

**BEFORE THE HUMAN RELATIONS COMMISSION
FOR THE STATE OF DELAWARE**

ELLE STONE)	
)	
Complainant,)	
)	
v.)	Case No. NC-EA-2151-20
)	
NEWARK NATURAL FOODS, et al.)	
)	
Respondents.)	

MEMORANDUM DECISION AND ORDER

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 State Human Relations Commission on Thursday, January 28, 2021 via WebEx Videoconference¹ to determine whether a violation of the Delaware Equal Accommodations Law, 6 *Del. C.* Ch. 45, had occurred.

PRESENT:

Gail Tarlecki, *Commissioner and Panel Chair*
Nancy Maihoff, *Commissioner and Panel Member*
Marty Rendon, *Commissioner and Panel Member*
Kemba S. Lydia-Moore, Deputy Attorney General, *Counsel for the Commission and the Panel*

APPEARANCES:

Elle Stone, *Complainant, pro se*
Lauren P. DeLuca, Esq., CONNOLLY GALLAGHER LLP, *Counsel for Respondents*

A meeting of a Panel of the Delaware State Human Relations Commission (“SHRC” or “Commission”) convened on January 28, 2021 in order to determine whether a violation of Delaware’s Equal Accommodation Law (“DEAL”), 6 *Del. C.* § 4504, occurred. Ms. Elle Stone

¹ The hearing was conducted via video conference in accordance with the recommendations in section I.2 of the Governor’s *Twenty-Seventh Modification of the Declaration of a State of Emergency for the State of Delaware due to a Public Health Threat* issued on September 3, 2020.

(“Complainant” or “Ms. Stone”) brought a complaint alleging that Respondents, Newark Natural Foods (“NNF”) and Pippa Duggan (collectively “Respondents”), discriminated against Ms. Stone on the basis of her disability and gender identity.² Immediately after the hearing, the panel conducted its deliberations.

SUMMARY OF THE COMPLAINT

Ms. Stone alleged in her complaint that she was refused, withheld, or denied accommodations, facilities, advantages, or privileges of a place of public accommodation because of her physical disability, mental disability, and gender identity.

Specifically, Ms. Stone alleges that on July 22, 2020, she was precluded from grocery shopping at NNF by its employee, Pippa Duggan, and was asked to leave because she was not wearing a face mask. Ms. Stone alleges Ms. Duggan was aware Ms. Stone could not wear a face mask due to a disability. Ms. Stone alleges Ms. Duggan informed her that no one was permitted to shop at NNF without wearing a face mask as that was the store policy that went into effect several weeks prior. Ms. Stone alleges she was denied access without a viable alternative for grocery shopping.

By these alleged actions, Ms. Stone claims Respondents illegally denied her access because of her mental disability, physical disability, and gender identity.

PRE-HEARING MATTERS

Respondents objected to Ms. Stone’s introduction of exhibits as they were not timely provided to Respondents. In support of their position, Respondents argued Ms. Stone violated the Equal Accommodations Regulations (“Regulations”) by providing a copy of her exhibits shortly

² During the hearing, Ms. Stone alleged for the first time that she was discriminated against on the basis of her source of income. The Panel notes that source of income is not identified by the DEAL as a class entitled to protection. See 6 *Del. C.* § 4503.

before the hearing began and not days prior to the hearing as required by the Regulations.³

The Panel exercised discretion consistent with Regulation 8.10.1⁴ and overruled Respondents' objection. The Panel acknowledged Ms. Stone's failure to comply with the Regulations, but stated it would consider Ms. Stone's exhibits and give them the weight they deserve. Additionally, the Panel noted Ms. Stone appeared pro se.

Both parties made opening statements.

SUMMARY OF THE EVIDENCE

A. Complainant's Case

1. Complainant Elle Stone

Ms. Stone, duly sworn, testified she is unable to wear a face mask because it has a negative impact on her mental and physical health. Ms. Stone acknowledged the *Thirteenth Modification of the Declaration of a State Emergency for the State of Delaware Due to a Public Health Threat* ("*Thirteenth Modification*"),⁵ approved by Governor John C. Carney on April 25, 2020, mandates that face masks be worn in grocery stores, however Ms. Stone noted the *Thirteenth Modification* provides an exception to this rule if wearing a face mask would inhibit an individual's health.

Ms. Stone testified she is diagnosed with Bipolar II Disorder, Post Traumatic Stress Disorder, and Schizotypal Personality Disorder. According to Ms. Stone, these diagnoses preclude her from wearing a face mask as it would inhibit her health by hindering her ability to breathe. Ms. Stone further testified she gets anxious in highly stressful situations and wearing a

³ According to Equal Accommodations Regulations 8.10, "Copies or photographs of all exhibits, except exhibits intended solely for impeachment, must be delivered to the office of the Division of Human Relations where the complaint was filed and to all other parties at least ten (10) days prior to the Hearing."

⁴ Equal Accommodations Regulation 8.10.1 states, "The Panel **may** refuse to receive into evidence any exhibit...which has not been delivered to the Commission and to an adverse Party as provided herein."

⁵ See Complainant's Exhibit 1.

face mask is highly stressful which could then cause her to become claustrophobic. In support of her diagnoses, Ms. Stone entered into evidence a copy of one page from her Psychological Evaluation performed by MidAtlantic Behavioral Health, LLC, dated February 28, 2013.⁶

Ms. Stone testified she is diagnosed with fibromyalgia which causes pain and difficulty breathing. Ms. Stone stated this diagnosis precludes her from wearing a face mask as it would inhibit her breathing and health. In support of her diagnoses, Ms. Stone entered into evidence a copy of a medical record generated by Rheumatology Center of DE, LLC, pertaining to a visit that occurred on September 14, 2016.⁷

Ms. Stone testified about a conversation she had with Pippa Duggan⁸ in late April or early May 2020 when Ms. Stone was shopping at NNF and not wearing a face mask. According to Ms. Stone, Ms. Duggan approached Ms. Stone and stated Ms. Stone needs to wear a face mask. Ms. Stone responded she is not required to wear a face mask because she has a medical exception. Ms. Stone testified Ms. Duggan was not aware of that exception and Ms. Duggan inquired if Ms. Stone has asthma. Ms. Stone testified she told Ms. Duggan she does not have to answer that question and the conversation ended. Ms. Stone testified she then continued shopping at NNF.

