BEFORE THE HUMAN RELATIONS COMMISSION
FOR THE STATE OF DELAWARE

James BOUCHER	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. S-EA-2214-20
	)	
David MOELLMAN,	)	
	)	
Respondent.	)	

MEMORANDUM DECISION AND ORDER

HEARING PANEL:

Gail Tarlecki, *Commissioner and Panel Chair*,
Nancy Maihoff, *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. James Boucher,
Complainant, pro se.

Mr. David Moellman,
Respondent, pro se.

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 videoconference[1] on April 13, 2021 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. James Boucher ("Mr. Boucher" or "Complainant") brought a complaint alleging that Respondent Mr. David Moellman ("Mr. Moellman" or "Respondent") discriminated against him based on his physical and mental disability. Immediately after the hearing, the Panel conducted its deliberations.

SUMMARY OF THE COMPLAINT

In brief summary, Mr. Boucher alleged in his complaint that he was refused, withheld, or denied accommodations, facilities, advantages, or privileges of a place of public accommodation because of his mental disability and Mr. Boucher has a service animal.

The crux of the complaint is that Mr. Moellman has a property in Milton,

[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.

Delaware that is available to rent via VRBO[2] (the "Property"). Mr. Boucher's wife made a request to rent the Property through VRBO for a family vacation in August 2021. Mrs. Boucher informed Mr. Moellman that her husband, the complainant here, has a service dog. Mr. Moellman denied Mrs. Boucher's rental request because he did not permit pets at the Property. Mr. Moellman explained that some of his other rental guests have pet allergies.

SUMMARY OF THE EVIDENCE

Both parties made brief opening statements in support of their respective cases.[3]

Complainant's Case

Mr. Boucher, duly sworn, testified that he is a military veteran and disabled police officer. He has a registered service dog. When Mr. Boucher made a rental request for the Property, Mr. Moellman promptly refused the request because pets were not permitted on the Property. Mr. Boucher explained to the Panel that his service dog is not a pet; his service dog is trained and registered.

Mr. Boucher said that Mr. Moellman admitted that his dog was a service dog

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[2] The Panel takes notice that Vacation Rentals By Owner (VRBO) is an online resource for owners of vacation homes to connect with potential tenants. *See* https://www.vrbo.com/about/.

[3] The Panel notes that opening statements are not evidence and are not summarized here. They are, however, part of the official record.

and that Mr. Moellman admitted to refusing his rental request because of his service dog because pets were not allowed on the Property.

On cross-examination by Mr. Moellman, Mr. Boucher understood that VRBO requires Mr. Moellman to quickly respond to rental requests. Mr. Boucher explained that his service dog assists him with his disability; he could not further specify what these services were. Mr. Boucher disagreed with Mr. Moellman's further questioning about his service dog's services.

Respondent's Case

Mr. Moellman, duly sworn, testified that he did not have any further evidence to present besides that already in the record.

Panel Questions

In response to Panel questioning, Mr. Moellman explained that he had eight rentals for the Property as of the hearing date. Mr. Moellman rents the Property through VRBO. He said VRBO's policies require all property owners to accommodate service animals regardless of any pet policies. Mr. Moellman was not aware of VRBO's service animal policy until the incident with Mr. Boucher. Mr. Moellman said AirBnB has a health concern exception for accommodating service animals.

In response to Panel questioning, Mr. Boucher explained to the Panel that he wanted to prevent the discrimination from happening again. He did not want any

money from Mr. Moellman.

Closing Arguments

In closing, Mr. Boucher argued that Mr. Moellman should not be questioning whether his service dog is a service dog. He argued that Mr. Moellman illegally refused to rent the Property; his service dog is not a pet.

In closing, Mr. Moellman asked for fairness. He argued that the Americans with Disabilities Act (ADA) allows him to ask 2 questions about service animals: (1) is it a service animal and (2) what services can it perform. Mr. Moellman did not contest that Mr. Boucher's service dog is a service animal.

Mr. Moellman further argued that he did not intend to discriminate. He had worked his whole life in furtherance of preventing discrimination. He thanked the Panel and the Division of Human Relations for their time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mr. Boucher alleges that Mr. Moellman violated the DEAL by refusing to rent the Property to Mr. Boucher due to his service dog. 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.[4] "The ultimate purpose [of the DEAL] is to eliminate the inconvenience, unfairness, and humiliation of...discrimination."[5]

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*.[6,7] 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.[8]

Here, to meet the initial burden of going forward requires a *prima facie* case

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[4] 6 *Del. C.* § 4501.

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

[6] 411 U.S. 792 (1973).

[7] *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).

