IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

BOSCOV'S DEPARTMENT STORE	:	
	:	**C.A. 06A-06-001 RBY**
Appellant,	:	
	:	
v.	:	
	:	
DONNA JACKSON, et al.,	:	
	:	
Appellee.	:	

Submitted: November 21, 2006
Decided: February 12, 2007

OPINION AND ORDER

Upon Consideration of Appellant's Appeal from the Decision of the State Human Relations Commission
AFFIRMED

Jeffrey K. Martin, Esq., Margolis Edelstein, Wilmington, Delaware for Appellant.

C. Malcolm Cochran, Esq., Richards, Layton & Finger, P.A., Wilmington, Delaware for Appellees.

Young, J.

This is the Court's Opinion on Appellant, Boscov's Department Store, Appeal from the decision of the Delaware Equal Accommodations Law.

PROCEDURAL POSTURE

Boscov's Department Store ("Appellant") comes before this Court with an appeal from a decision of the Human Relations Commission ("the Commission"). the Complainants, Donna Jackson, Marla Kepner, Norene Hamilton, Jason Russell and Chantel Hendrickson (hereinafter collectively "the Appellees"), alleged that the Appellant violated the Delaware Equal Accommodations Law.[1] The Commission held a hearing on the matter. It found the Appellant had violated that Law. The Commission, finding that the Appellant discriminated against the Appellees, ordered the Appellant to pay both actual damages to the Appellees and a civil penalty to the Special Administration Fund. For the following reasons, the Commission's decision, being supported by substantial evidence and free of legal error, is **AFFIRMED**.

FACTS

On August 30, 2005, the Appellant contacted the Appellees, informing them that all classes they were scheduled to teach at the Appellant's Dover Mall location were canceled by Appellant. Donna Jackson filed a Public Accommodations Discrimination Complaint with the Commission on October 17, 2005, and amended the Complaint on December 12, 2005, to include the four additional Appellees.

On January 25, 2006, and February 13, 2006, the Commission received evidence from the parties. Diana Welsh, was the first to testify for the Appellees. She is owner of Bell, Book and Candle, a retail shop on Loockerman Street in Dover.

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[1] 6 *Del. C.* § 4504.

She testified that she learned that the Appellees' classes for the Fall 2005 Campus of Courses at the Appellant's Dover Mall location ("the Appellant's Dover store") had been canceled when she received a call from the Director of Marketing for the store. She could not recall this person's name, but knew it was Lynda Gaskill's replacement. Ms. Welsh stated that the caller told her that a minister from a Baptist church had come into the Appellant's store, threatening a boycott if the classes were allowed to proceed unless "Christian classes" were not taught as well. Notably, neither the dates, places, contexts nor teachers for any such classes were offered.

Next to testify was Catherine Owens, who had been interested in taking some of the workshops offered in the Fall 2005 Campus of Courses at the Appellant's Dover store. She learned the classes had been canceled when she called and spoke to an employee at the Appellant's Dover store. She was not told why the classes were canceled. Instead, the employee referred her to Donna Jackson.

The first of the Appellees to testify was Norene Hamilton. She was scheduled to teach two classes on herbs and oils at the Appellant's Dover store. She testified that these classes were not religious in nature; nor did any attempt to convert anyone to a particular religion. Rather, she stated that the courses were designed to teach the medicinal use of herbs, and that each course would center on aliments that can be treated with herbs and methods to harvest, dry, store and mix those herbs. She stated that she first learned her courses had been canceled when she received a call from Donna Jackson in early September. She testified that it was her belief the courses were canceled because of what someone may have assumed the Appellees' religion to be. She based this belief on her being told the Appellees' classes were canceled after Reverend William Jeffcoat ("Rev. Jeffcoat") complained. She stated that she was not an authority on the Wiccan religion because she was a Pagan. She stated that

to her, Paganism is an earth religion.

The next Appellee to testify was Marla Kepner, who was scheduled to teach Talismans, Amulets, Charms for Protection, and Witch Balls at the Fall 2005 Campus of Courses to be held in the auditorium at the Appellant's Dover store. She testified that her classes were not religiously based, and were not intended to promote any particular religion. She first learned the classes had been canceled when she received a phone call from Jason Russell, another one of the Appellees. During this conversation, Ms. Kepner stated she learned that the courses were canceled because a Baptist minister had complained, and threatening to boycott if the "witch or witchy classes" continued, without his being given equal time for bible study classes. Ms. Kepner testified that she practices what she calls "Christian witch." She testified that she believed the classes were canceled because they were identified as being Wiccan; maintaining, however, that there was no teaching of the Wiccan religion involved in her courses.

Jason Russell, who was scheduled to teach Introduction to Numerology, testified that Numerology is not religiously based and is not intended to convert anyone to any particular religion. He said that he believes he is a born-again Christian. He presumed that his course was canceled because he was deemed guilty by association with Wiccans. He stated he first learned that the classes had been canceled when he received a phone call from his mother, Donna Jackson. He did not speak to anyone at the Appellant's Dover store about the classes having been canceled. He stated that he learned from his mother that the courses cancellation was due to a religious connection. Specifically, he stated his mother informed him that a Baptist minister had complained about the courses, insinuating that a boycott would occur if the Appellees' courses were not canceled. He stated that he was shocked to

hear of the cancellation of his course, because the Appellant's Dover store had offered Numerology in the past, and because it was currently being offered at another one of the Appellant's stores in Pennsylvania.

The next Appellee to testify was Chantel Hendrickson. She stated that she was to teach Candle Magic at the Appellant's Dover store. She explained that her course was not religiously based, and was not intended to convert anyone to a particular belief system. Instead, she planned to teach the history of candles, how to make candles and what the different colors and shapes of candles can mean. Ms. Hendrickson first learned the Appellees' courses were canceled when she received a call from Jason Russell. She asked from whom she could obtain more information, and was told to contact Sybil Harvey, one of the Appellant's employees at the Dover store. Ms. Hendrickson testified that Ms. Harvey was very apologetic, relaying that the courses were canceled, because a minister had complained about the religious nature of the Appellees' courses. Ms. Hendrickson stated that Ms. Harvey told her that, when the Appellant's management became aware of the situation, the decision was made to cancel all of the Appellees' courses.