Ms. Stone testified the week following her conversation with Ms. Duggan, another employee confronted Ms. Stone about not wearing a face mask and that employee also was not aware of the medical exception. Ms. Stone testified she later provided the content of the medical exception to NNF staff.

Ms. Stone testified that on July 22, 2020, she went to NNF and was not wearing a face mask. Ms. Duggan approached Ms. Stone and stated there was a new policy that went into effect

⁶ See Complainant's Exhibit 2.

⁷ See Complainant's Exhibit 3.

⁸ Later testimony in this hearing will reveal that Ms. Duggan is NNF's Assistant Manager.

two or three weeks ago. Ms. Stone testified Ms. Duggan also informed her that according to the new policy no one is allowed to shop at NNF without wearing a face mask. Ms. Stone testified she has been to NNF within the two to three weeks prior to July 22, 2020 and was not informed of the new policy by any of the various employees or managers with whom she spoke. Ms. Stone testified when she refused to put on a face mask Ms. Duggan offered to shop for Ms. Stone and Ms. Stone declined the offer. According to Ms. Stone, when she inquired what would happen if she continued to shop without a face mask, Ms. Duggan responded the cashiers would not permit Ms. Stone to make any purchases.

Ms. Stone stated Ms. Duggan also informed her on July 22, 2020 of the online ordering system that Ms. Stone could utilize to make purchases. Ms. Stone testified she attempted to use the online system, but she was not able to access it. Ms. Stone testified she received a message that the system was temporarily suspended. Ms. Stone entered into evidence a screenshot displaying this message.⁹

Ms. Stone testified the online ordering system was also unavailable to her because she shops at night and online orders are only permitted between 8:00 A.M. and 5:00 P.M. Ms. Stone stated the online system is also not available to her because she primarily purchases food using an EBT¹⁰ card which is not an accepted form of payment on the online system. Ms. Stone entered into evidence a document entitled “Elle Stone Transactions” for the period of March 20, 2020 through July 16, 2020.¹¹ Ms. Stone testified this document, a summary of her purchase history at NNF during the specified period of time, was initially created by the Respondents but she added the amount paid during each transaction. Ms. Stone noted the majority of her

⁹ See Complainant’s Exhibit 4.

¹⁰ The Panel is aware that EBT is an abbreviation for “Electronic Benefit Transfer” which is a system used to issue Supplemental Nutrition Assistance Program (SNAP) benefits by means of a payment card that individuals can use to purchase food.

¹¹ See Complainant’s Exhibit 5.

purchases, totaling \$737.00, were made using her EBT card. Ms. Stone also noted she used her Master Card for a total of \$464.00 and when she paid by cash the purchase was typically less than \$20.00. Ms. Stone explained that her cash purchases occurred after she had already shopped at NNF but she would return to purchase a forgotten item.

Ms. Stone testified the online ordering system was difficult to use because it was not a traditional website and was instead a Microsoft Form in which she had to type a description of the items being purchased. Ms. Stone stated if she opted to place an online order there was no information about inventory, price, product image, or product name. Ms. Stone entered into evidence a screenshot of one page of the Microsoft Form that is utilized to make online purchases at NNF.¹²

Ms. Stone testified because she was precluded from shopping at NNF, she had to shop elsewhere, which included unsafe locations that caused her to experience anxiety and paranoia. Ms. Stone testified she had to pay more money for purchases from other businesses because she could not receive the ten percent discount afforded her as an NNF volunteer and because placing online orders from other businesses included paying significant shipping costs. Ms. Stone entered into evidence three receipts from her online purchases with three other businesses that indicated shipping costs of \$21.68, \$17.00, and \$14.95.¹³ Ms. Stone testified she was not always able to find the food she eats when shopping at other businesses and sometimes the items purchased online would spoil during shipping.

Ms. Stone testified she was denied service at NNF because of her gender identity. Ms. Stone stated multiple NNF employees intentionally misgendered her, assumed she is something she is not, asked what pronouns should be used to describe her, and someone spread information

¹² See Complainant's Exhibit 6.

¹³ See Complainant's Exhibit 7.

at NNF about her being a transgender woman when she never informed any employee of that. Ms. Stone testified she never presented as a male when she was a customer at NNF. Ms. Stone described one incident, that occurred during the brief period of time she was employed at NNF, when a co-worker asked if Ms. Stone should be referred to as “he” or “she.” Ms. Stone described a second incident, that also occurred during her employment at NNF, when a different co-worker asked for advice about a relative that is transgender.

Ms. Stone described interactions with a third employee that occurred when she was a customer, an NNF employee, and an NNF volunteer. Ms. Stone identified the third employee as John, who is no longer employed at NNF. Ms. Stone stated John intentionally misgendered her multiple times. According to Ms. Stone, during her employment at NNF, John initially referred to her as a female, then John began using gender neutral pronouns, and then John used male pronouns. Ms. Stone testified she was too scared to report John’s behavior. Ms. Stone testified another employee informed Lauren Arnold¹⁴ of John’s behavior and Ms. Arnold spoke with John. John returned to using gender neutral pronouns, but he later used male pronouns during the period of time Ms. Stone served as an NNF volunteer. Ms. Stone testified she resigned and became a volunteer because of the incidents with these three employees, but as a volunteer she was still in the same situation because she still had to work with John.

