



STATE OF DELAWARE  
DEPARTMENT OF STATE  
DIVISION OF HUMAN RELATIONS

"PROMOTING AND ENFORCING LAWS AGAINST DISCRIMINATION"

OFFICE OF THE  
DIRECTOR

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WILMINGTON, DELAWARE 19801  
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November 20, 2018

Mr. Fred Tandoh  
228 Golden Plover  
Smyrna, DE 19977

RE: **Fred Tandoh vs BJ Liquor Store, et al**  
**N-EA-1656-17**

Dear Mr. Fred Tandoh:

Enclosed is the Decision and Order of the Human Relations Commission concerning your case. Also enclosed is a copy of the Equal Accommodations Regulations. If you do not agree with the decision and want to take further action, you have two choices:

1. You can ask the Commission to reconsider the decision. If you want the Commission to reconsider if it made the right decision, you must send your written request to the Commission within five (5) business days of when you received this letter. You can use the enclosed form to file for reconsideration. Please be sure to follow all of the directions on the form.

**OR**

2. You can file an appeal of the decision with the Superior Court of the State of Delaware in the county where the complaint was filed. If you want to file an appeal, you must do so in writing within thirty (30) days of the day this letter and decision were mailed to you. Information about your appeal rights is enclosed. More information is available at the Superior Court website:

<http://courts.delaware.gov/Superior/index.stm>

If you have questions, please call the Division of Human Relations at **1-877-54-HUMAN**.

Sincerely,

  
Vincent A. Petroff, Supervisor  
Division of Human Relations

VAP:ICH:amf  
Encs: Decision and Order  
Equal Accommodations Regulations

Certified Mail: 7003 2260 0005 4517 3603

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

FRED TANDOH,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. NC-EA-1656-17
	)	
	)	
BJ'S WHOLESALE CLUB, INC. <sup>1</sup>	)	
	)	
Respondent.	)	

***PANEL DECISION AND ORDER***

Pursuant to due notice of the time and place of the meeting served on all parties in interest, the above stated case came before a panel of the Delaware State Human Relations Commission on Friday, April 20, 2018 in the Carvel State Building, 10<sup>th</sup> Floor Conference Room, New Castle County, Delaware, to determine whether a violation of the Delaware State Equal Accommodations Law, 6 *Del. C.* Ch. 45, had occurred.

PRESENT:

Calvin Christopher, Commissioner and Panel Chair

Robert Watson, Jr., Commissioner

Chok-Fun Chui, Commissioner

Deputy Attorney General Carla A.K. Jarosz, Counsel for the Commission Panel

APPEARANCES:

Fred Tandoh, *pro se*

Shane Goodrich, Esq.,<sup>2</sup> Attorney for the Respondent

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<sup>1</sup> Respondent BJ's Wholesale Club, Inc., was incorrectly identified on the Complaint as "BJ's Liquor Store."

<sup>2</sup> Admitted *pro hac vice*.

Wayne Simone, witness for the Respondent

Mary Salley, witness for the Respondent

A meeting of a panel ("Panel") of the Delaware State Human Relations Commission convened on Friday, April 20, 2018 in order to determine whether a violation of Delaware's Equal Accommodation Law, 6 *Del. C.* § 4504, occurred. Specifically, Fred Tandoh, who is black, alleges that he was withheld access to a public accommodation furnished by the Respondent on the basis of his race..

### **Summary of the Complaint**

The Complainant, Fred Tandoh (hereinafter, "Complainant" or "Mr. Tandoh"), brings a Complaint alleging that he was refused, withheld or denied accommodations, facilities, advantages, or privileges of a place of public accommodation because of his race.

The Complaint alleges that on April 5, 2017 he was denied service in Respondent BJ's Wholesale Club, Inc.'s (hereafter "Respondent" or "BJ's") liquor store by their employee, Mary Salley, and that this denial occurred under circumstances suggestive that the motive was due to Complainant's race. This Complaint was read into the record and Mr. Tandoh acknowledged that it was the Complaint he had filed.

### **Summary of the Evidence**

#### **A. Complainant's Case**

##### **a. Fred Tandoh**

Mr. Tandoh was sworn in and testified. According to Mr. Tandoh, on April 5, 2017, he went to BJ's to purchase whiskey. BJ's employee, Ms. Salley, was supposed to assist him, but, instead, she made Mr. Tandoh feel very awkward. Mr. Tandoh inquired about the types of whiskey for sale and their prices. He asked Ms. Salley for a bottle of Johnny Walker Gold. The price of the bottle was \$80. Mr. Tandoh wanted to read what was on the label and Ms. Salley said "No." She would not let him read the bottle unless he paid for it first. In response, Mr. Tandoh asked Ms.