Ms. Hendrickson testified that she was a Wiccan. She stated that although the courses were labeled "Spiritual Awareness," a label the Appellees did not place on the courses, she was not teaching Wicca. She further stated that the Appellees were not trying to convert their prospective students to any religion. She testified that it was her belief that the courses were canceled because many of the instructors were Wiccan or Pagan or involved in the Wiccan/Pagan community. Ms. Hendrickson expressed confusion over the fact that these courses were previously permitted, but and were now being canceled by the Appellant. She said the only thing the Appellees did different this year was to hand out information about the courses at Pagan Pride

Day, which was held on the Legislative Mall in Dover on August 28, 2005.

Then, the Appellees called Barbara L.W. Criss, a frequent student of the Campus of Courses, and one of the Appellant's former employees. She testified that she saw the information on the Fall 2005 Campus of Courses to be offered at the Appellant's Dover store, and that she was interested in taking the classes on herbs. When she learned that the courses had been canceled, she contacted the Appellant's Dover store. She was connected to Sybil Harvey. Ms. Criss stated that, based on her previous employment, she was familiar enough with the Appellant's procedures to know to contact the Appellant's home office in Reading, Pennsylvania. She testified she was connected with someone in Marketing Public Affairs Department whose name, she believed, was Esther. Ms. Criss testified that she was told that the reason the Appellees' courses were canceled was due to a religious conflict.

The Appellees next called as a witness Laura Gabbert, one of the Appellant's employees at the Dover store. She testified that she handled a customer complaint from Rev. Jeffcoat on or about August 29, 2005. She stated that Rev. Jeffcoat indicated that he was concerned about the classes being offered, and that he wanted to complain. Ms. Gabbert explained that she took Rev. Jeffcoat's name and number, telling him that she would pass the information on to Sybil Harvey when she returned from lunch. She testified that when she received the complaint from Rev. Jeffcoat, she thought the scheduled Campus of Courses was going to start as planned. However, she stated that Ms. Harvey informed her that the courses already canceled prior to Rev. Jeffcoat's complaint.

Sybil Harvey, the Public Relations Manager for the Appellant's Dover store, testified that she handled a complaint from Rev. Jeffcoat on or about August 29, 2005, after returning from lunch and speaking with Ms. Gabbert. Ms. Harvey stated

that Rev. Jeffcoat disagreed with the nature of some of the courses, but did not express why he disagreed with them. During the meeting, she informed Rev. Jeffcoat that the courses already had been canceled. After meeting with Rev. Jeffcoat, she informed Ms. Gabbert. She testified that this was not the first complaint that she had received regarding the Fall 2005 Campus of Courses. She stated that the complaints regarding the courses began after the advertisement for the courses ran in the Delaware State News on August 28, 2005:

> "Well, there was a lot of community uproar, and yes, Reverend Jeffcoat was not the first person to call. I had calls and I had e-mails. There were a number of people who identified themselves as a concerned person, as a Christian, such as Reverend Jeffcoat. I don't know exactly what their deal was."[2]

Ms. Harvey testified that she personally dealt with three phone calls and two e-mails on the issue. When Ms. Harvey approached the store manager about the complaints, she was told to contact corporate headquarters in Reading, Pennsylvania. She spoke with Esta Neugoroschel, the Associate Director for Public Relations for the Appellant. Ms. Harvey stated that she told Ms. Neugoroschel about the complaints, following which Ms. Neugoroschel reviewed the courses. Ms. Harvey testified that, later the same day, she received a return call from Ms. Neugoroschel, who told her that the Appellees' courses were canceled. Ms. Harvey could not recall if she was given a reason for the cancellation. Ms. Harvey stated that she then began to get in touch with the instructors. She drafted a memo to her co-workers stating that anyone inquiring about the courses should contact Donna Jackson for more information. Ms. Harvey stated that in September 2004, similar courses had been

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[2] *Donna Jackson, et al., v. Boscov's Department Store*, HRC Hearing, No. K-PA-659-05, Tr. at 88.

taught at the Appellant's Dover store. She also stated that, interestingly, the only courses canceled in the Fall 2005 Campus of Courses were those taught by the Appellees.

The next to testify was Lynda Gaskill, who served as the Public Relations Manager for the Appellant's Dover store until August 11, 2005. She testified that she was in charge of the Campus of Courses at the Appellant's Dover store during the year and a half she held the Public Relations Manager position. During that time, she stated that the auditorium and the store itself were open for the use of the community. Specifically, she stated that the auditorium is offered to the community and non-profit organizations, because it brings people into the store. Thus, the store can help the community and receive some benefit at the same time. Ms. Gaskill testified that while she was in charge of the Campus of Courses, she was instructed to arrange for as many courses as possible. She stated that the only criterion she was aware of was to offer courses the public finds interesting. During her employment, the Appellant's Dover store has hosted courses similar to those being taught by the Appellees in the Fall 2005. In fact, some of the Appellees had taught the previous courses. Ms. Gaskill testified that she scheduled more of the types of courses offered by the Appellees due to the response to previous similar offerings. Ms. Gaskill submitted the list of courses for the Fall 2005 session to Ms. Neugoroschel in August 2005. At that time, Ms. Neugoroschel's only comment was that Ms. Gaskill should schedule more classes. Ms. Neugoroschel did not mention a concern over any diversity or lack of diversity of the courses. Ms. Gaskill stated that the reason the courses were submitted to Ms. Neuogorschel was that Ms. Neugoroschel was in charge of approving the courses before submitting the ads to the media.

Traci Coleman, who was employed at the Appellant's Dover store in August

2005, testified that, when she returned from vacation, she learned about the cancellation of the Appellees' courses by visiting the Delaware Pagans Online. She also attended the Pagan Pride Day. She said that Rev. Jeffcoat had caused a disturbance there that day, and that the police had to be called. When she returned to work, she stated she was instructed to refer all calls regarding the cancellation of the Appellees' courses to the store manager.

