this.’ I had five debit cards. She said the same exact thing for all five debit cards as she slid them across the counter...Her ignorance and rudeness that morning was out the window.” As Mr. Eley mimicked what the teller said upon returning his debit cards, his tone was abrupt and dismissive. Mr. Eley testified he was able to cash the checks with one identification at PNC Georgetown and he was not spoken to rudely nor was he disrespected. Mr. Eley testified he cannot speak to how others were treated at PNC Lewes, but he felt discriminated against due to how he was treated.

During additional cross examination, after the surveillance video was played, Mr. Eley testified he did not know what type of transactions the customers in front of him had conducted.

B. Respondents’ Case

1. Marshall Steinman

Mr. Steinman, duly sworn, testified that in 2015 he was employed at the

PNC Bank branch located in Rehoboth Beach, Delaware and in 2016 he began working at PNC Lewes. Mr. Steinman testified that he currently serves as a Portfolio and Trust Administrator but on April 20, 2021, he was the Assistant Branch Manager. Mr. Steinman said he was working on April 20, 2021, but he did not observe the incident. Mr. Steinman spoke with Mr. Eley afterwards and Mr. Eley said he was not permitted to cash his checks because the teller said Mr. Eley did not have acceptable identification. Mr. Steinman testified that he apologized to Mr. Eley for the incident and Mr. Eley concluded their conversation by stating he was going to make the teller pay for how she made him feel. Mr. Steinman said he notified the regional manager, and he logged a complaint in the “complaint system” which was ultimately referred to the Escalations Department.

Mr. Steinman testified he spoke with the PNC Lewes teller who reported that Mr. Eley was not permitted to cash his checks because he presented prepaid debit cards instead of bank issued debit cards. Mr. Steinman explained that customers who do not have accounts with PNC Bank (i.e., non-customers) must present primary and secondary forms of identification to cash a check and only bank issued debit cards (versus prepaid debit cards) are permissible as secondary identification.

Mr. Steinman identified and testified about a document entitled “*Processing Cash Check and Withdrawal Transactions*,” which was entered into evidence as Respondent’s Exhibit 1 (“RP Ex. 1”). He testified that the procedure established in

this document was in effect on April 20, 2021 and per the procedure, tellers must first determine if the person attempting to cash a check is a customer or non-customer. Then, tellers must review the “Processing Debit Transactions Resource Page” to determine, among other things, what to consider before processing the transaction and whether the transaction can be processed.

According to Mr. Steinman, before tellers can cash checks for a non-customer, tellers must receive two forms of identification - primary and secondary. Mr. Steinman said valid driver’s licenses, other state issued identifications, and passports are primary identifications. Mr. Steinman said credit cards, bank issued debit cards, current vehicle registration cards belonging to the check-casher, and utility bills in the check-casher’s name are secondary identifications. Mr. Steinman said prepaid debit cards, social security cards, insurance cards, and mail other than a utility bill are unacceptable forms of secondary identifications. According to Mr. Steinman, to determine if a debit card is an acceptable form of identification the teller looks at the back of the card for the letter “p,” which stands for prepaid, or the front of the card for a bank name. Also, the teller can check PNC Bank’s list of debit cards that have been identified as prepaid.

Mr. Steinman testified that PNC Lewes investigated this incident and concluded the teller should have cashed Mr. Eley’s checks because some of the debit cards he presented were bank issued. According to Mr. Steinman, the teller’s determination that all Mr. Eley’s debit cards were prepaid was the result of human

error. Mr. Steinman testified that after this incident with Mr. Eley and after learning there had been some changes to the appearance of debit cards, PNC Lewes had a “quick start” morning training with the entire team. Mr. Steinman testified that based on his understanding of what happened during this incident, Mr. Eley’s race did not bear upon the decision to not cash his checks.

During cross examination, Mr. Steinman testified that the teller resigned from PNC Lewes. He confirmed she was not reassigned to another branch, and she was not terminated. Mr. Steinman said he has no knowledge of a letter stating the teller was terminated.

During re-direct examination, Mr. Steinman testified he is unaware of a reason why PNC Bank would inform non-customers that an employee was terminated. He said that is a confidential personnel issue. Mr. Steinman confirmed the teller was not reassigned to another branch after this incident.

In response to Panel questions, Mr. Steinman again testified that Mr. Eley provided identifications that satisfied PNC Bank’s requirements. Mr. Steinman also repeated that the teller made a decision based on her knowledge and in turn committed a human error. Mr. Steinman explained that this incident prompted a “quick start” morning training because the policies and procedures website relating to reviewing secondary identifications had been updated. Mr. Steinman confirmed he viewed the bank surveillance video of this incident and said it is possible that a teller’s review of the debit cards could take longer than it did here, but a seasoned

teller knows exactly what to look for and can quickly review the cards.