Ms. Stone testified Ms. Arnold is a key person responsible for implementing the new face mask policy. Ms. Stone testified Ms. Arnold and other staff, including Beth Chavez,¹⁵ knew about John’s behavior towards Ms. Stone and knew Ms. Stone is transgender. Ms. Stone testified they may have been biased towards her and in turn used the new face mask policy to preclude Ms. Stone from shopping at NNF. Ms. Stone testified NNF is the only store where she has

¹⁴ Later testimony during this hearing reveals that Ms. Arnold is NNF’s Human Resources Manager.

¹⁵ Later testimony during this hearing reveals that Ms. Chavez is NNF’s General Manager.

problems with not wearing a face mask.

On cross-examination by Ms. DeLuca, Ms. Stone testified she has shopped at NNF for many years. Ms. Stone testified she tried to shop at NNF on July 22, 2020 and Ms. Duggan offered to shop for Ms. Stone but Ms. Stone declined the offer. Ms. Stone testified that on July 22, 2020, Ms. Duggan informed her of the online shopping system which Ms. Stone looked into and ultimately chose not to use.

Ms. Stone stated she looked into the online shopping system after she left NNF on July 22, 2020 and Ms. Stone found it difficult to use because she had to input descriptions of the desired products. Ms. Stone testified she could type in a product name, but she does not always know the name of products and she often recognizes a product by its packaging. Ms. Stone said she tried the online option again a few days later and received a message that it was closed. Ms. Stone said the online option is only available during the day and is not accessible after certain hours. Ms. Stone said the website does not indicate that orders can be placed and then picked up later in the day. Ms. Stone said she first learned that was an option in December 2020.

Ms. Stone testified that after July 22, 2020 she spoke with Ms. Chavez and they discussed what occurred. Ms. Stone testified she informed Ms. Chavez that Ms. Duggan had offered to shop for her on that day, but Ms. Stone was not made aware it was an option beyond July 22, 2020. Ms. Stone testified she informed Ms. Chavez she declined Ms. Duggan's offer because Ms. Stone did not want Ms. Duggan to pay for her.

Ms. Stone testified she chose not to return to NNF, use NNF's online shopping system, or have someone shop for her. Ms. Stone testified the statement "She provided no other alternative for a way to shop at the store"¹⁶ appearing in her complaint means there was no alternative to the new face mask policy that would permit people to shop at NNF without a face mask.

¹⁶ See Ms. Stone's Complaint, Attachment 6A, ¶ 6.

Ms. Stone testified she was employed at NNF for approximately one month in June 2019. Ms. Stone testified she overheard conversations regarding her gender identity during her employment at NNF. Ms. Stone testified she did not have any conversations with Ms. Arnold outside the scope of her employment.

In response to Panel questions, Ms. Stone testified she has not had any problems at other establishments regarding face mask mandates. Ms. Stone testified most stores do not question her about not wearing a face mask and the few establishments that have questioned Ms. Stone have understood she has a disability that excuses her from wearing a face mask.

Ms. Stone testified her vegan diet is not related to her disabilities, but Ms. Stone believes her diet has a positive effect on her mental and physical condition because she eats healthy foods.

Ms. Stone testified although she was a volunteer at NNF she did not know there was an option to have staff shop for customers. Ms. Stone stated she stopped volunteering at NNF in February or March 2020 and was not privy to any policies implemented thereafter.

Ms. Stone testified the online shopping system was too difficult and she opted not to use it.

2. Witness Lauren Arnold

Ms. Arnold, duly sworn, testified she was not aware Ms. Stone is transgender until she learned that John had misgendered Ms. Stone. Ms. Arnold testified when she became aware of John's behavior she spoke with him and advised him of the appropriate pronouns to use in reference to Ms. Stone.

Ms. Arnold testified the new face mask policy was driven by Beth Chavez and Pippa Duggan. Ms. Arnold said she assisted with the protocol and training after the policy was created.

Respondents did not conduct cross-examination of Ms. Arnold.

Ms. Stone then rested her case-in-chief.

B. Respondents' Case

1. Witness Beth Chavez

Ms. Chavez, duly sworn, testified she has been the General Manager at NNF since March 5, 2020 and prior thereto she served as NNF's bookkeeper. Ms. Chavez testified NNF has fifty (50) employees and averages 3,100 to 3,200 customers per week. Ms. Chavez described NNF as a small, independent store that sells natural, organic products for various dietary needs. Ms. Chavez described the culture of NNF as relaxed and welcoming. Ms. Chavez testified that NNF's mission is to promote local vendors and producers and to serve the community by providing a variety of organic, natural foods. Respondents entered into evidence a copy of NNF's Mission Statement.¹⁷

Ms. Chavez testified that in March 2020, after the first confirmed case of COVID-19 in the State of Delaware, NNF developed an emergency response plan. Ms. Chavez testified that a day after developing the emergency response plan she learned an employee tested positive for COVID-19 and as a result NNF was closed for cleaning by a third party on March 18 – 19, 2020. Ms. Chavez testified NNF re-opened on March 20, 2020 with reduced hours and special hours for seniors and high-risk individuals.

Ms. Chavez testified sales and the number of customers dropped dramatically in April 2020. Ms. Chavez testified curbside shopping became available in mid-April 2020. Ms. Chavez testified NNF first implemented a face mask policy on April 13, 2020. At that time, all NNF staff and customers were required to wear face masks; however customers were permitted to shop without a face mask if they had a medical condition and wearing a face mask would inhibit their

¹⁷ See Respondents' Exhibit 1 (p. R00001).

health.