Wendy Hawkley, another person scheduled to teach at the Fall 2005 Campus of Courses, but not named as a complainant, testified that her class was intended to teach guided meditation, and that it was not based in any religion. She learned that the courses were canceled when she received a call from Donna Jackson. Over objection, the Commission allowed Ms. Hawkley's testimony but did not rely upon it during deliberations because it was found to be cumulative.

Next to testify was Donna Jackson, who was scheduled to teach two courses, and who had filed the initial Complaint with the Commission. She began by presenting the Commission with documentary evidence in the form of newspaper clippings, including: an article on the Pagan Pride Day, which appeared on the front page of the local section of the News Journal on August 29, 2005; the advertisement for the Campus of Courses, which appeared in the Delaware State News on August 28, 2005; and an advertisement the Appellant ran for a promotion entitled "Friends Helping Friends." Ms. Jackson testified that all of the events occurred within a two or three day time period following the publishing of the story on Pagan Pride Day and the advertising for the Campus of Courses. As for the "Friends Helping Friends" advertisement, Ms. Jackson stated this demonstrated that the Appellant supported other religions, because four churches were listed as participating in this program. In addition, Ms. Jackson submitted a list of courses offered at the Appellant's other

stores. She stated that this list demonstrated that a number of the courses offered elsewhere were repetitious of the courses offered at the same location, and that these other stores also offered courses similar to those the Appellees were scheduled to teach.

After submitting and discussing the documentary evidence, Ms. Jackson testified about how she learned that the courses had been canceled. She stated that she received a phone call from Ms. Harvey on August 30, 2005, and that in that conversation Ms. Harvey informed her that all of the courses to be taught by the Appellees were canceled. She testified that Ms. Harvey informed her that the classes were canceled due to a pastor's discontent with the classes and threat to boycott the Appellant's Dover store if the classes were not canceled. A few weeks later, she learned that it was Rev. Jeffcoat who came into the Appellant's Dover store to complain. While Ms. Jackson stated that she believed the courses were canceled because of complaints associating the courses and the teachers' association with the Wiccan religion, she herself was a born-again Christian. Moreover, none of the courses she was to teach included any religious elements. Ms. Jackson testified that she had previously taught the same courses during the Spring 2005 Campus of Courses, and had been approached by an employee of the Appellant's Dover store, Ms. Gaskill, to create an agenda for the Fall 2005 Campus of Courses.

The final witness the Appellees called was Ivo Dominguez, Jr. Mr. Dominguez is a Wiccan elder, whom the Appellees called to explain more about the Wiccan religion. Mr. Dominguez stated that Wiccan is a survival or a recreation of the tribal religions of Europe. He testified that, although someone could perceive the Appellees' classes as religious because these classes teach practices that arise from Wicca, the practices have not remained confined to the specific domain of any

religion.

The Appellant began by calling Rev. Jeffcoat. He is the Pastor of Capitol Baptist Church in Dover. He stated he became involved in the matter before the Commission when he and a group of his parishioners attended the Pagan Pride Day to pass out some gospel tracts. During Pagan Pride Day, he saw a list of courses for the Fall 2005 Campus of Courses. A parishioner also brought him a copy of the advertisement, that ran in the Delaware State News. After he saw the advertisement he went to the Appellant's Dover store to express his concern about the content of the courses, and to inform the store that his church would show their displeasure if the courses taught by the Wiccans continued. He stated that Ms. Harvey informed him that he was not the first person, to complain about the courses, and that the courses had already been canceled by the Appellant's home office.

Next, Esta Neugoroschel, the Associate Director for Public Relations for the Appellant, testified. She stated that she works at the Appellant's home office in Reading, Pennsylvania and is responsible for coordinating with the Public Relations Managers at the Appellant's 40 locations. She testified that her responsibilities with the Campus of Courses program include: planning the dates for the Campus of Courses; submitting date information to the Public Relations Managers; conducting weekly conference calls where store Public Relations Managers discuss the Campus of Courses program and course selections that work in the local markets; and reviewing all advertisements for the Campus of Courses program before submission to local newspapers. The purposes of the program are to provide a community service and to bring shoppers into the Appellant's stores. She testified that the major criterion is having a large number of courses, between 35 and 40 each session. She also stated that she is concerned with the diversity of courses offered by the stores.

That is, she does not want all one specific type of courses. Although the local Public Relations Manager is in charge of scheduling courses, Ms. Neugoroschel has the authority to cancel courses.

Ms. Neugoroschel further testified about the Campus of Courses offerings at the Appellant's Dover store. During both the Winter 2004 and Fall 2004 Campus of Courses program, the Appellant's Dover store had classes that were spiritual in nature. She stated that she did not consider these classes to be religious, and never had a problem with any of the courses submitted by Ms. Gaskill before the Fall 2005 courses. As for the Fall 2005 classes, Ms. Neugoroschel stated that Ms. Gaskill submitted a list of courses in a Word document. Ms. Neugoroschel briefly scanned the list, questioning Ms. Gaskill about the low number of courses offered. Ms. Neugoroschel testified that normally she prints out the course listing, putting it in a job jacket; reviews every class; and then sends the jacket to advertising. She stated that this was not done in this case. Evidently, she inadvertently had forgotten to review the courses for the Appellant's Dover store, because she was busy with the back to school events, and with reviewing the Campus of Courses for the other stores. She testified she knew she had forgotten to review the courses, because when Ms. Harvey called to alert her to the complaints none of the courses seemed familiar.

Ms. Neugoroschel testified that Ms. Harvey called, stating that the Appellant's Dover store had received a complaint or two about the Campus of Courses. She stated that Ms. Harvey told her that some people were concerned about the nature of the classes. Ms. Neugoroschel testified that she did not know what Ms. Harvey was referring to. Hence, she pulled the file on the classes to be offered. After reviewing the courses, she called Ms. Harvey, informing her that the courses were canceled, because they were not diverse enough for the community. Ms. Neugoroschel made

this decision on her own the same day that she was contacted by Ms. Harvey.