Mr. Steinman testified that after the error was revealed he wanted to further discuss the issue with Mr. Eley, but he was advised not to contact Mr. Eley. Mr. Steinman said he does not know if the Escalations Department contacted Mr. Eley after the error was revealed. According to Mr. Steinman, each PNC Bank branch has a diversity and equality team that meets monthly to discuss ideas and issues of concern. PNC Bank sees itself as a community bank and created the diversity and equality team to facilitate a relationship with the community. Mr. Steinman testified there is no reason to believe Mr. Eley was precluded from cashing his checks because of his race. He said the teller resigned months after this incident and he is not aware of any prior complaints of discrimination against the teller.⁶

Ms. Reddick was permitted to conduct re-direct examination of Mr. Steinman based on the Panel's questions. Mr. Steinman testified he was familiar with PNC Bank's complaint process that existed at the time of this incident. Mr. Steinman identified and testified about a document that was described as PNC Lewes' position statement submitted in response to the complaint filed with the Division by Mr. Eley. This document was entered into evidence as Respondent's Exhibit 2 ("RP Ex. 2"). Mr. Steinman read into the record the first full paragraph

⁶ Respondent twice objected to the question that prompted this testimony on the bases of relevance and prejudice. The Panel Chair deemed the question to be relevant and overruled the objection.

that appears on page 2 of RP Ex. 2, which is a summary of the outcome of PNC Lewes' investigation. Per RP Ex. 2, "the matter was closed as unfounded for race discrimination." Mr. Steinman also read into the record the second full paragraph that appears on page 2 of RP Ex. 2, which discussed the Office of the Comptroller of the Currency's ("OCC") review of this incident. Per RP Ex. 2, "the OCC matter was subsequently closed."

Mr. Steinman identified and testified about a document entitled "*Code of Business Conduct and Ethics*" ("*Code of Ethics*"), which was admitted into evidence as Respondent's Exhibit 3 ("RP Ex. 3"). Mr. Steinman read a portion of RP Ex. 3 into the record and stated the teller complied with the *Code of Ethics* during this incident. Mr. Steinman testified that Mr. Eley's race was not a factor and that the checks were not cashed because of human error - the teller mistakenly believed Mr. Eley's debit cards were prepaid and not bank issued.

Mr. Eley was permitted to conduct re-cross examination of Mr. Steinman based on Ms. Reddick's re-direct examination. Mr. Steinman testified he was very apologetic to Mr. Eley when they spoke after the incident, and he remains apologetic.

C. Complainant's Closing Arguments

In closing, Mr. Eley said the bank teller "made me feel so bad" and "she tore me up inside." He said, "she almost made me while I was in public...do something

to somebody else for no apparent reason because of how she made me feel.” Mr. Eley contends the teller was either terminated or resigned because of this incident and everyone knows what she did. Mr. Eley said he should be compensated for this incident.

D. Respondent’s Closing Arguments

In closing, Ms. Reddick stated the issue is whether a banking error constitutes discrimination on the basis of race. She stated PNC Lewes recognizes the importance of treating everyone fairly and equally and all its policies, procedures, and practices are administered without regard to race or other protected class categories.

Ms. Reddick stated that prior to cashing checks, PNC Bank’s employees are required to obtain identifying information in accordance with federal and PNC Bank guidelines. Non-customers must produce primary and secondary forms of identification. As a non-customer, Mr. Eley was required to follow this procedure. Mr. Eley’s checks were not cashed because the teller mistakenly believed his secondary form of identification was a prepaid debit card which was an unacceptable secondary identification. The teller suggested other forms of identification that Mr. Eley did not produce and instead he chose to go to another bank branch.

Ms. Reddick argued that Mr. Eley was not precluded from cashing his

checks because of his race. Instead, he was precluded because of human error and that is a legitimate, non-discriminatory reason for not cashing his checks.

According to Ms. Reddick, the teller attempted to follow the race neutral procedure and made a mistake.

Ms. Reddick argued that Mr. Eley did not provide sufficient evidence to satisfy his burden of proof. He did not demonstrate he was denied equal accommodations on the basis of race. He did not demonstrate that other similarly situated individuals who were not Black were treated more favorably. Ms. Reddick said Mr. Eley's subjective perception does not give rise to a viable claim of race discrimination; his allegations are meritless; and his complaint should be dismissed.