Ms. Chavez testified NNF implemented a new face mask policy on July 10, 2020 (“July 10 Policy”) which required everyone entering NNF to wear a face mask, no exceptions. Ms. Chavez testified this policy was implemented in response to the fears and concerns voiced by staff and customers. Ms. Chavez testified if a mask-less customer arrived at NNF the customer would be informed of the alternative shopping options – an NNF employee could shop for the customer or the customer could utilize the online shopping system. According to Ms. Chavez, these two options became available in July 2020.

Regarding the option to have an NNF employee shop for the customer, Ms. Chavez testified she created a blank form to be placed at the front of the store for customers to fill out with their shopping list. Ms. Chavez testified she informed NNF staff on July 12, 2020 of this blank form via a Microsoft Teams electronic message, which is the platform NNF uses for internal communications. Respondents admitted into evidence a copy of the electronic message generated by Ms. Chavez.¹⁸

Regarding the option to make purchases via the online ordering system, Ms. Chavez testified there is an introductory screen that contains instructions on how to use the system and then the customer has to complete a Microsoft Form. According to Ms. Chavez, the customer fills in their contact information which includes indicating if they are a member of NNF. The customer then free types into the fields the items to be purchased and there is a comment section at the end of the form. Respondents admitted into evidence screenshots of the Microsoft Form utilized for making online purchases at NNF.¹⁹

Ms. Chavez testified customers cannot use an EBT card containing SNAP benefits to

¹⁸ See Respondent’s Exhibit 2 (p. R00065)

¹⁹ See Respondent’s Exhibit 3 (pp. R00058 – R00064)

make purchases via the online system. Ms. Chavez testified if customers need to use an EBT card, they can put on a mask long enough to enter the store, walk through the vestibule, and go the first register just past the vestibule to make payment. Ms. Chavez testified an employee would then deliver the groceries to the customer outside the store. Ms. Chavez testified NNF is not required to accept SNAP benefits. Ms. Chavez testified the only businesses that are permitted to accept EBT payments for online purchases are Amazon, Aldi, Walmart, and Rite Aid. Ms. Chavez testified if NNF wants to become an authorized online EBT retailer it has to apply to the State of Delaware for authorization.

Ms. Chavez testified the July 10 Policy was initiated by conversations among NNF supervisory staff, then Ms. Duggan and other managers were notified of the July 10 Policy via email, and then the policy was implemented over the course of a few weeks. Ms. Chavez testified other staff were trained on how to interact with mask-less customers and how to deal with belligerent customers. According to Ms. Chavez, NNF consulted the Department of Health and the Governor's Office prior to implementing the July 10 Policy, but neither office could offer advice on the subject. NNF was referred to and consulted with the Attorney General's Office, which also was unable to render an opinion about how or if the existing policy could be changed. According to Ms. Chavez, NNF decided to implement the July 10 Policy because of the fears and concerns raised by staff and customers.

Ms. Chavez testified the July 10 Policy did not change between July 10, 2020 and September 4, 2020. Respondents entered into evidence the *Twenty-Seventh Modification of the Declaration of a State Emergency for the State of Delaware Due to a Public Health Threat* ("*Twenty-Seventh Modification*") which was approved by Governor John C. Carney on September 3, 2020 and went into effect at 8:00 A.M. on September 4, 2020.²⁰ Upon reviewing

²⁰ See Respondents' Exhibit 4 (pp. R00006 – R00048)

portions of the *Twenty-Seventh Modification*, Ms. Chavez testified the July 10 Policy is consistent with the *Twenty-Seventh Modification* although the July 10 Policy was implemented earlier. Ms. Chavez testified NNF is a business responsible for indoor spaces open to the public,²¹ NNF customers are required to wear face masks,²² NNF offers accommodations like the ones specified in the *Twenty-Seventh Modification*²³ to anyone (e.g. employees, vendors, customers) who is unable or unwilling to wear a face mask, and allowing customers to shop at NNF without a face mask would endanger others.²⁴

Ms. Chavez testified staff training about the July 10 Policy included meetings, a video presentation, and answering questions posed by staff. According to Ms. Chavez, the video contained different scenarios that ranged from addressing mild situations to situations in which it appeared police assistance was necessary. Ms. Chavez testified NNF also implemented a de-escalation policy for dealing with aggressive customers. Respondents' admitted into evidence a copy of the written de-escalation policy that Ms. Chavez testified began in July 2020 although the written document is dated September 2020.²⁵ Ms. Chavez testified the staff received this information prior to September 2020 as it was incorporated in their trainings, including the video presentation. Ms. Chavez made note of Scenario 3 appearing in the de-escalation policy which pertains to communicating with customers who assert that they cannot wear face masks due to a medical condition.²⁶ Ms. Chavez testified staff are trained to explain NNF's face mask policy and offer the other shopping alternatives (i.e. online shopping system or staff can shop for the customer and then deliver the groceries).

²¹ See Respondents' Exhibit 4, p. R00025, ¶H.3.

²² See Respondents' Exhibit 4, p. R00026, ¶H.3.ii.1.

²³ See Respondents' Exhibit 4, p. R00026, ¶H.3.iv.

²⁴ Id.