Salley, “Does she think, if she gives it to me, I’m going to run away?” Mr. Tandoh testified that Ms. Salley responded: “Yes, it has happened before.” Mr. Tandoh paid for the bottle because he wanted to prove that he could afford it and was not there to steal. Mr. Tandoh was embarrassed and upset, so he reported the incident to Ms. Salley’s supervisor, who did nothing. Mr. Tandoh also called BJ’s customer service number to complain. Mr. Tandoh found out today that when he asked her to call her supervisor, she called a Loss Prevention Associate. He argued that doing so was evidence that Ms. Salley was concerned about him stealing.

On cross-examination, Mr. Tandoh admitted that he purchased the bottle of alcohol he sought to purchase and that no employee of BJ’s made any direct comments regarding his race. Although, Mr. Tandoh testified that when Ms. Salley stated “it has happened before,” Mr. Tandoh believed the statement was racially motivated.

Under questioning from the Panel, Mr. Tandoh testified that he was a BJ’s member and had provided some background information in order to get the membership. When asked why he thought Ms. Salley’s conduct was due to his race, Mr. Tandoh responded that when he walked to the counter to inquire about the liquor, Ms. Salley was not forthcoming; she did not take the bottles out for him to see them; she did not say anything verbally; but her attitude was “this is not your area.” When Ms. Salley finally took out the bottle for Mr. Tandoh, Mr. Tandoh felt awkward and was upset that she would not let him read the alcohol content and other label information.

Mr. Tandoh then rested his case.

**B. Respondent’s Case.**

**a. Wayne Simone**

For BJ’s, Wayne Simone was sworn and testified in response to questions from BJ’s attorney, Shane Goodrich, Esq. Mr. Simone has been employed by BJ’s for twenty years. He has

worked for the last two years as the General Store manager for Club Number 15. In that position, he oversees the entire operation for Club Number 15: the liquor store, gas and the entire sales area. The liquor store is attached to the main building but has its own entrance. The display case is located behind the cash register and near a door. It is usually locked. The liquor in the display case ranges in price from \$79 to \$3,000. The front door loss prevention employee was tasked with assisting customers with the display case. That employee reports directly to Shirley Pennington in the Loss Prevention and Safety Department.

Mr. Simone testified that there is a specific policy for the purchase of liquor in display case. The bottles are on display, but the actual products to be sold are in boxes behind the case. Employees need to remove the box from the locked case for the customer.

On the day at issue, Mr. Simone explained that there was only one cashier and they were located on the other side of the store; fifteen to twenty feet away from display case. The cashier would not have been able to leave the register, unlock the display case and retrieve a bottle because they were waiting on other customers.

Per BJ's policy, if a customer wanted to hold a bottle of alcohol shown in the display case, a BJ's loss prevention staff member is to allow the customer to hold the bottle. Mr. Simone testified that BJ's liquor display case policies have been in place for twenty years and are for customer convenience not due to past thefts. Mr. Simone said that there have not been any thefts from the display case.

Mr. Simone was aware of the interaction between Mr. Tandoh and Ms. Salley. He was notified of the incident by Ms. Salley's director supervisor, Shirley Pennington. Mr. Simone explained that Ms. Pennington informed him that there was an incident with a customer in the liquor store. Mr. Simone said that Ms. Pennington did not give him any more details. As a result,

Mr. Simone spoke with Ms. Salley. According to Mr. Simone, Ms. Salley followed all BJ's policies.

Mr. Simone was not aware of any other racial complaint during his tenure. He attempted to resolve Mr. Tandoh's complaint by telephoning him twice and leaving messages. Mr. Tandoh did not respond to Mr. Simone's telephone messages.

On cross-examination, Mr. Simone testified that when he left a message for Mr. Tandoh, Mr. Simone said "I understand you had an incident, here's my number and we'll try and resolve it." Mr. Simone does not train employees directly, but he does oversee the training. Employee training is typically done online. In response to Mr. Tandoh's question about whether Mr. Simone would pay \$80 for an item without seeing it first,<sup>3</sup> Mr. Simone responded that it would depend on the item. Mr. Simone reiterated that it is BJ's policy to allow customers to see a bottle shown in the display case if a customer requests to see it. Mr. Simone explained that BJ's policy of having a loss prevention staff member transport the bottle of display case alcohol to the cash register was meant to be a convenience only.

