

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

Kenneth S. WILSON and)	
Bertha WILSON)	
)	
Complainants,)	
)	
v.)	Case No. NC-EA-1689-17
)	
BIG FISH GRILL,)	
)	
Respondent.)	

MEMORANDUM DECISION AND ORDER

HEARING PANEL:

Calvin Christopher, *Commissioner and Panel Chair*,
Rosemarie Williams, *Commissioner and Panel Member*, and
Marty Rendon, *Commissioner and Panel Member*.

Daniel C. Mulveny, Deputy Attorney General,
Counsel for the Commission and the Panel.

APPEARANCES:

Mr. Kenneth Wilson and Mrs. Bertha Wilson,
Complainants, pro se.

Brian V. DeMott, Esq., of BAIRD MANDALAS & BROCKSTEDT, LLC,
Counsel for Respondent.

INTRODUCTION

Pursuant to due notice of time and place of meeting served on all parties in interest, the above-identified Panel of the Delaware State Human Relations Commission (the “SHRC” or “Commission”) convened a hearing by videoconference¹ on December 17, 2020 in order to determine whether a violation of Delaware’s Equal Accommodation Law (the “DEAL”, Title 6, Chapter 45 of the *Delaware Code*) occurred.

Mr. Kenneth Wilson and Mrs. Bertha Wilson (collectively, the “Wilsons” or “Complainants”) brought a complaint alleging that Respondent Big Fish Grill (“Big Fish” or “Respondent”) discriminated against them on the basis of their color. Immediately after the hearing, the Panel conducted its deliberations.

SUMMARY OF THE COMPLAINT

In brief summary, the Wilsons alleged in their complaint that they were refused, withheld, or denied accommodations, facilities, advantages, or privileges of a place of public accommodation because of their color. The Wilsons are black.

Specifically, on Saturday, August 3, 2014 the Wilsons, with other family and friends, went to Big Fish restaurant at the Riverfront in Wilmington, Delaware.

The crux of the Complaint is that the Wilsons ordered hot wings with a special

¹ The hearing was conducted by 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.

request that all of the chicken pieces only be the wing “backs” and that their waitress (who was white) refused and said that Big Fish has a policy against special accommodations.² The Wilsons further allege that Big Fish’s wait staff was making special accommodations for other (white) patrons and that Mr. Wilson observed another white family being given an order of wing backs. When the Wilsons complained to the managers, the managers all said that Big Fish was unable to make the wing back special accommodation because wings are proportioned for each order. The chef, however, came out from the kitchen and identified himself as “Chef Mike” and said there was no such policy and that there were plenty of wing backs available to make a special order for the Wilsons. The managers, who were white, then offered the Wilsons a \$50 gift certificate and apologized multiple times for the misunderstanding.

PRELIMINARY MATTERS

Before the parties presented their respective cases, Big Fish moved to dismiss this case because (1) it was untimely filed,³ and (2) the Complaint failed to state a claim for relief under the DEAL. After brief arguments were made, a recess

² While not specifically explained in the Complaint, the Panel takes notice that the Wilsons’s wing order was for every piece of chicken to be the “flat” or “back” part of the wing and the order was not to include any “drumette” part of the wing. For consistency here, the Panel adopts the Complaint’s description of this order as “wing backs”.

³ Big Fish argued that the case should be dismissed because the Complaint was not filed within 90-days after the incident as required by § 4508(b) of the DEAL.

was taken and the Panel considered Big Fish's motion.

The Panel found that Big Fish previously moved on March 23, 2020 to dismiss this case on the same grounds. And the Panel further found that, pursuant to SHRC Regulation 5.1.8, the SHRC Chair had previously considered Big Fish's pre-hearing motion to dismiss and denied the motion in a detailed written decision dated July 22, 2020. This decision, however, was not delivered to the parties due to administrative error.^{4,5} The Panel agreed to adopt the SHRC Chair's prior decision.

The hearing resumed and the Panel announced its decision to deny Big Fish's motion to dismiss. The Panel explained that the first part of the motion was denied for the reasons stated in the SHRC Chair's July 22, 2020 written decision.⁶ The second part of the motion was denied because the Panel found that the Wilsons's Complaint made a cognizable claim under the DEAL.

SUMMARY OF THE EVIDENCE

Both parties made brief opening statements in support of their respective cases.

⁴ The Panel understands that the motion was made at the hearing because Big Fish was unaware of the Commission's July 22, 2020 decision to deny the motion.

⁵ The July 22, 2020 written decision denying Big Fish's motion to dismiss was sent to the parties immediately after the hearing.

⁶ At this point, Counsel for the Panel read the SHRC Chair's July 22, 2020 decision to the parties at the hearing.