²⁵ See Respondents' Exhibit 5 (p. R00054 – R00057)

²⁶ See Respondents' Exhibit 5, (p. R00056)

Ms. Chavez testified she had one passing encounter with Ms. Stone when Ms. Stone was employed at NNF. Ms. Chavez testified she spoke with Ms. Stone on the telephone in late July 2020 or early August 2020, about what occurred on July 22, 2020. Ms. Chavez testified Ms. Stone stated the following: Ms. Stone was asked to leave NNF, Ms. Stone informed Ms. Duggan she was unable to wear a face mask, and Ms. Duggan informed Ms. Stone of the online shopping and NNF staff shop for the customer options. Ms. Duggan testified during the same conversation Ms. Stone explained she could not use her EBT card to pay online and Ms. Chavez asked if Ms. Stone could put on face mask and come in quickly to pay with EBT. Ms. Chavez testified during the same conversation Ms. Stone expressed disappointment that she did not get advance notice when NNF was briefly closed in March 2020 for cleaning. Ms. Chavez testified during the same conversation Ms. Stone said she had difficulty using the online shopping form and Ms. Chavez responded many customers have used it successfully. Ms. Chavez testified since April 2020 NNF has filled more than 900 orders placed via the online shopping system. Ms. Chavez testified she told Ms. Stone the online shopping system is available Monday through Friday between 8:00 A.M. and 5:00 P.M., NNF does not have the capacity to extend that availability, and customers can call with questions including ones about what items are in stock.

Ms. Chavez testified NNF keeps a record of customer transactions that are documented in the point of sale system. Ms. Chavez testified she reviewed Ms. Stone's transactions for the period of January 2020 through July 2020. Ms. Chavez testified she prepared a summary of Ms. Stone's transactions during March 2020 through July 16, 2020 that includes the date of the transaction and the form of payment. Respondents entered into evidence the transaction summary created by Ms. Chavez.²⁷ Ms. Chavez noted Ms. Stone used three different forms of payment during that period of time: Mastercard, EBT, and Cash. Ms. Chavez testified Ms.

²⁷ See Respondents' Exhibit 6 (p. R00066)

Stone's last transaction with NNF occurred on July 16, 2020 and Ms. Stone paid with Mastercard.

Ms. Chavez testified although the July 10 Policy went into effect on July 10, 2020, it took some time to notify all staff of the new policy and some staff were reluctant to enforce the policy as it could require interacting with belligerent customers. Ms. Chavez testified a lot of staff coaching has occurred since July 2020.

Ms. Chavez testified NNF does not deny service to customers based on gender identity. Ms. Chavez testified NNF has not received any prior complaints by customers alleging they have been discriminated against based on gender identity. Ms. Chavez testified NNF welcomes everyone, as indicated in its Mission Statement. Ms. Chavez testified NNF has allowed LGBTQ and other groups to use its community room. Ms. Chavez testified Ms. Stone is part of a group that has used the community room. Ms. Chavez testified that on June 17, 2020, NNF promoted Coolhaus, a queer-led ice cream company, on its Facebook page as part of LGBTQ Awareness Month. Respondents admitted into evidence a copy of the Facebook promotion.²⁸

Ms. Chavez testified Ms. Stone was asked to leave NNF on July 22, 2020 because she was not wearing a face mask and the request was unrelated to Ms. Stone's gender identity. Ms. Chavez testified she has not had any prior conversations with Ms. Stone regarding anyone misgendering Ms. Stone, spreading misinformation about Ms. Stone, or any one misusing pronouns when referring to Ms. Stone.

Ms. Stone did not conduct cross-examination of Ms. Chavez.

In response to Panel questions, Ms. Chavez testified on a weekly basis customers come into NNF and say they cannot wear a face mask because of a medical condition. Ms. Chavez testified in these situations NNF staff offer to shop for the customer and customers have

²⁸ See Respondents' Exhibit 7 (pp. R00067 -- R00068)

responded in different ways, including the customer ultimately decides to wear a face mask, the customer leaves, the customer wants to discuss that it is their right to not wear a face mask, the customer becomes angry and/or threatening.

Ms. Chavez testified no one has been allowed to shop at NNF without a face mask since the July 10 Policy was implemented. Ms. Chavez testified there have not been any other complaints about the July 10 Policy as it relates to difficulty of wearing a face mask because of one's medical condition.

2. Witness Pippa Duggan

Ms. Duggan, duly sworn, testified she has been employed at NNF since June 2019 and since mid-April 2020 she has served as the Assistant Manager. Ms. Duggan testified she is familiar with the July 10 Policy and her responsibilities include ensuring the policy is upheld by employees and customers. Ms. Duggan testified she approaches mask-less customers and informs them of the face mask requirement. Ms. Duggan testified if customers contend they have a medical condition and cannot wear a face mask, she offers alternative means of shopping (i.e. online shopping and a staff member will shop for you). Ms. Duggan testified if customers insist on shopping without a face mask or reject the alternative means they are asked to leave the store.

Ms. Duggan testified for a long period of time prior to implementation of the July 10 Policy several employees and customers expressed concern that they felt unsafe in instances where customers were permitted to shop mask-less at NNF. Ms. Duggan testified some customers indicated they would not return to NNF because NNF permitted shopping by mask-less customers.

Ms. Duggan testified prior to July 10, 2020 she was aware Ms. Stone shopped at NNF on a weekly basis. Ms. Duggan testified when face masks were first mandated, she spoke with Ms. Stone about wearing a face mask and Ms. Stone stated she has a medical condition that excepts

her from wearing a face mask. Ms. Duggan said she then permitted Ms. Stone to shop mask-less.