In response to the Panel's questions, Mr. Simone testified that the prices on the items in the display case are clearly labeled. Mr. Simone said that Ms. Pennington informed him about the incident about one day after it occurred. She did not tell him right away because he was not on duty. Mr. Simone explained that BJ's sells to both members and non-members and there is not a more expedited procedure for members. In order to become a member, BJ's takes basic customer information like address and email, not financial information. Members can pay for their merchandise with cash, credit card, and checks.

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<sup>3</sup> Mr. Goodrich objected to the question as irrelevant, the panel overruled the objection and allowed Mr. Simone to answer.

BJ's does not have sales representatives on the floor. They are only behind the customer service desk. Employees on the floor are called loss prevention personnel and are responsible for safety.

The Panel next questioned Mr. Tandoh about what he did to apply for BJ's membership and credit card. He responded that he did need to give some background information and BJ's checked his credit score before giving him their credit card. He did not use his credit card on the date at issue though. He has gone in to BJ's liquor store roughly once or twice a month during his ten year membership, although he does not remember ever seeing Ms. Salley before. There were no other customers buying liquor from the display case at the same time. The last time Mr. Tandoh purchased high priced liquor was years ago and at that time the BJ's employee handed him the bottle before he paid for it and he was able to read it.

Following Mr. Tandoh's cross examination, the Panel returned to question Mr. Simone. Mr. Simone testified that it was normal procedure to keep high priced liquor in a glass case. Mr. Simone said that it was not accurate that BJ's will not let customers hold bottles. According to BJ's policies, if a customer asks to hold or read a bottle, they are allowed to do so.

**b. Mary Salley**

Also as part of BJ's case, Mary Salley was sworn and testified. Ms. Salley said that she has been employed by BJ's for thirty years. Her current position is in Asset Protection/Loss Prevention. She has been in that position for twenty years. Ms. Salley's duties in that position include: working in both the liquor and main store, checking receipts going out for scanning errors, and safety.



Ms. Salley testified that she was working on April 5, 2017 and recalled her interaction with Mr. Tandoh. Three days after the incident, Ms. Salley wrote a statement explaining what happened.<sup>4</sup> Upon reviewing the written statement, Ms. Salley said that it is an accurate account of what she recalls occurred.

Upon questioning by BJ's counsel, Ms. Salley explained that when Mr. Tandoh entered the store, Ms. Salley was not standing next to the case, but she noticed that Mr. Tandoh was looking at whiskies so she asked if she could help him. Mr. Tandoh said he was interested in Johnny Walker Gold. Ms. Salley told him the Johnny Walker Gold was in the display case. Mr. Tandoh was interested in a 750 ml. bottle. Ms. Salley explained the price of the Johnny Walker Gold, Platinum, and Blue. She showed him the bottle of Johnny Walker Gold. Mr. Tandoh said, "Yes, I want it." So, Ms. Salley put the display bottle back in the case and pulled out the box. She told Mr. Tandoh that if he got in line she would bring the box over to the register. In response, Mr. Tandoh said, "What do you think I'm going to run out?" Ms. Salley replied, "[N]o sir, it is just policy, it has nothing to do with you."

Ms. Salley denied that Mr. Tandoh asked her to hold the bottle. Further, Ms. Salley denied referencing past thefts in her communications with Mr. Tandoh and said that she was unaware of any past thefts from the liquor display case. Ms. Salley testified that if Mr. Tandoh had asked to hold the bottle, she would have given it to him because she has done so in the past. According to Ms. Salley, BJ's policy is that when a customer decides to purchase an item from the display case, an employee brings the item over to the cashier for purchase. When Ms. Salley began to walk over to the cashier, she told Mr. Tandoh that doing so had nothing to do with him and was simply store policy. Ms. Salley said that Mr. Tandoh purchased the bottle of Johnny Walker Gold.

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<sup>4</sup> Entered into the evidence as Respondent's Exhibit 1.

After Ms. Salley brought the bottle of whiskey over to the cashier, she went back to the display case. Mr. Tandoh appeared agitated when talking to the cashier so Ms. Salley called her manager. Ms. Salley's manager is Shirley Pennington. Ms. Pennington is the Manager of Loss Prevention.

Ms. Salley spoke with Mr. Simone about a day later. She has never had any other complaints from customers for racial discrimination.