A. Complainant's Case

1. Mr. Wilson

Mr. Wilson, duly sworn, testified that he and Mrs. Wilson went to Big Fish's restaurant at the Wilmington Riverfront on August 3, 2014 for happy hour. Mr. Wilson explained that there was a waitress who would often harass them and tell them they couldn't have their special wing back order. Mr. Wilson, however, would see others with the same special order.

During the August 3, 2014 incident, Big Fish's manager came over. Mr. Wilson wondered why he needed to raise his complaint with the manager to get a wing back order.

Mr. Wilson further explained to the Panel that the waitress said that they couldn't have the special wing back order anymore because it wasn't on the menu. She said it couldn't be done. This started a commotion. Mr. Wilson saw that other people were getting served what they were asking for. He didn't understand why he couldn't make his special request for wing backs while others apparently did. The chef came out because of the commotion. The chef said there was no policy prohibiting special orders; he said they could order what they wanted. The chef gave the Wilsons a gift certificate. They never used it. Instead they took it to an attorney.

Mr. Wilson said that their mistreatment was not a single incident; it had been

going on for some time. They liked Big Fish and kept going back because Big Fish had a good menu.

On cross-examination by Mr. DeMott, Mr. Wilson said that he didn't have any receipts or other documents showing that the Wilsons went to Big Fish on August 3, 2014. Mr. Wilson said that he gave the gift certificate to his lawyer and it is no longer available to him now. Mr. Wilson did not know the names of the witnesses to the events on August 3.

Prior to August 3, 2014, Mr. Wilson had made prior special requests for wing backs. Mr. Wilson explained why he prefers wing backs to drumettes and why he requested wing backs. Mr. Wilson said that the waitress told him that Big Fish's policy is not to allow special orders for wing backs. Mr. Wilson said other customers who were not black were being treated better. He did not see, however, if others were getting special wing back orders; it was busy and he was seated at the bar. Mr. Wilson said that others were being treated with respect and dignity and he and his wife were not. Mr. Wilson did not know who these others were. Nor did he have any pictures of the wing orders by others at Big Fish. Mr. Wilson explained that there was a constant pattern at Big Fish where he and his wife had to constantly get the manager to come over because of the waitress.

Mr. Wilson said that the chef was "Chef Mike". Chef Mike told Mr. Wilson that there was no policy against special orders. He said "you can get whatever you

want.” The waitress, however, told them that they couldn’t get a special wing back order because Big Fish has a policy against special orders. The chef said that the waitress was wrong.

During the incident on August 3, Mr. Wilson explained that he just wanted to be treated with respect and dignity like everyone else. If that had happened, there wouldn’t have been a problem. Mr. Wilson didn’t see anyone else having the same problem that he and his wife were experiencing.

Mr. Wilson went on to explain that he and his wife were regulars at Big Fish. They did not, however, have receipts showing that they went there.

Prior to August 3, the Wilsons had the same problems with the waitress. They did not identify the waitress at the time. Mr. Wilson said that his wife (who was present with him at the hearing) could corroborate his version of the events.

Mr. Wilson didn’t know the identities of the white patrons who were being treated better.

Mr. Wilson said that he eventually was invited to place his wing back order but he argued that he shouldn’t have had to get the manager involved. He didn’t see anyone else have to do that to get a wing back order. He admitted that he didn’t know what the other people had to do to get their order.

In response to Panel questioning, Mr. Wilson said that it was always the same waitress that waited on them. She worked in the bar area. Someone else

would serve the food they ordered. Mr. Wilson said that the August 3 incident was the breaking point for them. The problem was the waitress.

Mr. Wilson explained the events of August 3, 2014. They had gone to Big Fish for happy hour and had to wait for a bar table to open up. He didn't know if tables were open in other areas, they were in the bar area. Big Fish has a special happy hour menu. They never got the opportunity to order because of the mistreatment. Mr. Wilson saw that some customers had wing back orders and some had hot wings that were mixed backs and drumettes.

Mr. Wilson tried to order wing backs but was told that special orders aren't permitted by the waitress. Mr. Wilson didn't see this as a special order. Wings are on Big Fish's happy hour menu.

On redirect, Mr. Wilson explained that the focus of the Wilsons's complaint isn't the wings. They felt discriminated against because they had to go over too many obstacles to get what they wanted. Others in the restaurant didn't have to do that. Mr. Wilson said that they had gone to Big Fish many times; it was a wonderful restaurant and it is a disappointment that they can't go back.

2. Mrs. Wilson

Mrs. Wilson, duly sworn, testified that she did not have anything further to add to Mr. Wilson's testimony.

