

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR SUSSEX COUNTY

DELAWARE BUILDING &	:	
CONSTRUCTION TRADES	:	
COUNCIL, AFL-CIO,	:	
Plaintiff,	:	C.A. No.: S14C-06-020 RFS
	:	
v.	:	
	:	
THE UNIVERSITY OF DELAWARE and	:	
1743 HOLDINGS,	:	
Defendants.	:	

**MEMORANDUM OPINION**

Upon Defendants' Motion for Summary Judgment For Alleged Lack of Justiciability. Denied.

Upon Plaintiff's Motion for Summary Judgment For Alleged Lack of Justiciability. Granted.

Date Submitted: November 10, 2015

Date Decided: February 20, 2015

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**STOKES, J.**

## **INTRODUCTION**

Plaintiff in this matter filed a declaratory judgment claim in which a determination as to whether the Defendants are subject to 29 *Del. C.* § 6960 (the “Prevailing Wage Law”) was sought. Ultimately, Plaintiff seeks judicial relief resulting in entry of an order declaring Defendants subject to all of the provisions of the Prevailing Wage Law based on the contention Defendants are subdivisions of the State of Delaware. This Letter Opinion will only address whether this Court may properly entertain this declaratory judgement action and exercise jurisdiction over this matter. For the reasons which follow, I conclude this matter is justiciable because Plaintiff presents an actual controversy between real adverse interests that is ripe for judicial adjudication. Oral argument will be scheduled to consider whether or not defendants are exempt from coverage.

## **FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

Plaintiff, Delaware Building & Construction Trades Council, AFL-CIO, is an unincorporated association that represents various laborers including but not limited to brick layers, cement masons, iron workers, plumbers, pipe fitters, sheet

metal workers, and roofers.<sup>1</sup> Defendants, the University of Delaware (the “University”) and 1743 Holdings, LLC (“1743”), are collectively an educational organization.<sup>2</sup> Defendants’ educational organization is structured such that it is comprised of an entity initially chartered by the General Assembly in 1743—the University—and a limited liability company—1743—that is wholly owned by the University.<sup>3</sup>

On September 20, 2012, Plaintiff initiated this action in Chancery Court alleging the Defendants are a subdivision of the State of Delaware and thus subject to 29 Del. C. § 6960 (the “Prevailing Wage Law”) when utilizing state funds on improvement projects.<sup>4</sup> Plaintiff sought a declaration and a permanent injunction to that effect.<sup>5</sup> The Chancery Court concluded there was not a sufficient basis to exercise subject matter jurisdiction over the claim.<sup>6</sup>

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<sup>1</sup> See Comp. ¶ 1.

<sup>2</sup> Defs’ Br. In Supp. of Mot. for Summ. J. at \*3.

<sup>3</sup> *Id.*

<sup>4</sup> *Delaware Bldg. & Constr. Trades Council , AFL CIO v. Univ. of Delaware*, 2014 WL 2218730, at \*1 (Del. Ch. May 29, 2014).

<sup>5</sup> *Id.*

<sup>6</sup> *Id. at* \*3.

With the loss of equitable jurisdiction,<sup>7</sup> this matter was transferred to the Superior Court pursuant to 10 Del. C. § 1902.<sup>8</sup> On July 22, 2014, the Defendants submitted their opening brief in support of their motion for summary judgment;<sup>9</sup> in response Plaintiff cross-moved on August 5, 2014.<sup>10</sup> Oral argument on the above-mentioned cross-motions for summary judgment was held on October 28, 2014.<sup>11</sup> During oral argument, counsel for Plaintiff argued this Court had discretion to exercise jurisdiction.<sup>12</sup> Further, Plaintiff maintains this matter presents a genuine and actual controversy ripe for a judicial determination.<sup>13</sup> Counsel for Defendants dispute these contentions and seek to summarily dismiss this matter.<sup>14</sup> After reviewing the submissions and arguments set forth by both parties, I conclude this matter is justiciable.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See generally, Defs' Opening Br. In Supp. of Mot. for Summ. J.

<sup>10</sup> See generally, Pls' Br. In Supp. Of Mot.for Summ. J.

<sup>11</sup> See, Tr. of Oral Argument at 1.

<sup>12</sup> *Id.* at 48-61.