E. Complainant's Rebuttal Closing Arguments

Mr. Eley argued that an employee is not fired for committing a human error, and an employee does not resign during the COVID-19 pandemic when jobs are sparse and bills need to be paid. Mr. Eley opined that the teller was either fired or forced to resign because of what she did - she violated his civil rights.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mr. Eley alleges Respondent violated DEAL and denied him access to public accommodation because of his race/color (Black). Section 4504(a)(1) of

DEAL provides that “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.”

The provisions of DEAL are to be “liberally construed” to safeguard the rights set forth therein.⁷ “The ultimate purpose [of DEAL] is to eliminate the inconvenience, unfairness, and humiliation of...discrimination.”⁸

Under Delaware law, claims alleging a direct or indirect refusal or denial of public accommodations based upon unlawful discrimination are decided using the guidance of 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 reason for denying plaintiff access.
- (3) After this production of evidence, the complainant retains the burden

⁷ 6 Del. C. § 4501.

⁸ *Uncle Willie’s Deli v. Whittington*, 1998 WL 960709, at *4 (Del. Super. Dec. 31, 1998) (citations and internal quotations 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*, 1998 WL 960709, at *4 (applying the *McDonnell Douglas* analysis to a case brought under DEAL).

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. Eley must show: (a) that he is a member of a protected class; (b) that he was denied access to public accommodation;¹² and (c) that 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 (APA),¹³ "the burden of proof shall always be upon the applicant or proponent."¹⁴

There is no dispute that Mr. Eley is Black, and therefore he is a member of the protected class "race." Next, the Panel must determine whether Mr. Eley was 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 bank that offers goods and services to the general public, PNC Lewes is clearly a place of public accommodation. It is

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).

¹⁵ 6 *Del. C.* § 4502(14).

also clear that Mr. Eley was denied access to this place of public accommodation when he was not permitted to cash his checks.

The final question for purposes of establishing a *prima facie* case is whether non-members of Mr. Eley's protected class were treated more favorably than him. The PNC Lewes surveillance videos (i.e., CP Ex. 1) from April 20, 2021 between the hours of 9:51:34 A.M. and 10:06:56 A.M. at the teller 3 counter, show Mr. Eley's inability to complete his transaction and three Caucasian individuals that successfully completed their transactions. A Caucasian man's transaction beginning at 9:51:34 A.M. was completed after the teller emptied the blue zippered pouches that the man provided, reviewed the contents and counted the currency therefrom, and returned the pouches. Another Caucasian man's transaction beginning at 10:00:53 A.M. was completed after he gave the teller an endorsed check and photo identification and in return the man received a slip of paper. A Caucasian woman's transaction beginning at 10:03:49 A.M. was completed after she gave the teller multiple checks and a slip of paper on which the woman input information and in turn the woman received two other slips of paper.

Although there is no testimony about the transactions that these individuals completed, the Panel takes notice¹⁶ of standard banking procedures for depositing

¹⁶ "A judicially noticed fact must be one not subject to reasonable dispute in that it is...generally known within the territorial jurisdiction of the trial court...." D.R.E. 201(b). "A court can take judicial notice, whether requested or not." D.R.E. 201(c).

checks and cash. The Panel takes notice that checks can be deposited by endorsing the check, filling out a deposit slip, giving the check and deposit slip to the bank teller, and receiving a receipt. The Panel takes notice that cash can be deposited by filling out a deposit slip, giving the deposit slip and the cash to the bank teller, and receiving a receipt. The Panel takes notice that customers may be required to provide identification when depositing checks or cash. The PNC Lewes surveillance footage shows that these standard banking procedures occurred when the three Caucasian individuals were at the teller 3 counter. Hence, the Panel finds by a preponderance of the evidence that the three Caucasians were able to complete their transactions,¹⁷ but Mr. Eley, a Black person, was not and therefore Mr. Eley has satisfied his burden of proving that non-members of his protected class were treated more favorably.

Having found that Mr. Eley has established a *prima facie* case, there is a presumption that PNC Lewes unlawfully discriminated against him¹⁸ and according to part two of the *McDonnell Douglas* test, the burden shifts to PNC Lewes to present evidence of a legitimate, non-discriminatory reason for precluding Mr. Eley from cashing his checks. PNC Lewes' burden is one of production, not persuasion. PNC Lewes only needs to produce evidence of a legitimate,

¹⁷ It should be noted that the Panel focused on a brief period of time before and after Mr. Eley's interaction with teller 3, but CP Ex. 1 shows more Caucasians who appear to have also successfully completed their banking transactions.