On cross-examination, Ms. Salley testified that if Mr. Tandoh had asked to read the label or even if he had reached for the bottle, she would not have stopped him or said no. She took the bottle to the cashier because it is store policy to do that. Ms. Salley said that BJ's policy states that anything locked in the cabinet is walked over to the cashier. That includes Johnny Walker Gold.

Ms. Salley explained that when she showed Mr. Tandoh the bottle, she had it in her hand and he looked at it. Then, Mr. Tandoh said, "I want it." Ms. Salley turned around, put back the display bottle and got the product box. Mr. Tandoh said, "[W]hat do you think I'm going to run out the door?" Ms. Salley said, "[N]o sir, this is has nothing to do with you, this is our policy." Mr. Tandoh was upset so Ms. Salley called for a manager.

As part of Ms. Salley's job training as a BJ's Loss Prevention Associate, she testified that she was not told that when people come to purchase expensive bottles they had to pay for the bottle before reading it. Ms. Salley admitted that she would not pay \$80 for something before examining the product. Ms. Salley reiterated that the store's policy says that the bottle must be walked over to the cash register, but there was no store policy against holding or picking up the bottle before purchasing.

Ms. Salley did not know who the other supervisor on duty was on the date of the incident. Ms. Salley explained that when Mr. Tandoh became upset, she said that she was going to call a manager. Mr. Tandoh replied, “[Y]es you do that.”

Ms. Salley testified further in response to the Panel’s questions that Mr. Tandoh did not ask to read the label.

The Panel followed-up by asking Mr. Tandoh if he specifically asked to read the label. Mr. Tandoh responded by confirming that he did. Mr. Tandoh confirmed that his issue was that Ms. Salley did not allow him to read the label on the bottle and her attitude during the incident. Mr. Tandoh considered not buying the bottle but thought about it and was afraid if he had done that, it would have been worse.

In closing, Mr. Tandoh argued that these things happen in the daily lives of black people. He claimed that because he made a purchase the police were not called. He argued that people hide behind policies to discriminate against black people and that there should be civil penalties awarded. Mr. Tandoh explained that he went to the BJ’s store to spend his hard-earned money, not to beg. Mr. Tandoh’s original aim in pursuing this matter was for Ms. Salley to undergo proper training, but someone who has been working that job for twenty years, like her, should know not to treat a customer that way.

In closing, Mr. Goodrich argued on behalf of BJ’s that this is not a case of race discrimination. Mr. Simone described the store policy and Ms. Salley followed the policy. The dispute in this case narrows down to whether Mr. Tandoh could read the bottle. Ms. Salley’s testimony and her statement, that was written shortly thereafter, both show that Mr. Tandoh did not ask to hold or read the label. Mr. Tandoh has not provided sufficient evidence that Ms. Salley

treated him differently than another class of person and because Mr. Tandoh was able to purchase of the liquor bottle, there were no damages.

### **Findings of Fact and Conclusions of Law**

Mr. Tandoh has alleged that BJ's violated the Delaware Equal Accommodations Law, 6 *Del. C.* § 4504(a) ("DEAL"), which 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 accommodation, facilities, advantages or privileges thereof." The provisions of DEAL are to be "liberally construed" to safeguard the rights set forth therein. 6 *Del. C.* §4501. "The ultimate purpose [of the Law] is to 'eliminate the inconvenience, unfairness, and humiliation of...discrimination.'" *Uncle Willie's Deli v. Whittington*, 1998 WL 960709 at \*4 (Del. Super. Ct. Dec. 31, 1998) (citations omitted).

In Delaware, the adjudication of claims alleging a direct or indirect refusal or denial of public accommodations based upon unlawful discrimination follows the three-part analysis established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for proving employment discrimination. *See, e.g., DP, Inc. v. Harris*, 2000 WL 1211151, at \*6 (Del. Super. Ct. July 31, 2000) ("Delaware Courts have applied the standard articulated in *McDonnell Douglas Corporation v. Green* for cases alleging unlawful discrimination.") (citations omitted); *and see Uncle Willie's* (applying the *McDonnell Douglas* analysis to a case brought under the APA).

The *McDonnell Douglas* analysis involves a three-part burden-shifting test. For a complainant to prove a denial of public accommodations claim, the procedure is as follows:

- (1) The complainant must establish a *prima facie* case of discrimination.
- (2) Once the *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 plaintiff retains the burden of persuading by a preponderance of the evidence that the defendant's proffered reason was a pretext for discrimination. *Salty Sam's Pier 13 v. Washam*, 2000 WL 1211227, at \*2 (Del. Super. Ct. Aug. 3, 2000) (citations omitted).