The Appellant introduced an e-mail from Ms. Gaskill. Ms. Neugoroschel testified that she had read the e-mail. In it, Ms. Gaskill states that she is the coordinator for the 2005 Pagan Pride Day, referring to Ms. Neugoroschel's desire for diversity in the Campus of Courses. She explained that to her, diversity means having different types of classes. On cross-examination, Ms. Jackson pointed out that at the Reading stores there were 27 classes listed as "New Age Related." She asked if any of these were canceled. Ms. Neugoroschel stated that none was canceled. Ms. Neugoroschel indicated that, while classes have been canceled in the past, this is the first time that she has canceled any classes for lack of diversity.

DECISION OF THE COMMISSION

The Commission noted that, for the Appellees to prevail on a claim of denial of public accommodations in violation of 6 *Del. C.* § 4504(a), they must meet a three-part burden-shifting test.[3] First, the Appellees, as complainants, must establish a *prima facie* case of discrimination by showing: (1) that they are members of a protected class; (2) that they were denied access to public accommodations; and (3) that non-members of the protected class were treated more favorably.[4] Second, once the *prima facie* case is established, the burden shifts to the Appellant, as respondent, to present evidence of a legitimate, non-discriminatory reason for denying access to the Appellees.[5] Finally, the Appellees bear the burden of persuading by a

[3] *Donna Jackson, et al., v. Boscov's Department Store*, HRC Hearing, No. K-PA-659-05, Op. at 53-54 (citing *Salty Sam's Pier 13 v. Washam*, 2000 WL 1211227, at *2 (Del. Super.)).

[4] *Id.*

[5] *Id.*

preponderance of the evidence that the Appellant's proffered reason was a pretext for discrimination.[6]

Based on the evidence presented during the hearing, the Commission concluded that the Appellees had met all three elements required to prove a *prima facie* case of discrimination. First, after determining that the word "creed" in 6 *Del. C.* § 4504(a) included "religion or religious or spiritual beliefs,"[7] the Commission stated that Appellees Chantel Hendrickson and Marla Kepner, who testified they were Wiccans; Norene Hamilton, who testified she was Pagan; and Donna Jackson and Jason Russell, who testified they were born-again Christians, are all members of a protected class.[8] While the Appellees did not collectively identify themselves with a single belief system, the Commission did not find the label the Appellees placed on their beliefs to be conclusive. Rather, the Commission concluded that the beliefs held by Ms. Hendrickson, Ms. Kepner, and Ms. Hamilton were related; that Ms. Jackson and Mr. Russell possessed similar beliefs; and that all the beliefs were "of a spiritual nature."[9] Additionally, the Commission held that even if Ms. Jackson and Mr. Russell did not hold beliefs similar to the other Appellees, they were associated with the protected class, further finding that courts in other jurisdictions have held an association sufficient to allow the assertion of claims of discrimination.[10]

Second, the Commission determined that the Appellant's Dover store was a

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[6] *Id*.

[7] *Jackson, et al.,* Op. at 55.

[8] *Id*. at 55-61.

[9] *Id*. at 57.

[10] *Id*. at 58-61.

place of public accommodation within the meaning of 6 *Del. C.* § 4504(a), because it was an "establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public."[11] After reviewing the facts developed during the hearing, the Commission concluded that the cancellation of the Appellees' courses resulted in a denial of access to public accommodations.[12]

Third, the Commission held that the Appellees had demonstrated that non-members of the Appellees' protected class had been treated more favorably.[13] The only courses canceled by the Appellant at its Dover store were the courses taught by the Appellees.[14] Furthermore, similar courses had been permitted at the Appellant's Dover store during the Fall 2004 and Winter 2005 Campus of Courses.[15] Additionally, the Appellant permitted courses at four Pennsylvania stores during the Winter 2006 Campus of Courses that were similar to the courses to be offered by the Appellees.[16] The Commission concluded that the only difference between the treatment of those teaching the courses offered at the Pennsylvania stores and the treatment received by the Appellees was that the teachers of the Pennsylvania courses were not identified as Wiccans, and that the Appellant did not receive any complaints regarding the Pennsylvania courses.[17]

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[11] *Id*. at 62 (citing 6 *Del. C.* § 4502(11)).

[12] *Id*. at 65.

[13] *Id*. at 66-67.

[14] *Id*. at 67.

[15] *Id*.

[16] *Id*.

[17] *Id*.

Next, pursuant to the three-part test for discrimination, the Commission shifted the burden to the Appellant to present evidence of a legitimate, non-discriminatory reason for denying access to the Appellees. The Commission stated that the Appellant's proffered reason for the cancellation of the Appellees' courses was that Ms. Neugoroschel inadvertently failed to review the courses prior to her approval and, if she had reviewed them, would have nevertheless canceled them, because they "lacked diversity".[18] The Commission held that the Appellant had failed to successfully present such a reason through its "failure to establish a clear policy . . . with respect to the procedures to be followed for creating diversity in the Campus of Courses and a policy on holding religious classes," which the Commission felt led to discriminatory practices.[19] Regardless, the Commission assumed the Appellant met its burden, and turned to the third prong of the analysis.[20]

Under the final prong of the burden-shifting analysis, the burden moved to the Appellees to show by a preponderance of the evidence that the proffered reason was a pretext for discrimination. The Commission stated that the Appellees could meet this burden by "directly persuading the Commission that a discriminatory reason more likely motivated the Appellant or by indirectly showing that the Appellant's proffered explanation is unworthy of credence."[21] The Commission concluded that the Appellant's stated reason was not credible but instead was a pretext for

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[18] *Id*. at 69.

[19] *Id*. at 68.

[20] *Id*.