¹⁸ See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 502-503 (1993).

nondiscriminatory reason and is not required to persuade the Panel that its actions were non-discriminatory.¹⁹

Mr. Steinman testified that the bank teller told him she did not cash Mr. Eley's checks because he provided prepaid debit cards. Mr. Steinman testified that as a non-customer Mr. Eley was required to provide a secondary identification and prepaid debit cards are unacceptable forms of secondary identification. Mr. Steinman testified the teller was mistaken when she determined that all of Mr. Eley's cards were prepaid, because Mr. Eley did provide some bank issued debit cards. The Panel finds that Mr. Steinman's testimony is sufficient evidence of a legitimate, non-discriminatory reason²⁰ and PNC Lewes has satisfied its burden at this juncture.²¹

Turning to part three of the *McDonnell Douglas* test, Mr. Eley must prove by a preponderance of the evidence that PNC Lewes' proffered reason was a pretext for discrimination. "[Mr. Eley's] burden is twofold. [He] must convince the [Panel] that the...stated reason was false...[and he] must prove discrimination was

¹⁹ *Boggerty v. Stewart*, 14 A.3d 542, 552 (Del. 2011).

²⁰ *See Campbell v. Department of Human Services*, 384 F.Supp.3d 1209, 1225 (U.S. Dist. Hawaii 2019) ("A mistake may be a legitimate and nondiscriminatory reason....").

²¹ However, at least one Panel member takes issue with the low burden at this juncture. It appears that *McDonnell Douglas* and its progeny allow any reason to satisfy the burden of persuasion without giving due consideration to whether the reason is in fact legitimate. Instead, this Panel member asserts, the word "legitimate" should have meaning and application when assessing whether a respondent has provided a legitimate, non-discriminatory reason.

the real reason...” that he was not permitted to cash his checks.²² The law requires “...specific and significantly probative evidence that [PNC Lewes’] alleged purpose is a pretext for discrimination.”²³ Mr. Eley cannot demonstrate pretext by showing the denial of access was a mistake. Instead, “he must point to weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the...proffered reasons such that a reasonable fact-finder could rationally find [the reasons] unworthy of credence.”²⁴

The Panel finds that there are weaknesses and implausibilities in PNC Lewes’ proffered reason which renders its reason unworthy of credence. The PNC Lewes teller, who had first-hand knowledge of what occurred, did not testify. Instead, Mr. Steinman, who was the Assistant Manager at the time and who did not personally witness the incident, testified about what the teller told him. As such, PNC Lewes only presented hearsay testimony about the reason - that the teller made a mistake. “Although it is well-settled in Delaware that hearsay evidence is permissible in...administrative hearings, the administrative board may not rely upon such evidence as the sole basis for its decision...In other words, hearsay evidence is permissible as long as there is competent evidence having probative

²² *Ennis v. Del. Transit Corp.*, 2015 WL 1542151, at *7 (Del. Super. Mar. 9, 2015).

²³ *Boggerty*, 14 A.3d at 554.

²⁴ *Ennis*, 2015 WL 1542151, at *8 (citing *Keller v. Orix Credit Alliance Inc.*, 130 F.3d 1101, 1108-1109 (3rd Cir. 1997) (internal quotations omitted)).

value to support the findings of the Board.”²⁵ PNC Lewes offered no competent, non-hearsay evidence to support a finding that the teller’s decision was human error. PNC Lewes’ position statement submitted in response to Mr. Eley’s complaint (RP Ex. 2) that summarizes the result of PNC Lewes’ investigation and OCC’s review is also hearsay evidence that is insufficient to alone show that the teller committed human error or as support for Mr. Steinman’s hearsay testimony. As such, the Panel finds that the proffered reason has weaknesses and implausibilities and was pretext for discrimination.

Because the Panel does not find the proffered reason to be credible, the Panel has determined that the reason is false. The Panel has also determined there is sufficient evidence that discrimination was the real reason the teller did not cash Mr. Eley’s checks. In making this determination, the Panel is aware that the existence of a *prima facie* case and a pretextual reason only permits the Panel to presume there was unlawful discrimination and does not compel a judgment in favor of Mr. Eley because Mr. Eley maintains the burden of proof and must prove by a preponderance of the evidence that PNC Lewes discriminated against him.²⁶ This Panel finds that Mr. Eley has met that burden.

On April 20, 2021, Mr. Eley, a Black person, went to PNC Lewes to cash

²⁵ *Larkin v. Gettier & Associates, et. al.*, 1997 WL 717792, *3 (Del. Super. Nov. 14, 1997).

