



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT OVENS,)
)
)
 Appellee Below,)
 Appellant,)
)
 v.)
) **No. 123, 2016**
)
 CARL DANGERG, Commissioner,)
 Department of Correction; G. R.)
 JOHNSON, Warden, Sussex)
 Correctional Institution,)
)
)
 Appellants Below,)
 Appellees.)

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF DELAWARE**

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION
OF DELAWARE AS AMICUS CURIAE, URGING REVERSAL OF
THE SUPERIOR COURT DECISION REVERSING THE DECISION
OF THE HUMAN RELATIONS COMMISSION**

**Richard H. Morse (ID No. 531)
American Civil Liberties Union Foundation
of Delaware
100 W. 10th St., Suite 706
Wilmington, DE 19801
(302) 654-5326
rmorse@aclu-de.org**

Attorney for Amicus Curiae

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STATEMENT OF INTEREST

Proposed Amicus Curiae, the American Civil Liberties Union Foundation of Delaware (“ACLU-DE”), submits this brief in support of appellant, Robert Ovens, to urge this Court to reverse Superior Court’s determination that Sussex Correctional Institution is not subject to the Delaware Equal Accommodations Law as a place of public accommodation.

ACLU-DE has worked against discrimination since it was established in 1961 through legal advocacy, engagement in the legislative process and public education. Most recently in this Court, in *Short v. State of Delaware*, No. 431, 2014, its attorneys briefed the very question on which it seeks to file an amicus brief in this matter – whether Delaware’s principal anti-discrimination law applies to the Department of Correction.¹

ACLU-DE is a state affiliate of the American Civil Liberties Union (“ACLU”), a nonprofit, nonpartisan, 500,000 member organization founded in 1920 to protect and advance civil liberties throughout the United States. It promotes, *inter alia*, the right to fairness and equal protection flowing from the

¹ This Court did not reach the issue in *Short*. Just prior to the scheduled oral argument defendant advised the Court that it would be seeking a statutory amendment providing appellant prisoner with the specific relief he sought. It was successful in obtaining that amendment, and the appeal was dismissed. *See Short v. State of Delaware*, D.I. Nos. 23, 28, 30 - 31.

Fifth and Fourteenth Amendments, Del. Const. art. I, §§ 7, 9, and the statutes enacted to protect and expand rights to fair and equal treatment under the law.

ACLU-DE receives many complaints from prisoners, including complaints of discrimination on the basis of race, religion, disability and gender identity. If the Superior Court decision under review is reversed, prisoners with those claims will be able to present their claims to the Delaware Human Relations Commission where, as a practical matter, a claimant does not need counsel. If the decision is affirmed they will have no alternative to filing suit under 42 U.S.C. § 1983, where having counsel is all but essential.

The only issue addressed in this amicus brief is whether the Human Relations Commission's legal conclusion that prisons are subject to the Delaware Equal Accommodations Law as places of public (A131)² was error.

The motion to file this brief has been approved by ACLU-DE's Legal Review Panel.

² References to "A__" are to pages in the Appendix to Appellant's Opening Brief.

ARGUMENT

THE DELAWARE EQUAL ACCOMMODATIONS LAW, WHICH PROHIBITS DISCRIMINATION ON THE BASIS OF DISABILITY, APPLIES TO DELAWARE PRISONS

A. Question Presented: Are Delaware prisons subject to the Delaware Equal Accommodations Law (“DEAL”) because they are “places of public accommodation” within the meaning of the statute. This issue was raised at A14-15 and addressed by the Superior Court at pp. 3-6 of its opinion.

B. Scope of Review: On an appeal from a Superior Court decision deciding an appeal from a Delaware administrative agency, this Court’s review is limited to determining whether the agency's decision is supported by substantial evidence and is free from legal error. *See Boggerty v. Stewart*, 14 A.3d 542, 550 (Del. 2011). This Court reviews questions of law *de novo*. *Duvall v. Charles Connell Roofing*, 564 A.2d 1132 (Del. 1989). A lower court's interpretation of a statute is also reviewed *de novo*. *Knott v. LVNV Funding, LLC*, 95 A.3d 13, 15 (Del. 2014).