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

of discrimination. Therefore, Mr. Boucher must show: (a) that he is a member of a protected class; (b) that he was denied access to public accommodations; and (c) that non-members of the protected class were treated more favorably.[9] Further, because Equal Accommodations hearings before the SHRC are subject to the provisions of Delaware's Administrative Procedures Act (APA),[10] "the burden of proof shall always be upon the applicant or proponent."[11]

Discussion

The Panel finds no dispute with the material facts about what happened.

A. Mr. Boucher is a member of a protected class

Mr. Boucher is disabled and he has a service dog to assist him with his disability. While Mr. Moellman contested whether or not the service dog performed tasks for Mr. Boucher, in the end, Mr. Moellman told the Panel he did not contest that Mr. Boucher's service dog was a service animal. Accordingly, the Panel concludes that evidence shows that Mr. Boucher's service dog is a "service animal" under the DEAL. Accordingly, the Panel concludes that Mr. Boucher is a member of a protected class and that Mr. Boucher has met the first prong in showing a *prima facie* case of discrimination.

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

[10] 29 *Del. C.* Ch. 101.

[11] 29 *Del. C.* § 10125(c).

B. Mr. Boucher was denied access to the Property

To address the second prong of a *prima facie* case requires the Panel to determine whether or not Mr. Boucher was denied access to a place of public accommodation. The Panel finds no dispute that Mr. Boucher was denied access to the Property when Mr. Moellman refused the rental request.

C. Is the Property of Place of Public Accommodation?

With no meaningful dispute as to the relevant facts, the Panel finds that the key issue in this case is whether or not the Property—a private home being offered for transient vacationers to rent[12]—is a "place of public accommodation" as defined by the DEAL. To the Panel's knowledge, this question has not been answered before in Delaware. To answer this, the Panel must look to the statutory definition of "place of public accommodation" and determine if the Property falls within that definition. This requires the Panel to construe this statutory definition.

1. Defining the meaning of "place of public accommodation"

The rules of statutory construction are well established by the Delaware

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[12] The Panel notes that Mr. Moellman testified that he had booked eight rentals of the Property for the 2021 season. The Panel infers from this testimony that the Property is being rented to the transient public for relatively short periods of time, such as a week or weekend during the 2021 vacation season. The Panel further infers that the Property it is not being rented as a temporary or permanent residence for longer periods of time, such as months or years. Further, in the instant case, there is no dispute Mr. Boucher was requesting a transient rental for his family's vacation. Based on these findings, the Panel concludes that the Property is a private home that is being rented to transient vacationers.

courts and the goal of statutory construction "is to determine and give effect to legislative intent."[13] The first step is to determine whether the statute is ambiguous because if the plain language is *not* ambiguous, "there is no room for judicial interpretation" (or in this case, Panel interpretation) and "the plain meaning of the statutory language controls."[14,15] It is well-settled in Delaware that the "plain meaning" of statutory terms comes from dictionary definitions.[16] Further, the Panel must "assume the General Assembly used particular text purposefully."[17]

With the above guidance from Delaware law, the Panel must first determine whether or not the statutory definition of "place of public accommodation" is ambiguous. A statute is ambiguous if: (1) "it is reasonably susceptible to different conclusions or interpretations"; or (2) "a literal interpretation of the words of the statute would lead to an absurd or unreasonable result that could not have been intended by the legislature."[18] Mere dispute over the interpretation of a statute does

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[13] *Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012) (citations omitted).

[14] *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hosp., Inc.*, 36 A.3d 336, 342-43 (Del. 2012) (citations and internal quotations omitted).

[15] The Panel notes that the *Delaware Code* requires that "[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language". 1 *Del. C.* § 303.

[16] *Id.* at 343 (referencing Merriam Webster's Dictionary for the definition of "true").

[17] *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 540 (Del. 2011).

[18] *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007) (citations omitted).

not make it ambiguous.[19] And, if the statute *is* ambiguous, Delaware law requires the Panel to "consider the statute as a whole, rather than in parts, and [to] read each section in light of all others to produce a harmonious whole."[20]

Turning to the statute, Section 4502(14) defines "place of public accommodation" as follows:

> [*A*]*ny 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 includes hotels and motels catering to the transient public, *but it does 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.* (emphasis added).

The first sentence is clear and unambiguous. It broadly defines a "place of public accommodation" such that it covers the Property. The relevant dictionary definition of "establishment" is "a place of business or residence with its furnishings and staff."[21] The Panel finds no dispute that Mr. Moellman's Property is a home (thus, an establishment) and the Property is being offered to the transient public for rent (thus, catering to the general public).

But this does not end the Panel's analysis. There are two exclusions in the

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[19] *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010).

[20] *Id.* (citations and internal quotations omitted).

[21] *See* Merriam Webster's Dictionary definition of "establishment" at merriam-webster.com.

statutory definition of "place of public accommodation" that the Panel must also consider. The first excludes "the sale or rental of houses, housing units, apartments, rooming houses, or other dwellings"[22] and the second excludes "tourist homes with less than 10 rental units catering to the transient public."