Under the *McDonnell Douglas* analysis, to meet his initial burden of establishing a *prima facie* case of discrimination, Mr. Tandoh must demonstrate proof that: (1) that he is a member of a protected class, (2) that he was denied access to the public accommodations, and (3) that non-members of the protected class were treated more favorably.

The Panel found that Mr. Tandoh failed to carry his burden to show all the elements of a *prima facie* case of discrimination. While it was undisputed that Mr. Tandoh, who is black, was a member of a protected class, Mr. Tandoh did not establish, through his testimony or other credible evidence, that he was denied access to a public accommodation or that non-members of the protected class were treated "more favorably" than he was.

The issues with respect to any alleged denial of public accommodation, as narrowed by the parties, is Ms. Salley's alleged conduct in (a) not allowing Mr. Tandoh to hold or further examine the bottle of Johnny Walker Gold without purchasing it first, and (b) Ms. Salley's insistence in carrying the bottle of whisky to the cash register.

In analyzing these facts, the Panel recognizes that no court has held that being denied the ability to hold a bottle of whiskey prior to purchase or the ability to carry the whiskey to the cash

register is the denial of public accommodation. The Board declines to address that question here for two reasons.

*First*, regarding whether Mr. Tandoh was denied the ability to hold the bottle of whiskey, the Board finds that the parties presented competing testimony on this issue. The Panel is empowered to resolve conflicts in testimony and issues of credibility and the Panel finds Ms. Salley's testimony to be more credible. As a result, the Panel finds that Mr. Tandoh was not denied the ability to see the bottle of whiskey or read its label because the Panel finds as a matter of fact that he did not ask to do so.

*Second*, while Mr. Tandoh, did present facts supporting a *prima facie* case that Ms. Salley denied him the ability to carry the bottle of whiskey over to the register himself, the Board need not decide whether this would constitute a "denial of services," under the standard applied by the Superior Court in *Hadfield's Seafood v. Rouser*, 2001 WL 1456795, at \*4 (Del. Super. Ct. Aug. 17, 2001), *aff'd*, *Rouser v. Hadfield's Seafood, Inc.*, 792 A.2d 189 (Del. 2002), because Mr. Tandoh has failed to meet the third prong of the *McDonnell Douglas* test. Mr. Tandoh presented no testimony or evidence that a white customer would have been treated differently in the same situation. Indeed, Mr. Tandoh testified that there were no other customers purchasing liquor from the display case at the same time. Further, although he purchased alcohol from BJ's once or twice a month for many years, Mr. Tandoh presented no evidence of white customers requesting to hold and examine the bottles in the display case and being denied or requesting to walk their bottles to the cash register and being denied.

Mr. Tandoh's claim fails because he failed to show that a "non-member" of the protected class was treated more favorably than he was. Although a complainant can also establish discrimination by showing services rendered "in such a markedly hostile manner and in a manner

which a reasonable person would find objectively unreasonable,” *Rouser v. Hadfield's Seafood, Inc.*, 792 A.2d 189 (Del. 2002) (In the Rouser case, there was evidence presented that an employee had used a racial slur against the complaining customer, calling her “white trash,” in the context of a heated argument.) Mr. Tandoh has also not made such a showing. Mr. Tandoh testified that Ms. Salley had an “attitude” and that her comments to him implied that the reason she would not let him hold the bottle was because he was a black man. This incident simply does not rise to the level of “markedly hostile” or “objectively unreasonable” treatment required to show discrimination without a comparator.

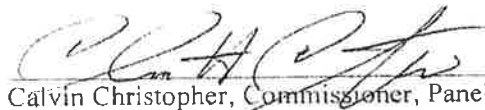
**Conclusion**

The Panel of the HRC, by unanimous vote, finds as follows: as to Respondent BJ's Wholesale Club, Inc., no violation of the DEAL was established.

**ORDER**

For the reasons stated above, the Panel of the State Human Relations Commission, by unanimous vote, finds in favor of BJ's Wholesale Club, Inc. The Complaint is hereby dismissed.

IT IS SO ORDERED this 13<sup>th</sup> day of June, 2018.

  
Calvin Christopher, Commissioner, Panel Chair

  
Robert Watson, Jr., Commissioner

  
Chok-Fun Chui, Commissioner