C. Merits of the Argument

a. The plain language of 6 Del. C § 4502(14) supports the Commission’s decision

DEAL is Delaware’s main anti-discrimination law. It prohibits any person operating a “place of public accommodation” from “directly or indirectly refus[ing], withhold[ing] from or deny[ing] 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.” 6 *Del. C.* § 4504(a). Delaware’s other equal protection statutes are all narrow in scope. *See* 9 *Del. C.* § 1181 (county government positions); 18 *Del. C.* § 2304 (unfair insurance practices); 19 *Del. C.* § 711 (employment discrimination) and 29 *Del. C.* § 6962 (public works contracting). There is no state constitutional provision.

The scope of DEAL’s applicability is provided by the statute’s definition of “place of public accommodation.” In the decision being appealed, Superior Court did not independently examine the statutory language to determine the meaning of that term. Instead, it relied on the prior Superior Court decision in *Short v. State of Delaware*, 2014 WL 11048190, 2014 Del. Super. LEXIS 3467 (Del. Super. August 5, 2014)³. The *Short* court apparently found it incongruous that a prison would meet the definition of “place of public accommodation,” since except for those people visiting inmates, providing services to inmates or employed there, members of the public want to stay out. *See, id.*, *14 (“A correction facility clearly does not fit within the statutory definition of a place of public accommodation. Correction facilities are designed specifically so that those people housed inside remain inside, and so those people outside of them are unable to gain access.”).

³ The unreported opinions cited herein are attached to this brief.

The plain language of the statute, the legislative history and the purpose of DEAL require a different conclusion, one that does not rely on the design of correction facilities.

DEAL defines a “place of public accommodation” as:

any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public. This definition includes state agencies, local government agencies, and state-funded agencies performing public functions. This definition shall apply to hotels and motels catering to the transient public, but it shall not apply to the sale or rental of houses, housing units, apartments, rooming houses or other dwellings, nor to tourist homes with less than 10 rental units catering to the transient public.

6 *Del. C.* § 4502(14).

The definition explicitly covers *any* establishment that provides goods, services or facilities to the general public. The definition does not limit its applicability to establishments that provide goods, services or facilities to every member of the public, and it has been recognized as covering establishments intended to deal with a subset of the public. *See, e.g., Gordy v. Bice ex. rel. Bice*, 2003 Del. Super. LEXIS 308, *11, 2003 WL 22064103 (Del. Super. August 21, 2003) (“a public school is a place of public accommodation”), recognizing that institutions that provide services only to school age children are covered by DEAL. Prisons are more inclusive than schools, since anyone who violates the criminal law, not just people of a specific age, may be placed there.

Likewise, nothing in the definition limits public accommodations to establishments where people want to be. No one would argue that hospitals are not covered by DEAL, although “a hospital, like a jail, is a place where most people would prefer not to be housed.” *Chisolm v. McManimon*, 97 F. Supp. 2d 615, 621 (D. N.J. 2000), *overruled on other grounds*, 275 F.3d 315 (3d Cir. 2001) (predicting that the New Jersey Supreme Court would find jails and prisons are places of public accommodation subject to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-4.1).

Broad applicability of the law is mandated by the common definition of general public, “ordinary people in society, rather than people who are considered to be important or who belong to a particular group.”

<http://www.macmillandictionary.com/us/dictionary/american/the-general-public>

(last visited May 4, 2016).

The definition of place of public accommodation makes DEAL applicable to prisons for a second reason as well. The term is defined to include “state agencies ... performing public functions.” 6 *Del. C.* § 4502(14). The Department of Correction performs the public functions of the “treatment, rehabilitation and restoration of offenders as useful, law-abiding citizens within the community,” 11 *Del. C.* § 6502(a).

The clear language, which demonstrates what the General Assembly intended, necessarily controls. *See, e.g., Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 227 (Del. 2010) (Courts “must give effect to the legislature's intent by ascertaining the plain meaning of the language used.”); *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989) (“In the construction of a statute, this Court has established as its standard the search for legislative intent.”) (citing *Richardson v. Wile*, 535 A.2d 1346, 1348 (Del. 1988), and *Evans v. State*, 516 A.2d 477, 478 (Del. 1986)).

b. The legislative history supports the Commission’s decision.