[21] *Id*. at 69 (citing *DP, Inc. v. Harris*, 2000 WL 1211151, at *7 (Del. Super.)).

discrimination.[22] The Commission cited numerous reasons for its conclusion, including that portions of Ms. Neugoroschel's testimony was not credible, that courses at other stores met Ms. Neugoroschel's definition of lack of diversity and were not canceled, and that there were other options short of canceling all the Appellees' classes which would have addressed the Appellant's concern.[23]

Based on its finding of discrimination, the Commission determined the Appellant owed both actual damages to the Appellees and civil damages to the Special Administration Fund.[24]

STANDARD OF REVIEW

On appeal, this Court conducts a limited review of decisions from the State Human Relations Commission to determine whether the Commission's decision is supported by substantial evidence and free from legal error.[25] Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[26] In addition, substantial evidence is "more than a scintilla but less than a preponderance."[27] This Court does not have the "authority to weigh evidence, determine the credibility of witnesses or make independent factual

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[22] *Id*.

[23] *Id*. at 69-74.

[24] *Id*. 74-79.

[25] *Quaker Hill Place v. State Human Relations Comm'n*, 498 A.2d 175, 178 (Del. Super. 1985).

[26] *Olney v. Cooch*, 425 A.2d 610, 614 (Del.1981)(quoting *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

[27] *Id*. (quoting *Cross v. Califano*, 475 F.Supp. 896, 898 (D. Fla. 1979)).

findings."[28] It merely determines whether or not the evidence is legally adequate to support the agency's factual findings.[29] If the Commission's decision is supported by substantial evidence, this Court "must affirm the ruling unless it identifies an abuse of discretion or a clear error of law."[30] Questions of law are reviewed *de novo*.[31]

DISCUSSION

The Appellant appeals, contending: (1) that the Commission incorrectly concluded that the Appellees suffered public accommodations discrimination on the basis of their religion; (2) that some of the Commission's findings are not supported by substantial evidence; and (3) that the Commission violated the Appellant's due process rights by not providing a fair hearing. The Appellees defend the Commission's decision as being supported by substantial evidence and free from legal error.

The Commission Correctly Determined that the Appellant Violated 6 *Del. C.* § 4504(a).

The Appellant disputes the Commission's determination as to all three parts of the burden-shifting analysis undertaken to assess the validity of a claim under 6 *Del.*

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[28] *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005)(citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

[29] *Johnson*, 213 A.2d at 66.

[30] *Bolden v. Kraft Foods*, 2005 WL 3526324, at *2 (Del.)(citing *DiGiacomo v. Bd. of Public Educ.*, 507 A.2d 542, 546 (Del. 1986)).

[31] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998)(citing *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994)).

C. § 4504(a). Specifically, the Appellant alleges: (1) that the Appellees failed to met the first and third elements necessary to prove a *prima facie* case of public accommodation ;[32] (2) that the Appellant had a legitimate, non-discriminatory reason for denying public accommodations to the Appellees; and (3) that Appellees failed to demonstrate that the Appellant's stated reason was a pretext for discrimination.

The Appellant's first issue is with the Commission's decision that the Appellees met the first and third elements necessary to prove a *prima facie* case of discrimination. As to the first element, the Appellant argues that the Appellees were members of a protected class, because the Appellees were members of different religions. As to the second element, the Appellant disputes the Commission's finding that non-members of a protected class were treated more favorably.

The burden-shifting analysis used by the Commission in this case was first developed by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*.[33] The Supreme Court constructed this analysis because of the difficulty in proving discrimination. As the Third Circuit subsequently noted, "[A]n employer who discriminates will almost never announce a discriminatory animus or provide employees or courts with direct evidence of discriminatory intent."[34] Thus, the Supreme Court's *McDonnell Douglas* analysis allows complainants "to proceed without direct proof of illegal discrimination where circumstances are such that

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[32] The Delaware Supreme Court has stated that "[t]he failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal." *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). The Appellees contend the Appellant failed to raise an issue regarding the first element of the *prima facie* case. The Court finds that the Appellant's statement that it did not concede that the Appellees met the first element was enough to raise a legal issue.

[33] 411 U.S. 792 (1973).

[34] *Iadimarco v. Runyon*, 190 F.3d 151, 157 (3d Cir. 1999).

common sense and social context suggest that discrimination has occurred."[35] When constructed, that analysis was intended to deal with the ordinary case of employment discrimination, i.e. where a racial minority claims discrimination in violation of Title VII of the Civil Rights Act of 1964, or 42 *U.S.C.* § 2000e.

Since *McDonnell Douglas*, other courts, including our own, have applied this burden-shifting analysis and applied it to cases implicating all forms of discrimination, not merely employment discrimination. Specifically, our courts have applied the *McDonnell Douglas* analysis to public accommodations discrimination under 6 *Del. C.* § 4504(a).[36] Thus, the Commission adopted the analysis for "creed" as it is specifically for considerations of race. That is, a *prima facie* establishment of (1) membership in a protected class; (2) denial of access to public accommodations; and (3) more favorable treatment of non-members of the protected class.[37]

That is appropriate, since in the years following *McDonnell Douglas* numerous courts have applied the *prima facie* criteria, constructed for discrimination based on the complainant's status as a racial status to cases where the complainant, although not part of a racial minority, is still a member of a protected class.[38]

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[35] *Id*.

[36] *See Quaker Hill Place v. State Human Relations Comm'n*, 498 A.2d 175, 182-183 (Del. Super. 1985).

[37] *Uncle Willie's Deli v. Whittington,* 1998 WL 960709, at *4 (Del. Super.).

[38] *See McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 283 (1976). The Delaware Equal Accommodations Law is similarly as broad, for it entitles "[a]ll persons within the jurisdiction of this State...to full and equal accommodations" if they possess one of the enumerated protected traits. 6 *Del. C.* §4503. *See also Geddis v. University of Delaware*, 2001 WL 536408, at *6 (D. Del) (citing *Iadimarco v. Runyon,* 190 F. 3d at 157-164).