<sup>13</sup> In this aspect, the Court finds there are no material factual disputes regarding justiciability as this matter is purely a matter of law.

<sup>14</sup> *Id.* at 65-66; see also, Def's Reply Br. In Supp. Of Mot. for Summ. J.

## **STANDARD OF REVIEW FOR DECLARATORY RELIEF**

Delaware's Declaratory Judgement Act<sup>15</sup> enables parties to secure comprehensive and expeditious judicial relief.<sup>16</sup> As a remedial statute, Delaware's Declaratory Judgment Act (the "Act") is to be liberally construed.<sup>17</sup> The Act "afford[s] relief from uncertainty and insecurity with respect to rights, status, and other legal relations."<sup>18</sup> Declaratory relief "enable[s] Courts to adjudicate a controversy prior to the time when a remedy is traditionally available."<sup>19</sup> On the other hand, "the Declaratory Judgement Act is not to be used as a means of eliciting advisory opinions from the courts."<sup>20</sup>

It is well-settled Delaware law that this Court has discretion in determining whether a declaratory judgment is merited.<sup>21</sup> This Court may not, however, exercise

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<sup>15</sup> 10 Del. C. § 6501-6513.

<sup>16</sup> *Weiner v. Selective Way Ins. Co.*, 793 A.2d 434, 439 (Del. Super. 2002).

<sup>17</sup> 10 Del. C. § 6512; *Global Energy Fin. LLC v. Peabody Energy Corp.*, 2010 WL 4056164, at \*18 (Del. Super. Oct. 14, 2010) (explaining [c]onsistent with its remedial purpose, the Act is to be liberally construed); *see also; Stabler v. Ramsay*, 88 A.2d 546, 551 (Del.) adhered to on reh'g, 89 A.2d 544 (Del. 1952).

<sup>18</sup> 10 Del. C. § 6512 (Declaratory Judgment Act, "Purpose and construction of chapter").

<sup>19</sup> *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662 (Del. 1973).

<sup>20</sup> *Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. 1964).

<sup>21</sup> 10 Del.C. §§ 6506, 6512; *see, e.g., Gannett Co., Inc. v. Bd. of Managers of the Delaware Criminal Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003 ) (providing that "[t]his

that discretion unless the underlying matter presents an actual controversy.<sup>22</sup> To determine whether an actual controversy exists between the parties, the following elements must be satisfied:

- (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.<sup>23</sup>

Delaware courts consider the following factors when analyzing ripeness for adjudication which is the fourth requirement in the actual controversy test:

- (1) a practical evaluation of the legitimate interests of the plaintiff in a prompt resolution of the question presented; (2) the hardship that further delay may threaten; (3) the prospect of future factual development that might affect the determination made; (4) the need to conserve scarce resources; and (5) a due respect for identifiable policies of law touching upon the subject matter in dispute<sup>24</sup>

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Court reviews for abuse of discretion the Superior Court's decision to exercise declaratory judgment jurisdiction over a case").

<sup>22</sup> *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2014 WL 605753, at \*2 (Del. Super. Jan. 21, 2014) (stating “[t]he presence of an actual controversy is a prerequisite for declaratory relief. Lack of an actual controversy acts as a bar to a party proceeding with a case requesting only declaratory judgment as a remedy”); see also, *XI Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208 (Del. 2014).

<sup>23</sup> *Rollins Int'l, Inc.*, 303 A.2d at 663.

<sup>24</sup> *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 565 A.2d 268, 274 (Del. Super. 1989).

Ripeness requirements of the Act may, at times, serve competing interests.<sup>25</sup>

Nevertheless, the exercise of judicial discretion should “turn importantly upon a practical evaluation of the circumstances present.”<sup>26</sup>

## DISCUSSION

Defendants dispute whether the above-mentioned elements are present.<sup>27</sup> For the purposes of this motion, Defendants have conceded the first two elements of the analysis.<sup>28</sup> To that effect, Defendants thus contend a declaratory judgement would be improper because the matter is not ripe nor is this controversy between two parties whose interests are real and adverse.<sup>29</sup> Conversely, Plaintiff argue this matter is justiciable advancing the opposite positions.<sup>30</sup>

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<sup>25</sup> *Global Energy Fin. LLC*, 2010 WL 4056164 at \*18.