²⁶ *St. Mary’s Honor Center*, 509 U.S. at 502-503.

two checks, but he was not permitted to cash the checks. On the same day, there were at least three Caucasian individuals that were permitted to complete their banking transactions. It is of no consequence that Mr. Eley attempted to complete a transaction different than the transactions completed by those customers. The fact that a Black person was denied access, but the Caucasian customers were granted access to PNC Lewes' service is germane.

Likewise, Mr. Eley's testimony was credible and compelling. He testified that he was mentally affected by what occurred and it made him want to harm people for no reason. He testified that he was treated poorly, and that the PNC Lewes teller was ignorant and rude when she returned the debit cards provided as forms of identification. Mr. Eley explained and exhibited how the teller treated him. He said, "if you were standing behind me that day you probably would have looked at her like...you probably would have looked at her like 'bitch what is your problem?'" She took her finger on each one of my debit cards and slid them across that counter...this is exactly how she said it 'We don't accept this. We don't accept that. We don't accept this.' I had five debit cards. She said the same exact thing for all five debit cards as she slid them across the counter...Her ignorance and rudeness that morning was out the window." When Mr. Eley provided this testimony he mimicked the teller's voice, which was abrupt and dismissive.

The surveillance video (CP Ex. 1) was also compelling and supports Mr. Eley's testimony. The teller spent approximately 14 seconds reviewing Mr. Eley's

debit cards. The Panel finds that that was insufficient time to properly review each of the cards and give due consideration to whether they were acceptable forms of secondary identification. There is no credible evidence to counter Mr. Eley's testimony and he is the only witness who provided a first-hand, personal knowledge account of what occurred. As discussed, the Panel does not credit Mr. Steinman's testimony that the teller made a mistake, and the Panel does not credit his testimony that the teller may have had sufficient experience to review the cards so quickly. Only the teller can testify about her experience, but she was not called to testify. The Panel also observed the amount of time and attention the teller gave to each of the Caucasian customers, underscoring Mr. Eley's assertions that he was treated differently and denied service based on his race.

Finding that Mr. Eley has proven that PNC Lewes discriminated against him because of his race in violation of 6 *Del. C.* § 4504, the Panel has discretion to order "such relief as may be appropriate." The Panel may order "actual damages... 'including damages caused by humiliation and embarrassment,' costs, expenses, reasonable attorneys' fees[,] and injunctive or other equitable relief."²⁷ The Panel may also assess a civil penalty to be paid to the Commission's Special Administration Fund "to vindicate the public interest."²⁸

²⁷ 6 *Del. C.* § 4508(h).

²⁸ *Id.*

The Panel believes it is appropriate to award Mr. Eley \$5,000 in compensatory damages for the humiliation, embarrassment, and mental anguish caused by PNC Lewes. His pain and suffering were evident throughout his testimony. The Panel also believes PNC Lewes should pay a \$5,000 civil penalty to vindicate the public interest. Lastly, the Panel believes PNC Lewes employees should undergo training in the following areas: (1) customer service and customer relations that includes sensitivity training, implicit bias training, and training about proper ways to communicate with customers; and (2) how to determine what are acceptable forms of primary and secondary identifications.

CONCLUSION

After careful consideration of the evidence presented, the Panel, by unanimous vote, concludes that Mr. Eley has shown that PNC Lewes violated DEAL, 6 *Del. C.* § 4504.

ORDER

The Panel has found that PNC Lewes violated § 4504 of DEAL. Pursuant to § 4508(h) of DEAL, the Panel hereby orders the following:

- (1) PNC Lewes shall pay \$5,000 in compensatory damages to Mr. Eley;
- (2) PNC Lewes shall pay a civil penalty of \$5,000;
- (3) PNC Lewes shall ensure that all employees undergo training in the

area of customer service and customer relations, which shall include sensitivity training, implicit bias training, and training about proper ways to communicate with customers. This training shall last at least three hours, shall be completed by all employees within six months from the date of this Order, and shall occur on an annual basis thereafter;

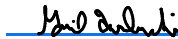
- (4) PNC Lewes shall ensure that employees who serve as tellers and who routinely review identifications undergo training on how to determine what are acceptable forms of primary and secondary identifications. This training shall occur within sixty days from the date of this Order and at least every six months thereafter.

IT IS SO ORDERED this 23rd day of January, 2023.



Martin Rendon (Jan 23, 2023 12:43 EST)

Martin Rendon
Commissioner and Panel Chair



Gail Tarlecki (Jan 23, 2023 14:52 EST)

Gail Launay-Tarlecki
Commissioner and Panel Member



Dwayne J. Bensing (Jan 23, 2023 15:11 EST)

Dwayne Bensing
Commissioner and Panel Member