The intent shown by the language is consistent with the legislative history. In 2000, the Delaware Attorney General's office issued an opinion addressing whether state agencies were subject to the DEAL. Del. Op. Atty. Gen. 00-IB09, 2000 WL 1092966 (May 30, 2000) (copy attached). The opinion advised that, as the statute was then written, “[g]overnment agencies are not places of public accommodation under the statute.” *Id.*, *2. It contrasted DEAL with the Michigan statute, which included state agencies, and noted that the Michigan statute had been found applicable to prisoners and prisons. *Id.*, *3.

Recognizing that other states were included in their respective equal accommodations statutes, the opinion recited that it was being referred to the Office of the Governor for consideration of the policy issues and offered assistance

in drafting “any remedial legislation that may be necessary.” *Id.*, *4. Thereafter, the definition of place of public accommodation was amended to add an additional sentence: “This definition includes State agencies, local government agencies, and State-funded agencies performing public functions.” 75 Del. Laws c. 356, § 9 (2006). There was no exception for prisons.

The General Assembly is presumed to be aware of the relevant law extant when it amends a statute. *See, e.g., Colonial School Bd. v. Colonial Affiliate, NCCEA/DSEA/NE*, 449 A.2d 243, 247-48 (Del. 1982) (in ascertaining legislative intent in enacting statute at issue, court presumed General Assembly was aware of relevant common law and a separate statute that provided context). The context here is, of course, that before state agencies were added to the definition the Attorney General had opined that doing so could result in DEAL applying to prisons.

c. Policy supports the Commission’s decision.

DEAL’s purpose also supports a reading of the statute to include prisons. It provides, in part, that “[t]his chapter shall be liberally construed to the end that the rights herein provided for all people, without regard to race, age, marital status, creed, color, sex, physical disability, sexual orientation, gender identity or national origin, may be effectively safeguarded.” 6 *Del. C.* § 4501.

Applying DEAL to prisons provides a safeguard for inmates who have been discriminated against because of their race, religion, disability, or other protected class, or believe they have been discriminated against for these reasons, by giving them a practical right even when they cannot obtain counsel (which is usually the case) to bring their claim to a state agency that will investigate the claim and, when appropriate, try to resolve it. *Miller v. Spicer*, 602 A.2d 65, 67 (Del. 1991) (recognizing that DEAL authorizes the Human Relations Commission “to investigate discrimination complaints and resolve grievances, where well founded, through conciliation and voluntary compliance” and, in “the absence of voluntary agreement to enter an order of compliance”).⁴ *See also*, 6 *Del. C.* § 4508(g-h) (authorizing Commission panels to grant relief and dismiss complaints). Superior Court’s reversal of the Human Relations Commission decision removed that safeguard.

There is a second policy reason for not finding an exclusion of prisons from DEAL. Delaware has no equal protection clause in its constitution, and there is no statute other than DEAL that would protect inmates from discrimination because of their race, religion, disability or membership in some other class that is generally entitled to protection from discrimination under American law. Interpreting DEAL not to apply to prisons would imply that the General Assembly intended to prevent

⁴ Such orders are appealable to Superior Court. 6 *Del. C.* § 4511.

prisoners who claim discrimination from seeking relief under state law, and to require that they invoke federal law. This Court should not impute that intention to the General Assembly, especially in the absence of an explicit exclusion and in the presence of clear statutory language and persuasive history.

Delaware is better than that. *See, e.g.,* Mulholland, *et al.*, *Article I of the Delaware Constitution: Liberty Begins at Home*, Del. Law., 2011/2012, at 18 (describing circumstances where Article I of the Delaware Constitution provides greater protection for individual rights than the Bill of Rights).

This Court should accept DEAL as written and reverse the Superior Court decision.

CONCLUSION

For the reasons stated hereinabove, amicus curiae respectfully requests that this Court reverse Superior Court's decision.

/s/ Richard H. Morse

Richard H. Morse (ID No. 531)

American Civil Liberties Union Foundation
of Delaware

100 W. 10th St., Suite 706

Wilmington, DE 19801

(302) 654-5326

rmorse@aclu-de.org

Attorney for Amicus Curiae