Hence, considering the presentation of a *prima facie* case the Commission's focus is not on the complainant's specific religion, as the Appellant suggests, but on the respondent's actions. The statute itself demonstrates this is the proper inquiry, for an owner of a public accommodation violates the statute when she "directly or indirectly refuse[s], withhold[s] from or den[ies] any person, on account of . . . creed," any accommodation.[39] Absence of the pronoun "their" establishes that the violation of civil rights occurs when evidence exists that the owner's allegedly discriminatory action is motivated by consideration of an impermissible factor, i.e., a statutorily protected trait. As noted, both the U.S. Supreme Court and the Third Circuit have made clear that the focus of the *prima facie* case analysis is whether the respondent has acted based on the consideration of an impermissible factor contained within the applicable discrimination statute.[40] The federal case law also demonstrates that proving the first element of the *prima facie* case, that one is a member of a protected class, simply requires that the complainant point to the applicable statute, and find in it a protected trait that applies to the situation.[41]

The protected traits contained within 6 *Del. C.* § 4504(a) are race, age, marital

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[39] 6 *Del. C.* § 4504(a).

[40] *See Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978) and *Iadimarco*, 190 F.3d at 161.

[41] *See Dunleavy v. New Jersey*, 2006 WL 3780673, at *3 (D. N.J. 2006) (The complainant brought a civil action for a violation of Title VII of the Civil Rights Act. The Court held that the complainant had failed to meet the first element of the *prima facie* case analysis because he did not show he was a member of a protected class. The Court listed the five protected classes under the statute: race, color, religion, sex and national origin. The Court held that to qualify as a member of a protected class, under the definition of the Civil Rights Act, the complainant must be a member of one of the five categories identified in the text of the statute. *Sarullo v. U.S. Postal Serv.*, 352 F .3d 789, 798 (3d Cir. 2003). The complainant claimed he was discriminated based on age. The Court concluded that since age is not a protected class, the complainant failed to state a cause of action recognized by the Civil Rights Act and shall be dismissed.).

status, creed, color, sex, handicap and national origin. In the case *sub judice*, the Appellees demonstrated they were members of a protected class by pointing to a protected trait in the statute, in this case creed; and demonstrating that the trait applied to them, in this case demonstrating they are adherents to a creed. Therefore, the Appellees could properly allege discrimination based on the protected trait of creed. The Commission was correct, when it concluded the Appellees had met this prong of the analysis. While the Appellant suggests otherwise, neither the statute nor the *prima facie* analysis requires that, when many individuals join together to file a complaint of discrimination, they all must be of the same creed.

As to the third prong, the Commission held that the Appellees had demonstrated that non-members of the protected class were treated more favorably. The Appellant argues this determination was incorrect. However, the analysis undertaken by the Commission was legally correct. The Commission properly identified the non-members, or others, in this case as the providers of courses scheduled at the Dover store that were not canceled. The Commission also properly concluded that the cancellation of the Appellees' courses demonstrated that these others were treated more favorably, when their courses were not canceled; or, alternatively, that the Appellees were treated less favorably than these others, when their courses were canceled, based on what the Commission identified as "religious objections to the [Appellees'] courses."[42] Therefore the Commission correctly concluded that the Appellees had proven a *prima facie* case of public accommodations discrimination.

The Appellant next argues that the Commission incorrectly concluded that its stated reasons for denying the Appellees accommodations, (that the classes were

[42] *Jackson, et al.,* Op. at 66.

determined to lack diversity or that religious courses were not allowed), were a pretext for discrimination.[43] First, the Commission correctly stated the law when it opined that the Appellees could prove the Appellant's stated reason was pretextual by "directly . . . persuading the [Commission] that a discriminatory reason more likely motivated the [Appellants] or [by] indirectly . . . showing that [Appellants] proffered explanation [was] unworthy of credence."[44] Second, this Court finds that there is sufficient evidence to support the Commission's decision. Based on its conclusion that the Appellant's lead witness, Ms. Neugoroschel, was not credible, and on its conclusion that Ms. Harvey's testimony was coached or the product of fear.

The Commission pointed out numerous inconsistencies and irregularities in Ms. Neugoroschel's testimony, leading it to conclude that the stated reason for denying accommodations was not credible. These irregularities included the fact that Ms. Neugoroschel reviewed the course list sent by Ms. Gaskill and noticed more classes were needed, but did not notice that the content of the Appellees' courses met her demands for diversity. Additionally, the Commission was concerned that Ms. Neugoroschel stated that she canceled the Appellees' courses claiming they lacked diversity, yet her testimony revealed that this was the first time courses were canceled for a lack of diversity, and even though courses at other stores showed a lack of diversity but were not canceled. As for Ms. Harvey, the Commission felt her inability to remember certain details was suspicious.

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[43] It should be noted the Appellant takes no issue with the Commission's legal conclusion regarding the second prong of the burden-shifting analysis, for the Commission accepted the Appellant's reason even as legitimate even thought the Commission felt the Appellant had failed to demonstrate its reason was backed by a clear policy on creating diversity in the Campus of Courses or of prohibiting religious courses from being a part of the Campus of Courses.

[44] *Jackson, et al.,* Op. at 66 (citing *DP, Inc. v. Harris*, 2000 WL 1211151, at *7 (Del. Super.)).

As our courts have held, "Motivation, intention, and credibility are intensely factual determinations influenced by various factors including reasonableness, consistency, contradictions and demeanor which are appropriately assessed by the finder of facts."[45] This Court cannot engage in weighing the evidence, determining the credibility of witnesses or making independent factual findings. This Court has reviewed the record and the Commission's findings, and concludes the Commission's findings are fully supported by the record.

Based on this conclusion, the Court must affirm unless there is an abuse of discretion or a clear error of law. As already stated, the Commission applied the proper law. As for the factual findings, the Court does not find that the Commission's determinations were arbitrary, capricious or the result of bias and, thus, the Court cannot hold the Commission has abused its discretion.

In addition, the Commission found the argument that the Appellees' courses were canceled because the Appellant did not permit courses of a religious nature to be unworthy of credence. The Appellant takes issue with what it views as the Commission's summary dismissal of this reason. Yet this reason is not the one advanced by the Appellant as its legitimate, non-discriminatory reason for denying accommodations to the Appellees. Ms. Neugoroschel, the source of the cancellation, maintained throughout her testimony that the only reason the Appellees courses were canceled was due to a lack of diversity. Therefore, the Court concludes that the Commission correctly determined that the Appellant's only stated reason for denying accommodations to the Appellees, lack of diversity, was a pretext for discrimination.