<sup>26</sup> *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1238 (Del. Ch. 1987).

<sup>27</sup> See generally, Defs’ Reply Br. In Supp. Of Mot.for Summ. J.

<sup>28</sup> Defs’ Br. In Supp. of Mot. for Summ. J. at \*9.

<sup>29</sup> *Id.*

<sup>30</sup> Pls’ Reply Br. In Supp. of Mot for Summ. J at \*4–6.

*a. The Dispute is Ripe for Adjudication*

The Delaware Court of Chancery's ripeness considerations provide pertinent guidance for resolving this matter.<sup>31</sup> The Court held:

[I]n deciding whether a particular declaratory judgment action is ripe for judicial determination, a practical evaluation of the legitimate interest of the plaintiff in a prompt resolution of the question presented and the hardship that further delay may threaten is a major concern. Other necessary considerations include the prospect of future factual development that might affect the determination to be made; the need to conserve scarce resources; and a due respect for identifiable policies of the law touching upon the subject matter of the dispute.<sup>32</sup>

Applying a practical evaluation to the present circumstances, Plaintiff's claims are ripe.<sup>33</sup> Plaintiff have a legitimate interest in a prompt resolution of this matter.<sup>34</sup> First, as a practical matter, the ability to obtain an injunction has been foreclosed leaving declaratory relief as the only viable means for legal redress at this juncture.<sup>35</sup> As such, a declaration would be of great practical utility in settling the underlying dispute.<sup>36</sup>

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<sup>31</sup> *Schick Inc.*, 533 A.2d at 1238.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Delaware Bldg. & Constr. Trades Council*, 2014 WL 2218730, at \*1.

<sup>36</sup> *Schick Inc.*, 533 A.2d at 1238.

Determining whether the University must comply with the requirements of the Prevailing Wage Law will provide much needed clarity regarding the parties' rights under Delaware law and relative to each other presently and going forward.<sup>37</sup> A decision on this matter will elucidate what provisions of the Prevailing Wage Law, if any, apply to Defendants.<sup>38</sup> Principally, whether the enforcement and penalty mechanisms are available to Plaintiff should Defendants fail to comply with the requirements of the Prevailing Wage Law.<sup>39</sup>

Such an inquiry is not merely conjectural because there is evidence of past non-compliance.<sup>40</sup> Furthermore, Defendants regularly receive state funds and capital from the state.<sup>41</sup> As the distribution of state money to Defendants is ongoing, so too is the probability of repeated injury.<sup>42</sup>

Even though the past infractions were remedied, the parties' rights under the law remain unclear.<sup>43</sup> Defendants undertook a voluntary audit with the assistance of

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<sup>37</sup> *Id.*

<sup>38</sup> Tr. of Oral Argument at 39, 47.

<sup>39</sup> *Id.*

<sup>40</sup> Tr. of Oral Argument at 37.

<sup>41</sup> Pls' Br. In Supp. Of Mot. for Summ. J. at 7.

<sup>42</sup> *Id.*

<sup>43</sup> Tr. of Oral Argument at 37.

the Department of Labor (“DOL”); however, the DOL was not obliged to assist Defendants on their quest to recompense workers.<sup>44</sup> Safeguards for workers employed by Defendants to work on state-funded projects appear to be lacking and there is no guarantee the DOL will continue to assist Defendants should they elect to undertake audits in the future.<sup>45</sup>

Also, even if Defendants and the University pledged to continue voluntary audits, it is uncertain whether the enforcement and penalty provisions are applicable as a matter of law.<sup>46</sup> These contingencies understandably will create considerable insecurity regarding the parties’ rights.<sup>47</sup> Thus, the value of achieving certainty with respect to the parties’ relative rights coupled with Plaintiff’s anticipated future injuries weigh in favor of expeditious judicial relief.<sup>48</sup>

Delay threatens to create a hardship on Plaintiff because absent resolution it is uncertain whether workers employed by Defendants are entitled to the statutory

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 39.

<sup>46</sup> *Id.* at 37.