Ms. Duggan testified after July 10, 2020 she first saw Ms. Stone at NNF on July 22, 2020 and Ms. Stone was not wearing a face mask. Ms. Duggan testified she informed Ms. Stone of the July 10 Policy and offered Ms. Stone a face mask but Ms. Stone indicated she has a medical condition that excepts her from wearing a face mask. Ms. Duggan testified she informed Ms. Stone there are no exceptions to the July 10 Policy and Ms. Stone stated she shopped without a face mask at NNF since the July 10 Policy was implemented yet no one had informed her of the July 10 Policy. Ms. Duggan testified she informed Ms. Stone she would speak with the employees about that issue and reiterated that Ms. Stone was required to wear a face mask. Ms. Duggan testified she explained to Ms. Stone the reason for the July 10 Policy and informed Ms. Stone of the online shopping system. Ms. Duggan testified Ms. Stone rejected that option after Ms. Duggan informed Ms. Stone there are no pictures of the products available online and Ms. Stone could not use her EBT card to pay online but Ms. Stone could use her EBT card when she came to pick up her items. Ms. Duggan testified she also informed Ms. Stone of the option to have a staff member shop for her and Ms. Stone also declined that option. Ms. Duggan testified she then asked Ms. Stone to leave the store and informed Ms. Stone the police would be contacted if she refused. Ms. Duggan testified Ms. Stone left the store.

Ms. Duggan testified she has not had any conversations with Ms. Stone about her gender identity or which pronouns to use in reference to Ms. Stone. Ms. Duggan testified she has never intentionally misgendered Ms. Stone. Ms. Duggan testified she has never spread any information about Ms. Stone. Ms. Duggan testified her request that Ms. Stone leave NNF on July 22, 2020 was unrelated to Ms. Stone's gender identity. Ms. Duggan testified she has no knowledge of Ms. Stone's medical condition.

On Cross Examination, Ms. Duggan testified she was aware of the medical condition

exception when she spoke with Ms. Stone prior to implementation of the July 10 Policy about wearing a face mask. Ms. Duggan testified during that conversation Ms. Duggan asked Ms. Stone if she has asthma and when Ms. Stone refused to answer the question Ms. Duggan did not further pursue the issue.

3. Witness Nicolette Hilderbrand

Ms. Hilderbrand, duly sworn, testified she began working at NNF's Farmer's Market in May 2019 but has served as a cashier at NNF since January 2020. Ms. Hilderbrand testified she has seen Ms. Stone shopping at NNF between Winter 2020 and Spring 2020. Ms. Hilderbrand testified she is familiar with NNF's July 10 Policy. Ms. Hilderbrand testified prior to the July 10 Policy she had a conversation with Ms. Stone as Ms. Hilderbrand was checking out Ms. Stone's items. Ms. Hilderbrand testified during that conversation Ms. Stone stated having to wear a face mask is ridiculous and no one should have to wear one as it is dumb and does not work. Ms. Hilderbrand testified during that conversation Ms. Stone also stated if she is asked to wear a face mask she will say she has a medical disability and Ms. Hilderbrand should do the same.

Ms. Hilderbrand testified she has not had any conversations with Ms. Stone about her gender identity. Ms. Hilderbrand testified she has not misgendered Ms. Stone and she has not asked Ms. Stone what pronouns should be used to refer to Ms. Stone.

On Cross Examination, Ms. Stone did not ask Ms. Hilderbrand specific questions but Ms. Stone stated she does not recognize Ms. Hilderbrand whose testimony indicates Ms. Hilderbrand would have checked out Ms. Stone twenty times during the period of January 2020 through Spring 2020 since Ms. Stone shopped at NNF on a weekly basis.

Respondents' then rested their case-in-chief.

C. Complainant's Rebuttal

1. Complainant Elle Stone

Ms. Stone, still under oath, testified that on July 22, 2020 she was not made aware of the ongoing option to have a staff member shop for customers nor was she made aware of the blank form placed at the front of the store for customers to complete. Ms. Stone testified on July 22, 2020 she was given the option to have her shopping performed just for that day as well as the option to use the online ordering system.

Ms. Stone noted the *Twenty-Seventh Modification* was not in effect on July 22, 2020 as it became effective on September 4, 2020.

Ms. Stone testified NNF's July 10 Policy had nothing to do with health and safety because Ms. Stone shopped when no one was present in the store, she was not sick, she posed no health risk, she had no symptoms, she was not contagious, and she could not cause anyone to become sick. Ms. Stone testified NNF's actions do not correlate with their health and safety reasoning. Ms. Stone stated the July 10 Policy was not about health and safety because Ms. Duggan stood in close proximity to Ms. Stone during their lengthy conversation on July 22, 2020. Ms. Stone said Ms. Duggan indicated that face masks help protect her and staff. In response, Ms. Stone inquired why people wearing face masks would be worried about well people if the mask-wearers are protected. Ms. Stone testified NNF is not concerned about staff and is not following basic protocols because NNF has not properly trained staff about face masks (i.e. fit, use, disposal, and air circulation). Ms. Stone testified Respondents did not care about her health and safety when they insisted she wear a face mask which could lead to a lack of oxygen.

Ms. Stone testified NNF's Facebook promotion was done on behalf of Coolhaus itself and not the individuals who own Coolhaus.

Ms. Stone testified NNF employees intentionally misgendered her.

Ms. Stone testified during her conversation with Ms. Duggan on July 22, 2020 there was no mention of police. Ms. Stone testified the conversation was polite and was not aggressive.

Ms. Stone testified she asked Ms. Duggan if she could finish shopping and Ms. Duggan stated the cashiers will not check out her items.

Ms. Stone testified she does not recall Ms. Hilderbrand and she would not advise anyone to say they have a medical condition to avoid having to wear a face mask as it is not part of her agenda to lead people like that. Ms. Stone testified she may have said forcing employees to wear a face mask is a bit ridiculous. Ms. Stone testified her mental and physical disabilities make it difficult to breath wearing a face mask and her decision not to wear one was not due to her views about wearing face masks.

D. Complainant's Closing Arguments

In closing, Ms. Stone asked the Panel to find discrimination. Ms. Stone argued Respondents did not take her health into consideration when she was denied access and was offered the online shopping option. Ms. Stone argued NNF does not have a duty to protect the public and its actions are discriminatory against Ms. Stone because of Ms. Stone's mental disability, physical disability, and gender identity.