(a) The Property is not a "tourist home"

Taking the easy step first, the Panel finds the "tourist home" exclusion to be clear and unambiguous. And the Panel concludes that this exclusion does not apply to the Property. The dictionary definition of "tourist home" is "a house in which *rooms* are available for rent to transients."[23] The Property is not a "tourist home" because the Panel finds as a matter of fact based on the evidence presented that Mr. Moellman was not renting the Property to the transient public on a room-by-room basis. Rather, the Panel finds that Mr. Moellman was renting the whole house to the transient public.[24]

(b) Does the "rental of houses" exclusion apply to the Property?

Which brings us to the "rental of houses" exclusion. Here, the Panel is

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[22] For brevity's sake, the Panel refers to this exclusion as the "rental of houses" exclusion.

[23] *See* Merriam Webster's Dictionary definition of "tourist home" at merriam-webster.com (emphasis added).

[24] The Panel declines at this time to address the hypothetical question of whether or not the "tourist home" exclusion would to apply to the Property if was being rented on a room-by-room basis because the record is not developed on that issue.

mindful that § 4501 of the DEAL instructs 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, disability, sexual orientation, gender identity, or national origin, may be effectively safeguarded."[25] With this additional guidance, the Panel considers whether or not the "rental of houses" exemption excludes transient vacation rentals of the Property (and, by extension, all other homes being rented to transient vacationers in Delaware) from the DEAL.

This brings us back to the first step of statutory construction, that is, whether or not the "rental of houses" exclusion is ambiguous. If it is unambiguous, the Panel must accept the plain meaning of the words in the statute. Conversely, if it is ambiguous, then the Panel may look to the broader DEAL in trying to determine what General Assembly intended.

Reading the "rental of houses" exception, the Panel finds it to be clear and unambiguous. It broadly excludes the rental of houses (and other dwellings) from the scope of "place of public accommodation". The Panel does not find the "rental of houses" exclusion to have more than one reasonable meaning. The ordinary meaning of "rental" in the context of this exclusion is "to grant the possession and enjoyment of in exchange for rent."[26] The relevant definition of "house" is "a

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[25] 6 *Del. C.* § 4501 (emphasis added).

[26] *See* Merriam Webster's Dictionary definition of "rent" at merriam-webster.com.

building that serves as living quarters for one or a few families."[27] And the relevant definition of "dwelling" is "a shelter (such as a house) in which people live."[28] Using these ordinary meanings, the Panel concludes that when the General Assembly chose the words "rental", "houses", and "other dwellings" it meant to exclude *all* rentals of places where people live from the DEAL. And by "rental", this can only mean "rental" as it is ordinarily understood.[29] This includes permanent long-term rentals, temporary short-term rentals, and transient rentals.

To explain, when the General Assembly broadly excluded "the...rental of houses...or other dwellings" without limitation as to whether or not the rental catered to the transient public, the Panel must assume the General Assembly did so purposefully.[30] The Panel finds that statutory definition of a "place of public accommodation" reflects the General Assembly's intent to draw some lines around what is, and is not, a "place of public accommodation" subject to the DEAL.

For example, hotels and motels catering to the transient public were specifically included. And tourist homes with less than 10 rental units catering to

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[27] *See* Merriam Webster's Dictionary definition of "house" at merriam-webster.com.

[28] *See* Merriam Webster's Dictionary definition of "dwelling" at merriam-webster.com.

[29] 1 *Del. C.* § 303.

[30] *Taylor*, 14 A.3d at 540.

the transient public were specifically excluded (meaning that any tourist home with 10 or more rental units is included). By drawing a line at less than 10 rental units for tourist homes catering to the transient public, the Panel sees a legislative intent to exclude certain establishments from the definition of a "place of public accommodation." Further, the Panel sees that the General Assembly was aware that Delaware has a variety of establishments catering to the transient public when it specified which of these establishments are (and are not) places of public accommodation subject to the DEAL.

2. The Property is not a "place of public accommodation" as defined by the DEAL.

With this legislative intent in mind, we turn to the "rental of houses" exclusion that is dispositive to this case. Here, the General Assembly specifically—and broadly—excluded "the sale or rental of houses, housing units, apartments, rooming houses, or other dwellings" from a "place of public accommodation." The Panel finds the breadth of the "rental of homes" exclusion was done intentionally. And, important here, the General Assembly did not further specify that the "rental of houses" exclusion does not apply to rentals catering to the transient public. The General Assembly twice used the phrase "catering to the transient public" in defining places of public accommodation. If the General Assembly also intended to limit its broad "rental of houses" exclusion such that rentals catering to the transient public would be places of public accommodation,

the General Assembly could have easily done so.[31] When the General Assembly uses a phrase in one part of a statute, but not another, "it is reasonable to conclude that the legislature was aware of the omission and intended it."[32] Because the General Assembly chose not to limit the broad "rental of houses" exclusion in any way, the Panel must conclude that the "rental of houses" exclusion was intended to broadly exclude *all* rentals of houses (and other dwellings).[33]

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[31] For example, if the General Assembly intended to extend the DEAL to cover the rental of homes and other dwellings catering to the transient public, it could have written the exclusion as follows (additions in underline): "...but it does not apply to the sale or rental of houses, housing units, apartments, rooming houses, or other dwellings, except for those rentals catering to the transient public...."