<sup>47</sup> *Id.*

<sup>48</sup> *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 623 A.2d 1133, 1136 (Del. Super. 1992) (explaining the purpose of declaratory judgment as the “procedural means for securing judicial relief in an expeditious and comprehensive manner”).

protection afforded by the Prevailing Wage Law.<sup>49</sup> Workers employed by Defendants appear to be protected to a lesser degree when compared with workers who are performing similar work on state-funded sites requiring mandatory compliance with the statutory guidelines of the Prevailing Wage Law.<sup>50</sup> Additionally, Plaintiff maintain valuable contracts have been lost because of the ambiguity clouding Defendants' responsibilities with regard to the Prevailing Wage Law.<sup>51</sup>

Also, further factual development is unlikely to affect a determination because the occurrence, or non-occurrence, of compliance will not substantially advance this Court's ability to render a statutory interpretation or resolve the legal issues presented by the parties because their factual circumstances will remain sufficiently static.<sup>52</sup>

On balance, resolving these issues as a matter of statutory interpretation will not overly burden scarce judicial resources because the fulcrum of the controversy

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<sup>49</sup> Tr. of Oral Argument at 45–48.

<sup>50</sup> Tr. of Oral Argument at 41.

<sup>51</sup> *Id.* at 59.

<sup>52</sup> *KLM Royal Dutch Airlines v. Checchi*, 698 A.2d 380, 382 (Del. Ch. 1997) (holding when “factual circumstances were sufficiently static” a justiciable controversy is present).

rests on legal interpretation of the Prevailing Wage Law and the underlying dispute between the parties will end upon a judicial declaration.<sup>53</sup>

Lastly, the Prevailing Wage Law is supported by strong public policy.<sup>54</sup> For example, the legislature enacted the Prevailing Wage Law to assure consistent wages to workers when major public works projects are undertaken and to penalize those who fail to enforce this law.<sup>55</sup> The strong public policy aims supporting the Prevailing Wage Law coincide with the legitimate interests of Plaintiff's request for a prompt resolution.<sup>56</sup>

In sum, the aforementioned elements have been met and the dispute is ripe for adjudication.

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<sup>53</sup> *Hoechst Celanese Corp.*, 623 A.2d at 1137 (explaining [a] litigant need not have suffered actual harm, but an actual controversy must exist so that judicial resources are not wasted on hypothetical disputes or on situations in which a judicial declaration will not end the dispute between the parties).

<sup>54</sup> 29 Del. C. § 6960.

<sup>55</sup> *Callaway v. N. B. Downing Co.*, 172 A.2d 260, 263 (Del. Super. 1961) (approving the following language of the Arizona Supreme Court “[u]pon examining minimum wage laws of other jurisdictions similar to our law, I find that it is generally recognized that such laws are enacted to serve a dual purpose, i. e., to assure the employee that the required minimum wage will be paid, and to penalize the employer who fails to pay such wage”).

<sup>56</sup> *Id.*

*b. The Dispute is Between Parties whose Interests are Real and Adverse*

In addition to the presence of the above-mentioned elements demonstrating a real ongoing controversy between two adverse parties, it is important to note Defendants' present willingness to comply with the Prevailing Wage Law is of little consequence. In fact, the United States Supreme Court illustrated a similar sentiment with respect to the concept of mootness, finding a dispute does not instantly cease to exist when a party unilaterally promises voluntary compliance.<sup>57</sup> The Court explained: " a defendant claiming that its voluntary compliance moots a case bears a formidable burden."<sup>58</sup> Mootness is not presently at issue, however, it is evident that voluntary compliance does not *ipso facto* resolve all disputes.

Rather, both parties presently maintain a concrete stake in resolving this dispute, particularly regarding the enforcement mechanisms built into the Prevailing Wage Law, notwithstanding the voluntary compliance of Defendants. Contrary to Defendants' belief, the alleged hardship suffered by Plaintiff is not assuaged by Defendants' mere promise of voluntary compliance.<sup>59</sup> First, voluntary

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<sup>57</sup> *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 168 (2000).