B. Respondent's Case

1. Mr. Michael McNutt

Mr. McNutt, duly sworn, testified in response to questions from Mr. DeMott. He is the director of catering operations at Big Fish.

On August 3, 2014, Mr. McNutt was the executive chef at Big Fish. He explained that Big Fish gets its wings from suppliers. The wings are provided to Big Fish in mixed boxes with approximately a 50/50 mix of backs and drumettes. The wings are sold by weight, not count. These are 40-pound boxes. When someone orders wings, the wings are portioned out as four backs and four drumettes. Mr. McNutt said that customers don't often make special requests for wings. If a special request is made and there is enough inventory to accommodate the request, Big Fish allows such special orders. If the inventory is low, however, Mr. McNutt said that Big Fish would probably not allow a special request.

Mr. McNutt did not recognize either Mr. or Mrs. Wilson. He did not recall the incident on August 3, 2014. He did not recall speaking to the Wilsons about the incident. He did not recall getting the wing back order. He said that he could have been working on August 3, 2014, but did not recall exactly. He did not recall the identity of the waitresses working that day. It was a long time ago.

On cross-examination by Mr. Wilson, Mr. McNutt explained that his job was to oversee the kitchen. When special requests are made, Big Fish tries to

accommodate but can't do it for everyone.

In response to Panel questioning, Mr. McNutt said that there's no policy against special orders at Big Fish. He did not recall the incident involving the Wilsons on August 3, 2014.

2. Ms. Holly Monaco

Ms. Holly Monaco, duly sworn, testified in response to questions from Mr. DeMott. She has been working at Big Fish for 21 years. She is the Vice President. She explained that Big Fish has a policy addressing discrimination. She said Big Fish tries to accommodate all of its guests. Big Fish tries to address situations and tries to fix them.

Ms. Monaco explained that she did not become aware of the Wilsons's complaint until February or March of 2020. Because the complaint was about events in 2014, Big Fish was unable to investigate. She didn't know who the relevant witnesses would be. If Big Fish knew who the relevant people were, it could have investigated.

On cross-examination by Mr. Wilson, Ms. Monaco said that Big Fish tracks complaints. Disciplinary action for staff includes being written up and termination.

Ms. Monaco said that misconduct could happen that management isn't aware of; there are 17 locations. Usually, Big Fish gets immediate feedback when there is an incident.

In response to Panel questions, Ms. Monaco said that there is a policy to handle complaints. There is also training for employees.

Closing Arguments

In closing, Mr. Wilson said that on August 3, 2014, Big Fish discriminated against him and his wife. They were treated with disrespect. Chef Mike was the person who came out to them.⁷ Both he and Mrs. Wilson remember what happened. They feel they can't be part of Big Fish anymore because of how they were treated.

Mr. Wilson asked Big Fish to revisit its discrimination policy and to take time to educate their staff so not to offend anyone else.

Mr. DeMott argued for Big Fish. He argued that the incident happened six years ago. The Wilsons have the burden of proof. He argued that Mr. Wilson admitted that he got the wing back order he wanted and that Mr. Wilson did not know the identities of the other customers who allegedly were treated better. Further, Mr. Wilson didn't produce evidence who was his waitress and Big Fish has no way to determine who she was.

⁷ The Panel notes that Mr. Wilson was identifying Mr. McNutt as the chef who intervened on August 3, 2014.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Wilsons allege that Big Fish violated the DEAL because of their color. 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.⁸ “The ultimate purpose [of the DEAL] is to eliminate the inconvenience, unfairness, and humiliation of...discrimination.”⁹

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*.^{10,11} This analysis requires the following steps:

⁸ 6 *Del. C.* § 4501.

⁹ *Uncle Willie’s Deli v. Whittington*, 1998 WL 960709 at *4 (Del. Super. Dec. 31, 1998) (citations and internal quotations omitted).

¹⁰ 411 U.S. 792 (1973).

¹¹ *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).

- (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.¹²

Here, to meet the initial burden of going forward requires a *prima facie* case of discrimination. Therefore, the Wilsons must show: (a) that they are members of a protected class; (b) that they were denied access to public accommodations; and (c) that non-members of the protected class were treated more favorably.¹³ Further, because Equal Accommodations hearings before the SHRC are subject to the provisions of Delaware's Administrative Procedures Act (APA),¹⁴ "the burden of proof shall always be upon the applicant or proponent."¹⁵

There is no dispute that the Wilsons are black and are members of a protected class under the DEAL.¹⁶ And there is no dispute that Big Fish is a place

¹² *Salty Sam's Pier 13 v. Washam*, 2000 WL 1211227, at *2 (Del. Super. Aug. 3, 2000) (citations omitted).