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[45] *DP, Inc.*, 2000 WL 1211151, at *7.

The Commission's Findings and Its Ultimate Decision Are Supported By Substantial Evidence.

In addition to attacking the Commission's factual findings as to pretext, the Appellant maintains that certain findings by the Commission were not supported by substantial evidence. These findings include: (1) that there were numerous complaints about the Appellees' courses, some of which were based on the spiritual beliefs and religious objections of the callers to the courses; (2) that the Appellant identified the Appellees as Wiccans; (3) that Donna Jackson and Jason Russell were members of the same protected class as the other Appellees; (4) that Ms. Harvey advised Rev. Jeffcoat, that given the Appellant's policy regarding religious classes, it was not justifiable to allow Appellees to hold their classes in the auditorium; and (5) that the Appellees established that non-members of the protected class were treated more favorably.

First, the Appellant contends that no witnesses made any statements that there were "religious objections" to the classes. The Appellant cites Ms. Harvey's testimony for this statement. However, a review of Ms. Harvey's testimony reveals that, in fact, she was the witness who indicated that those who contacted the Appellant to complain had indicated religious objections to the courses. At one point, Ms. Harvey stated that some of those who called indicated they were Christians and did not agree with the subject matter of the courses.[46] At another point she testified that some of the calls were "not in the liking of [the Appellees'] beliefs and [the callers] objected to that."[47]

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[46] Trans. at 91.

[47] Trans. at 124.

Second, the Appellant argues that there is no testimony to support the Commission's finding that it identified the Appellees as Wiccan. The Appellant cites two different places where the Commission states this finding. In the first, the Commission goes on to indicate that its conclusion regarding the identification of the Appellees as Wiccan came from Rev. Jeffcoat's testimony that Ms. Harvey told him that "it did not seem justifiable that Boscov's continue with the classes with the Wiccans."[48] In the second, the Commission concluded that the great weight of the evidence indicated the Appellant identified the entire group as Wiccans. As previously stated, this evidence included complaints from other members of the public who cited their objection to the classes based on the "questionable nature" of the courses and the beliefs of those teaching the courses. This evidence is legally sufficient to support the Commission's conclusion that the Appellant believed or perceived the Appellees to be Wiccan. Additionally, as previously discussed, the Court notes that the Commission determined that the Appellees met the *prima facie* case requirement. This determination would also support the Commission's conclusion, since proving a *prima facie* case raises an inference that the Appellant's actions were more likely than not based on the consideration of the Appellees' creed.

Third, the Appellant disputes the Commission's determination that Donna Jackson and Jason Russell were members of the same protected class as the other Appellees. Instead of arguing why this finding is not supported by substantial evidence, the Appellant merely poses a series of questions none of which dispute that this finding was supported by substantial evidence. Additionally, the Court has already addressed what is meant by the requirement that the Appellees demonstrate they are members of a protected class, and has already determined that the

[48] *Jackson, et al.,* Op. at 57; Trans. at 250.

Commission correctly found the Appellees met this requirement.

Fourth, the Appellant disputes the Commission's conclusion that Ms. Harvey advised Rev. Jeffcoat that, given the Appellant's policy regarding religious classes, it was not justifiable to allow Appellees to hold their classes in the auditorium. The Appellant argues that there was no testimony to support this conclusion, and, that this conversation occurred after the cancellation of the classes. As to the first argument, this finding is directly supported by the testimony of Rev. Jeffcoat. As to the second argument, it appears accurate that this conversation occurred after the cancellation of classes. However, the timing of the conversation does not make the Commission's finding unsupported by substantial evidence. The evidence, previously described at length, amply exists.

Finally, the Appellants argue that there is no legal or factual basis for the Commission to conclude that the Appellees demonstrated that non-members of the protected class were treated more favorably. This, too, has been demonstrated as specious.

Additionally, the Appellant indicates that the above are only a selection, but not all, of the findings it believes are unsupported by substantial evidence. However, the Appellant's failure to raise additional concerns with the Commission's factual findings constitutes a waiver of any such claims.[49] Therefore, this Court will not address these unraised issues.

To the extent that the Appellant has disputed certain findings of the Commission, this Court holds that those findings are supported by substantial evidence. Additionally, after reviewing the record the Court concludes that the Commission's ultimate decision is supported by substantial evidence as well.

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[49] *See Murphy v. State*, 632 A.2d at, 1152.

The Commission Did Not Violate the Appellant's Due Process Rights.

The Appellant's final contention on appeal is that certain actions of the Commission deprived Appellant of a fair hearing in violation of its due process rights. Specifically, the Appellant claims its due process rights were violated by: (1) hearing testimony from two witnesses who were not identified by the Appellees as potential witnesses; (2) permitting Ms. Hawkley to testify even though she had served as the secretary for the Deputy Attorney General appointed to advise the Commission; (3) permitting hearsay testimony throughout the proceeding; (4) permitting Ms. Gaskill to communicate with the Appellees during the hearing; (5) allowing additional questioning of and testimony from the Appellees after they rested, and (6) allowing television cameras into the proceeding.

Due process requires that a party be provided with notice of the hearing, the opportunity to be heard and present evidence, and the right to refute evidence presented.[50] In administrative proceedings, "rudimentary requirements of fair play satisfy the due process requirements."[51] Furthermore, "an individual's due process rights are not violated, and will not affect the validity of an administrative determination, unless actual prejudice is shown."[52]

First, the Appellant complains of the Commission is by allowing two witnesses, Ms. Criss and Mr. Dominguez, to testify even though they were not on the witness list. The Appellant contends that this action denied it the opportunity to prepare to

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[50] *Givens v. State Harness Racing Com'n*, 1999 WL 169400, at *4 (Del. Super.).

[51] *Sandefur v. Unemployment Ins. Appeals Bd.*, 1993 WL 389217, at *5 (Del. Super.).