<sup>58</sup> *Id.*

<sup>59</sup> Tr. of Oral Argument at 37, 54.

compliance, as the name implies, may be withdrawn at any time. Not only may Defendants withdraw from this practice, but also proper implementation of the policy hinges on assistance from a wholly separate state agency.<sup>60</sup>

Moreover, Defendants' willingness to seek assistance from a state agency does not mean the issue is within the agency's limited jurisdiction.<sup>61</sup> In other words, seeking assistance from a state agency does not trigger a corresponding duty for the agency to assist Defendants.<sup>62</sup> After all, adoption of an internal policy, in it of itself, is not a jurisdiction-conferring act regardless of the agency's willingness to assist.<sup>63</sup>

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<sup>60</sup> Tr. of Oral Argument at 37, 46; Defs' Ex. F (providing "to the extent that the Delaware Department of Labor has a role in the enforcement of the Prevailing Wage Law, the University shall seek the Department assistance in the enforcement of this policy").

<sup>61</sup> *Timmons v. Cropper*, Del. Ch., 172 A.2d 757, 760 (1961) (explaining "[i]t is a cardinal principle of the law that jurisdiction of a court over the subject matter cannot be conferred by consent or agreement") (citations omitted); *see also, Elia Corp. v. Paul N. Howard Co.*, Del. Super., 391 A.2d 214, 215–16 (1978) (holding that "[j]urisdiction over a party or subject matter, or venue of a cause, can not [sic] be determined by private bargaining where there is no other basis for such jurisdiction or venue") (citing *Central Contracting Co. v. C.E. Youngdahl & Co.*, 418 Pa. 122, 209 A.2d 810 (1963)).

<sup>62</sup> *See, 92 Am. Jur. 2d Administrative Law § 73* (stating "[a]dministrative agencies are tribunals of limited jurisdiction, and there is no presumption in favor of jurisdiction of an administrative agency. As a general rule, agencies have only such adjudicatory jurisdiction as is conferred on them by statute").

<sup>63</sup> *Id.* (explaining [a]n agency's jurisdiction is dependent entirely upon the validity and the terms of the statutes reposing power in it, and an agency cannot confer jurisdiction on itself.)

Second, the whole policy is not absolutely without question.<sup>64</sup> It generally asserts “the policy and practice of the University is to comply with the Prevailing Wage Law, as it may be amended time to time.”<sup>65</sup> Whether compliance is required by both Defendants, the University and 1743, is unclear.<sup>66</sup>

Also, it is uncertain whether the practice of the University will include compliance with all of the provisions or a select few—such as only paying the prevailing wage rates.<sup>67</sup> Specifically, whether the enforcement and penalty provisions of the Prevailing Wage Law will apply to Defendants are of paramount concern to Plaintiff.<sup>68</sup> Simply paying the prevailing wage rate may be insufficient. Defendants could resist enforcement by arguing that they were not required to comply with the provisions of the Act.<sup>69</sup>

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<sup>64</sup> Defs’ Ex. F.

<sup>65</sup> *Id.*

<sup>66</sup> Tr. of Oral Argument at 31.

<sup>67</sup> *Id.* at 36.

<sup>68</sup> *Id.* at 41.

<sup>69</sup> *Id.* at 36.

Finally, despite the parties' characterizations,<sup>70</sup> it is undisputed that the policy was recently drafted in the context of the present litigation.<sup>71</sup> Defendants assert their predisposition to comply with all of the provisions of the Prevailing Wage Law.<sup>72</sup> Further, Defendants contend their intent is memorialized in the written policy.<sup>73</sup> This Court, however, recognizes Defendants' failure to stipulate to being subject to all of the provisions of the same law.<sup>74</sup> As such, it appears Defendants' stance is intransigent; a dispute regarding real and adverse interests remain.<sup>75</sup>

## CONCLUSION

Considering the foregoing, this matter is an actual ripe controversy, and the parties' interests are real and adverse. Therefore, Defendants' motion for summary judgment based on the justiciability of the present matter is hereby **DENIED**. The remaining arguments will be determined following future oral argument.

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<sup>70</sup> The parties dispute whether the policy is epiphanic or long-standing.

<sup>71</sup> *Id.* at 29.

<sup>72</sup> Tr. of Oral Argument at 62.

<sup>73</sup> *Id.*

<sup>74</sup> Pls' Reply Br. In Supp. Of Mot. for Summ. J.

<sup>75</sup> *Id.*

**IT IS SO ORDERED**

/s/ *Richard F. Stokes*

Richard F. Stokes, Judge

cc: Prothonotary