¹³ See *Boggerty v. Stewart*, 14 A.3d 542, 550 (Del. 2011) (citations omitted).

¹⁴ 29 Del. C. Ch. 101.

¹⁵ 29 Del. C. § 10125(c).

¹⁶ See 6 Del. C. § 4503 ("All persons within the jurisdiction of this State are entitled to the full and equal accommodations, facilities, advantages and privileges of any place of public accommodation regardless of the race, age, marital status, creed, color, sex, handicap, sexual orientation, gender identity, or national origin of such persons.").

of public accommodations subject to the DEAL.

The issue for the Panel to decide is whether the Wilsons presented sufficient evidence to conclude that they were denied access to public accommodations by Big Fish in violation of the DEAL. For the reasons discussed below, the Panel finds that the Wilsons did not meet their burden to show that Big Fish violated the DEAL.

1. Findings of Fact

The Panel finds that the Wilsons went to Big Fish on August 3, 2014 for happy hour and sat in the bar area. They were being waited on by a waitress who had waited on them in the past. The Wilsons tried to order wing backs but were told by their waitress that Big Fish did not allow a special request for wing backs. This apparently wasn't true (or at least a mistake). A commotion ensued. The chef, Mr. McNutt, came out and corrected the waitress and invited the Wilsons to order what they wanted. Mr. McNutt (or a manager) then gave the Wilsons a \$50 gift certificate presumably to remedy the situation. The Wilsons never put in their order for wing backs apparently due to their disagreement with the mistreatment by the waitress. And they never used the gift certificate despite being fans of the restaurant.

2. Discussion

To summarize the Wilsons' complaint, they had a continuing problem with a

waitress at Big Fish. And on August 3, 2014, they felt mistreated because they did not get the courteous and respectful treatment they, or any restaurant patron, expected to get from Big Fish. They saw other customers (who weren't black) being treated better. On August 3, 2014, the Wilson's reached their breaking point with their waitress when she refused to allow the Wilsons to order wing backs purportedly because Big Fish had a policy against such special requests. The waitress apparently was incorrect and the chef, Mr. McNutt, attempted to rectify the situation by inviting the Wilsons to order what they wanted and the Wilsons were given a \$50 gift certificate. Mr. Wilson argued that they should have been treated with dignity and respect. They should not have had to escalate the situation to get management involved. They should not have had to jump over so many obstacles to get the wing backs they wanted.

The DEAL prohibits a place of public accommodations, through its owners, managers, or employees, from denying “any of the accommodations, facilities, advantages, or privileges thereof”.^{17,18} In shorthand, the Panel refers to these “accommodations, facilities, advantages, or privileged” as “access”. The question here, is whether the Wilsons were denied “access” to Big Fish by its owners,

¹⁷ 6 *Del. C.* § 4504(a)(1).

¹⁸ To avoid any confusion, the prohibitions of § 4504(a)(1) of the DEAL extend to the “owner, lessee, proprietor, manager, director, supervisor, superintendent, agent, or employee.” Here, only the owner, manager, and employees are relevant to the Panel's analysis.

managers, or employees because they were black.

There is no dispute that the Wilsons were waited on. But they didn't get to submit their wing backs order because the waitress—incorrectly—said there was a Big Fish policy prohibiting such special orders. The question is whether the waitress's actions constituted a denial of access.¹⁹ Delaware law recognizes that “a denial of access may take the form of something less than an outright denial of service.”²⁰ However, there is not “a precise legal rule which articulates what does or does not constitute a denial of access.”²¹ Rather, the “question may be fact-intensive, depending upon the circumstances of a particular case.”²²

Delaware courts have recognized that poor service and hostile treatment may rise to a denial of service, however, to support a claim under the DEAL, it must also be shown that the denial must be made in a “markedly hostile” manner.^{23,24} The problem the Board sees here is that the Wilsons' have not shown sufficient

¹⁹ The Panel notes the Wilsons never actually put in their order even after the chef intervened.

²⁰ *Stewart v. Human Relations Commission*, 2010 WL 2653453, at *3 (Del. Super. July 6, 2010) (citing *Hadfield's Seafood v. Rouser*, 2001 WL 1456795, at *4 (Del. Super. Aug. 17, 2001).

²¹ *Stewart*, 2010 WL 2653453, at *6.

²² *Id.*

²³ *See, Hadfield's Seafood*, 2001 WL 1456795, at *4-*6 (finding that “crude treatment” was not good business conduct, but without more, it “simply does not rise to the level of racial discrimination.”).