[52] *Id.*

question the witnesses or impeach their testimony. According to regulations enacted by the Commission, a hearing panel, "in its discretion, may refuse to receive into evidence any testimony of a witness who has not been named on the witness list."[53] Consequently, it may elect not to refuse it. Additionally, the Commission's regulations do not specifically provide for pre-hearing discovery by the parties; rather, these regulations contemplate investigation of the matter merely by the Commission's staff.[54] This does not result in an unfair hearing, for pre-hearing discovery is not required to provide the Appellant with due process.[55] Appellant was, in accordance with its due process rights, provided an opportunity to respond to the testimony presented by these witnesses. Thus, the Commission's allowance of testimony by Ms. Criss and Mr. Dominguez an act of discretion, and not a violation of due process.

Second, the Appellant argues that the Commission provided an unfair hearing when it allowed a biased witness, Ms. Hawkley, to testify. The Appellant argues Ms. Hawkley was biased in that, five years ago, she had served as secretary to the Commission's Deputy Attorney General. At the hearing, the Appellant objected to Ms. Hawkley's testimony, but the Commission overruled the objection. Cross-examination is the vehicle designed to deal with suspected bias. The Commission's position was entirely appropriate. Moreover, Appellant fails to show how the admission of this testimony created actual prejudice, given the fact that the

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[53] Delaware Dept. Of State, Human Relations Commission, DE ADC 1 1500 1501, § 8.8.1 (Westlaw) (2006).

[54] *Id*. at § 6.0.

[55] *See Eastburn v. Delaware Harness Racing Com'n*, 2006 WL 2900768, at *4 (Del.Super.) (citing *In re Gresick*, 1988 WL 116411, at *6 (Del. Super.)).

Commission ultimately concluded that Ms. Hawkley's testimony was cumulative, and decided not to rely on the testimony in reaching its decision.

Third, the Appellant argues that the continued allowance of hearsay testimony throughout the hearing was unfair. The Appellant specifically cites testimony by three of the Appellees who stated Ms. Harvey told them that the Appellant canceled the courses because it received a complaint from a minister. The Commission's own regulations clearly grant it the discretion to consider hearsay testimony.[56] Furthermore, our courts have long held not only that the admission of hearsay evidence in an administrative type proceeding is not a violation of due process,[57] but that agencies have discretion to rely upon such evidence.[58] Indeed, even adherence to the Delaware Rules of Evidence would not alter the determination. The specific testimony was a recitation of something told to the witness by an employee of Appellant. That is not hearsay.[59]

Fourth, the Appellant argues that allowing Ms. Gaskill to pass notes to the Appellees during the hearing violated due process. Not only is this a virtually disingenuous claim of deprived due process, but the Appellant has again failed to demonstrate how the passing of notes by a non-attorney actually prejudiced them.

Fifth, the Appellant contends that the Commission's allowance for additional testimony from the Appellees after they rested, and the Commission's questioning of those witnesses violated due process. The Commission is vested with investigatory

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[56] Human Relations Commission, DE ADC 1 1500 1501, § 8.15.1 ("Formal rules of evidence need not be strictly followed.").

[57] *In re Kennedy*, 472 A.2d 1317, 1329 (Del. 1984), *cert. denied*, 467 U.S. 1205 (1984).

[58] *Allied Sys. v. Shively*, 2004 WL 2419128, at *2 (Del. Super.).

[59] *See* D.R.E 801(d)(2).

as well as adjudicatory powers.[60] Part of its investigatory powers include the ability to "recall the Parties for further testimony if necessary to reach a decision"[61] and "to call and examine witnesses."[62] As our courts have noted, "it is not unusual for an administrative agency to act as litigant, lawyer and judge in the initial determination of the matter before it . . ."[63] In the past, our courts have upheld the commingling of such authority against due process challenges.[64] To the extent that the Appellant's argument suggests that the Commission's dual role violated due process, because the Commission undertook the allegedly unfair actions due to bias or prejudice, the Appellant bears the heavy burden of "overcom[ing] a presumption of honesty and integrity in those serving as adjudicators."[65] Such burden can be met upon a showing of the adjudicator's financial interest or of the adjudicator's personal hatred of or prejudice against the complaining party stemming from personal abuse or criticism of the adjudicator by the complaining party.[66] The Appellant having made no such showing, the presumption remains intact.

Finally, the Appellant argues that by allowing television cameras into the hearing the Commission violated due process because the Delaware Supreme Court does not permit the use of television cameras in the courtroom. This argument, like

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[60] *See* 6 *Del. C.* § 4508 (c), (e).

[61] Human Relations Commission, DE ADC 1 1500 1501, § 8.15.8.

[62] Human Relations Commission, DE ADC 1 1500 1501, § 8.15.

[63] *Blinder, Robinson & Co. v. Bruton*, 552 A.2d 466, 472 (Del. 1989).

[64] *In re Kennedy*, 472 A.2d 1317.

[65] *Blinder, Robinson & Co.*, 552 A.2d at 473.

[66] *Id*.

the virtually vacuous arguments in the other contentions in this section, fails. The Supreme Court has specifically granted lower tribunals discretion to permit television cameras in non-jury civil proceedings.[67] Additionally, the Appellant again fails to demonstrate how the Commission's decision either amounted to an abuse of the discretion granted it or resulted in any actual prejudice.

For the foregoing reasons, the Court holds that the Appellant's arguments regarding alleged due process violations are without merit.

CONCLUSION

In conducting this appellate review, the Court was reminded of these words from Thomas Jefferson, which were included within the Virginia Statute for Religious Freedom:[68] "Our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry." The Commission was charged with ensuring that we Delawareans uphold similar ideals. After examination of the record, the Court is satisfied that the decision of the Commission, finding a violation of 6 *Del. C.* § 4504(a) and ordering damages, is supported by substantial evidence and free from legal error. Accordingly, the decision is **AFFIRMED.**

SO ORDERED.

/S/ ROBERT B. YOUNG
J.

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[67] *See* Del. Supr. Ct. Admin. Dir. 155, Steele, C.J. (April 5, 2004).

[68] Va. Code Ann. § 57-1 (2006).