[32] *In re Adoption of Swanson*, 623 A.2d 1095, 1097 (Del. 1993) (citations omitted).

[33] The Panel notes that Delaware's nearby sister states have taken a different path and each appear to broadly define a "place of public accommodation" such that it includes rentals to the transient public. *See*, 43 Pa. Stat. Ann. § 954(1) ("'public accommodation,' ...means any accommodation...which is open to, accepts or solicits the patronage of the general public, including but not limited to inns, taverns, roadhouses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest."; N.J. Stat. Ann. 10:1-5 ("A place of public accommodation...shall be deemed to include any inn, tavern, road house, or hotel, whether for entertainment of transient guests or accommodation of those seeking health, recreation, or rest."); Md. Code Ann. § 20-301(1) ("'place of public accommodation' means: (1) an inn, hotel, motel, or other establishment that provides lodging to transient guests."); and Va. Code. Ann. § 2.2-3904(A) ("'[p]lace of public accommodation' means all places or businesses offering or holding out to the general public goods, services, privileges, facilities, advantages, or accommodations."). The Panel finds that the laws of Delaware's sister states add weight to its conclusion here that the Delaware General Assembly, presumably aware of these laws, could have chosen different—and much broader—language when it defined a "place of public accommodation" but deliberately chose not to.

Stated another way, to find the Property to be within the definition of a "place of public accommodation", necessarily requires the Panel to insert an unstated limitation in the "rental of houses" exclusion such that rented vacation homes catering to the transient public are not included in the "rental of homes" exclusion. While the Panel must "liberally construe" the provisions of the DEAL, it cannot rewrite the statute to insert language that is not there. Nor can it ignore the plain and ordinary meaning of "rental" as it is used in the statute when there is no ambiguity as to what that term means.

The Panel recognizes that the result of its decision here is to exclude from the DEAL *all* rentals of "houses, housing units, apartments, rooming houses, or other dwellings." This is a broad exclusion. And broadly excluding all such rentals—which are increasingly used by the transient public in Delaware—from the DEAL seems incongruous with the DEAL's goal of safeguarding the public from discrimination. And, to be candid, the Panel strongly disagrees with this result. That said, the Panel has no greater power than that of the Supreme Court of Delaware when construing clear and unambiguous statutory language and the Delaware Supreme Court has said: "A court's duty of fidelity to a valid and plain legislative mandate leaves no alternative even though the result appears

anachronistic, and a different course would have been preferable."[34]

CONCLUSION

The goal of the DEAL is to prevent practices of discrimination in places of public accommodation. Under Delaware law, the boundaries of what is, and is not, a place of public accommodation is exclusively for the General Assembly to decide. And it is inappropriate for the Panel to assert its own policy judgment over that of the General Assembly.[35] For the reasons explained above, the Panel concludes that the DEAL defines a "place of public accommodation" such that it excludes the rental of homes or other dwellings catering to the transient public. Thus, the Property is not a "place of public accommodation" under the DEAL. Accordingly, by unanimous vote, the Panel concludes that Mr. Boucher's complaint must be dismissed.

The Panel invites the General Assembly to consider this issue if it disagrees with the result of the Panel's decision here.

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[34] *Williams v. West*, 479 A.2d 1253, 1254 (Del. 1984) (holding that "if an otherwise valid statute causes or leads to an inequitable result, then it is the sole province of the legislature to correct it.") (citations omitted).

[35] *See Taylor v. Diamond State Port Corp.*, 14 A.3d 536 at 542 (Del. 2011) ("[The] Court's role is to interpret the statutory language that the General Assembly actually adopts, even if unclear and explain what we ascertain to be the legislative intent without rewriting the statute to fit a particular policy position.").

ORDER

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

IT IS SO ORDERED this *First* day of *August*, 2021.

Gail Tarlecki (Aug 1, 2021 23:15 EDT)

Gail Tarlecki, *Commissioner and Panel Chair*

Nancy A Maihoff (Jul 31, 2021 08:49 EDT)

Nancy Maihoff, *Commissioner and Panel Member*

Marty Rendon (Jul 29, 2021 09:10 EDT)

Marty Rendon, *Commissioner and Panel Member*