E. Respondents' Closing Arguments

In closing, Ms. DeLuca argued the July 10 Policy is consistent with the law. Ms. DeLuca argued NNF was following the law and although the Commission's powers derive from statutes that do not grant the Commission authority to enforce the Governor's Executive Orders, the Executive Orders are informative about what constitutes reasonable accommodations as required by the DEAL.

Ms. DeLuca argued Ms. Stone has not established a prima facie case of discrimination which requires proof of membership in a protected class, denial of access to public accommodations, and proof that non-members of the purported protective class(es) are treated favorably.

Regarding membership in a protected class, Ms. DeLuca argued source of income is not a protected class. Ms. DeLuca argued Ms. Stone's Psychological Evaluation, dated 2013, and her Rheumatology Center of DE, LLC medical record, dated 2016, say nothing about wearing a face mask or Ms. Stone's inability to breath when wearing a face mask. Ms. DeLuca argued there is no evidence in support of Ms. Stone's testimony that Ms. Stone has a disability which would be hindered by wearing a face mask. Ms. Stone argued the presence of a medical condition is not enough to prove Ms. Stone is a member of a class protected by the DEAL as not every medical condition is a disability. Ms. DeLuca argued Ms. Stone's complaints about having to wear face masks should be considered when assessing Ms. Stone's credibility.

Regarding denial of access to public accommodations, Ms. DeLuca argued Ms. Stone was not denied access as she had other options for shopping at NNF. Ms. DeLuca argued Ms. Stone could have shopped online or had NNF staff shop for her, but Ms. Stone declined to utilized these options which are reasonable accommodations. Ms. DeLuca argued these accommodations are in-line with the Governor's Executive Order. Ms. DeLuca cited *Berardelli v. Allied Services Institution of Rehabilitation Medicine*²⁹ in support of Respondents' argument that Ms. Stone may not insist on a certain accommodation if another reasonable accommodation was offered and Ms. Stone does not get to pick another accommodation because she finds the one offered to be inconvenient. Ms. DeLuca argued the online shopping option was available and Ms. Stone was able to access it. Ms. DeLuca argued there is no evidence Ms. Stone was denied meaningful access to the online shopping system simply because Ms. Stone was not permitted to pay with an EBT card as there are other acceptable forms of payment.

Regarding proof that non-members of Ms. Stone's purported protective class(es) are treated favorably, Ms. DeLuca argued there is no evidence of this. Ms. DeLuca argued the July

²⁹ 900 F.3d 104 (3d Cir. 2018)

10 Policy applies to everyone regardless if one wears a face mask, refuses to wear a face mask, or cannot wear a face mask.

Ms. DeLuca argued even if Ms. Stone has established a prima facie case, Respondents' have shown a legitimate, non-discriminatory reason for implementing the July 10 Policy - NNF implemented the policy to protect the safety of its staff and customers.

Ms. DeLuca argued Ms. Stone's complaint that she was denied accommodations because of her gender identity is vague and is not supported by the evidence. Ms. DeLuca argued this complaint is based on purported NNF employee behaviors but the witnesses who testified during the hearing said they never spoke with Ms. Stone about her gender identity. Ms. DeLuca argued Ms. Stone's gender identity is unrelated to why Ms. Stone was asked to leave NNF on July 22, 2020. Ms. DeLuca argued Ms. Stone was asked to leave because she refused to wear a face mask.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ms. Stone alleges Respondents violated the DEAL and denied her access to public accommodation because of her physical disability, mental disability, and gender identity. Section 4504(a)(1) of the 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 the DEAL are to be "liberally construed" to safeguard the rights set forth therein.³⁰ "The ultimate purpose [of the DEAL] is to eliminate the inconvenience,

³⁰ 6 Del. C. §4501.

unfairness, and humiliation of...discrimination.”³¹

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*.^{32,33} 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 of persuading by a preponderance of the evidence that the respondent’s proffered reason was a pretext for discrimination.³⁴

Here, to meet the initial burden of going forward and establishing a *prima facie* case of discrimination, Ms. Stone must show: (a) that she is a member of a protected class; (b) that she was denied access to public accommodation; and (c) that non-members of the protected class were treated more favorably. Further, because Equal Accommodations hearings before the SHRC are subject to the provisions of Delaware’s Administrative Procedures Act (APA),³⁵ “the burden of proof shall always be upon the applicant or proponent.”³⁶

The first question for the Panel to decide is whether Ms. Stone is a member of a protected class. The Panel finds Ms. Stone is a member of two protected classes: disability (mental and

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

³² 411 U.S. 792 (1973).

³³ See, e.g., *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 the DEAL).

³⁴ *Salty Sam’s Pier 13 v. Washam*, 2000 WL 1211227, at *2 (Del. Super. Aug. 3, 2000) (citations omitted).

³⁵ 29 Del. C. Ch. 101.

³⁶ 29 Del. C. § 10125(c).

physical) and gender identity. According to the DEAL, “[d]isability’ means a physical or mental impairment which substantially limits a person’s major life activities, or being regarded as having such an impairment....”³⁷ The Panel finds Ms. Stone’s testimony about her diagnoses and resulting disabilities to be credible evidence. Additionally, Complainant’s Exhibits 2 and 3 support Ms. Stone’s testimony.