²⁴ The *Hadfield's Seafood* court found the “markedly hostile” treatment to be part of the “disparate treatment” component of a *prima facie* case.

evidence that Big Fish, that is the waitress, treated them in a “markedly hostile” manner.²⁵ Further, the Wilsons presented little evidence suggesting that the waitress was in any way discriminating against the Wilsons because they are black.

While the Panel finds that the Wilsons didn’t put their wing back order in, the reason *why* is unclear. On one hand, there appears to be no dispute that the waitress wrongfully refused to take the wing back order because of a Big Fish “policy”. There was no such policy prohibiting special orders. On the other hand, there appears to be no dispute that the chef, Mr. McNutt, not only corrected the waitress’s error, but also invited the Wilsons to get what they wanted. And there is no dispute that the Wilsons were given a \$50 gift certificate.

What is missing here is something to convince the Panel that the August 3, 2014 incident rose above just remarkably poor service and became illegal discrimination. While Mr. Wilson testified that other white patrons were getting wing back orders and that others (who were not black) were being treated more favorably, this testimony was conclusory and lacked any specific detail. There was no explanation of how exactly these others were being treated better. Nor was there any corroborating evidence from anyone else present August 3 (or any other day)

²⁵ The Panel finds that the Wilsons do not show that any other Big Fish employee was involved here. It is just the waitress that was the problem for the Wilsons.

to support Mr. Wilsons's testimony.²⁶ The Panel requires more than broad claims of disparate treatment to conclude that discrimination in violation of the DEAL occurred.

For similar reasons, the Panel does not believe Mr. Wilson's broad claim that there was a continuing problem of discrimination with the same waitress. Mr. Wilson did not explain in detail what exactly those "continuing" problems were. There was no evidence providing a detailed description of these other instances of poor service. And there was scant evidence that the waitress treated non-blacks any better than she treated the Wilsons on these prior occasions. While it may be that this waitress treated the Wilsons poorly in the past, based on the evidence presented, the Panel cannot conclude that this prior poor service amounted to *discrimination* by the waitress in violation of the DEAL.²⁷

In summary, the Panel understands that the Wilsons wished to be treated with dignity and respect. And the Panel agrees in a general sense that the chef should not have had to come out to tell the waitress to allow the Wilsons to order

²⁶ The Wilsons's complaint alleged that they came to Big Fish with family and friends, but the Wilsons did not have any of their companions testify to corroborate Mr. Wilson's testimony.

²⁷ While Mr. Wilson testified of a prior incident with the same waitress where managers got involved to sort out the problem, the Panel discounted this testimony because it wasn't specific in detail or substance. In contrast, Mr. Wilson was able to recount specific details of the August 3 incident. It is the Panel's role to weigh the evidence and here the Panel finds that the weight of the evidence does not support Mr. Wilson's suggestion that there was a continuous problem of mistreatment by Big Fish's waitress that was in some way based on the fact that the Wilsons were black.

what they wanted. The problem for the Wilsons's case here is that the credible evidence presented only supports the conclusion that the events on August 3, 2014 were an instance of poor service by a waitress that was corrected by the chef. The Panel concludes that this does not amount to a denial of access under the DEAL.²⁸

The Panel does wonder whether more could have been done by Big Fish to get the Wilsons to return after the August 3, 2014 incident. Mr. Wilson testified that he and his wife enjoyed Big Fish. They were frequent customers. And they're so disappointed by what happened on August 3, 2014 that they don't feel comfortable returning to Big Fish. While the \$50 gift certificate appears to have been a good faith effort to bridge the gap, it also appears to have been lost. The Panel suggest that Big Fish replace this lost gift certificate and that the Wilsons return to Big Fish and try to renew their enjoyment of the restaurant.

CONCLUSION

After careful consideration of the evidence presented, the Panel, by unanimous vote, concludes that the Wilsons have failed to show that Big Fish violated the DEAL.

²⁸ Because the Panel does not find that the Wilsons met their burden to show a *prima facie* case of discrimination, the Panel need not address Big Fish's evidence of a legitimate non-discriminatory reason for what happened.

ORDER

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

IT IS SO ORDERED this 26 day of February, 2021.

Calvin Christopher
Calvin Christopher (Feb 26, 2021 13:33 EST)

Calvin Christopher, *Commissioner and Panel Chair*

Rosemarie Williams
rosemarie williams (Feb 26, 2021 13:52 EST)

Rosemarie Williams, *Commissioner and Panel Member*

Marty Rendon
Marty Rendon (Feb 26, 2021 13:54 EST)

Marty Rendon, *Commissioner and Panel Member*












Wilson Final Agreement

Final Audit Report

2021-02-26

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