According to the DEAL, “[g]ender identity’ means a gender-related identity, appearance, expression or behavior of a person, regardless of the person’s assigned sex at birth. Gender identity may be demonstrated by consistent and uniform assertion of the gender identity or any other evidence that the gender identity is sincerely held as part of a person’s core identity; provided, however, that gender identity shall not be asserted for any improper purpose.”³⁸ This Panel finds Ms. Stone has presented sufficient evidence that she is a member of the protected class gender identity. In support of this conclusion, the Panel relies upon the following: Ms. Stone’s Psychological Evaluation³⁹ which indicates she had sex reassignment surgery in 2013, Ms. Stone’s testimony about never presenting as a male when she was a customer at NNF, Ms. Stone’s testimony about three NNF employees’ behaviors and how it affected her, and Ms. Stone’s testimony that Ms. Arnold as well as other NNF staff knew Ms. Stone is transgender.

The next question for the Panel to decide is whether Ms. Stone was denied access to public accommodation. “‘Place of public accommodation’ means any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public....”⁴⁰ As a grocery store that is open to the general public, NNF is clearly a place of public accommodation. It is also clear Ms. Stone was not denied access to public accommodation on

³⁷ 6 Del. C. § 4502(7).

³⁸ 6 Del. C. § 4502(10).

³⁹ See Complainant’s Exhibit 2.

⁴⁰ 6 Del. C. § 4502(14).

July 22, 2020, as alleged in her complaint. Ms. Stone was a regular customer at NNF and shopped there on a weekly basis for many years. On July 22, 2020, Ms. Stone attempted to shop at NNF and was instructed she needed to wear a face mask. When Ms. Stone stated she could not wear a face mask, she was informed of the online shopping system and the option to have NNF staff shop for her. Ms. Stone left NNF after declining the option to have NNF staff shop for her. Later, Ms. Stone declined the online shopping option because it was difficult to use and she could not pay with her EBT card. This Panel finds that Ms. Stone made a conscious decision to not utilize the available shopping options (i.e. shop at NNF while wearing a face mask, shop at NNF via the online shopping system, or have NNF staff shop for her) and that she was never denied the opportunity to shop at NNF.

The fact that NNF's July 10 Policy and the options available for shopping at NNF are consistent with the *Twenty-Seventh Modification* is informative, persuasive, and gives credence to NNF's policies and procedures, notwithstanding that the *Twenty-Seventh Modification* went into effect almost two months later. Although the *Thirteenth Modification* provided a medical exception to the requirement that all grocery store customers must wear a face mask, the *Thirteenth Modification* simply states businesses cannot inquire about the customer's particular medical condition and does not address scenarios like the one at issue here.

Given that Ms. Stone has not proven she was denied public accommodation, she has not established a prima facie case of discrimination and she cannot prevail on her complaint. However, the Panel will briefly address the remaining element required to establish a prima facie case as well as the remaining prongs of the *McDonnell Douglas* three-part analysis.

Ms. Stone did not present any evidence that non-members of the protected class were treated more favorably. However, Respondents presented uncontroverted evidence that effective July 10, 2020 everyone entering NNF, for whatever purpose, is required to wear a face mask.

Respondents also presented uncontroverted evidence that if customers attempt to shop at NNF sans face mask they are asked to put on a mask and if they refuse they are informed of the two other options for shopping at NNF. Therefore, Ms. Stone did not meet her burden of proof for the third element of establishing a prima facie case for discrimination and her complaint also fails on that basis.

Assuming, hypothetically, that Ms. Stone had established a prima facie case, the second prong of the *McDonnell Douglas* three-part analysis requires Respondents to produce evidence of a legitimate, non-discriminatory reason for denying Ms. Stone access. It should be noted that Respondents' burden is one of production, not persuasion. Respondents only need to produce evidence of a legitimate, nondiscriminatory reason and are not required to persuade the Panel that their actions were lawful.⁴¹ The Panel finds that Respondents satisfied their burden of production by presenting testimony that the July 10 Policy was implemented as a result of the concerns raised by staff and customers – they were concerned about their safety because individuals were permitted to shop mask-less at NNF.

Continuing this hypothetical analysis, if Ms. Stone had established a prima facie case (which she did not) and given that the Panel finds that the Respondents satisfied their burden of production, the third prong of the *McDonnell Douglas* three-part analysis requires Ms. Stone to prove by a preponderance of the evidence that Respondents' purported legitimate, nondiscriminatory reason is just a pre-text for discrimination. The law requires Ms. Stone to "...offer specific and significantly probative evidence that the [Respondents'] alleged purpose is a pretext for discrimination."⁴² "[Ms. Stone's] subjective...beliefs, without more, will not raise a genuine issue of material fact as to whether the [Respondents'] proffered non-discriminatory

⁴¹ See *Boggerty v. Stewart*, 14 A.3d 542 (Del. Supr. Ct. 2011).

⁴² *Id.* at 554.

reason for the challenged conduct is pretextual.”⁴³ Ms. Stone did not meet this burden. During her rebuttal testimony, Ms. Stone said NNF’s July 10 Policy had nothing to do with health and safety. However, Ms. Stone failed to produce specific and significantly probative evidence supporting this assertion. Ms. Stone simply provided her subjective beliefs. This is insufficient to cause the Panel to conclude Respondents violated the DEAL.

CONCLUSION

After careful consideration of the evidence presented, the Panel, by unanimous vote, concludes that Ms. Stone has failed to establish a prima facie case of discrimination and therefore failed to prove that Respondents violated the DEAL.

Additionally, Ms. Stone failed to satisfy the third prong of the *McDonnell Douglas* three-part analysis which precludes her from prevailing here.

ORDER

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


IT IS SO ORDERED this _____ day of _____, 2021.


Gail Tarlecki (Mar 9, 2021 12:15 EST)

Gail Tarlecki, *Commissioner and Panel Chair*


Nancy A. Maihoff (Mar 9, 2021 13:31 EST)

Nancy Maihoff, *Commissioner and Panel Member*


Marty Rendon (Mar 9, 2021 13:35 EST)

Marty Rendon, *Commissioner and Panel Member*

⁴³ Id.

