

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

MICHAEL A. JUSTICE,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	C.A. No. _____
)	
CITY OF DOVER, CARLETON E. CAREY, SR.,)	
and JAMES HOSFELT,)	
)	
<i>Defendants.</i>)	
_____)	

COMPLAINT

PRELIMINARY STATEMENT

1. Plaintiff Michael A. Justice brings this action under the Federal Civil Rights statute, 42 U.S.C. § 1983, to enjoin Defendants from enforcing Section 70-7 of the Code of Ordinances, City of Dover, Delaware against him and for a declaration that the law is unconstitutional under the Ex Post Facto Clause of the United States Constitution.

2. Dover Code § 70-7, which was adopted on April 9, 2012, prohibits registered sex offenders, like Mr. Justice, from residence or employment within 500 feet of a day care center after April 9, 2013. As a result of the adoption of Section 70-7, Mr. Justice has been instructed to vacate his home by April 9, 2013.

3. Mr. Justice alleges that Dover Code § 70-7 is unconstitutional on its face as applied to registered sex offenders who committed their offenses before April 9, 2012, the date of its enactment, because it imposes a punishment to which they were not subject at the time of their offenses. The Ex Post Facto Clause of the United States Constitution forbids the imposition

of retroactive punishment. Mr. Justice contends that because § 70-7 imposes punishment it cannot be applied retroactively to sex offenders like him whose offenses occurred before the effective date of the statute.

4. Mr. Justice further alleges that Dover Code 70-7 is preempted by the laws of the State of Delaware, which contain a comprehensive scheme for the management of sex offenders.

JURISDICTION AND VENUE

5. This action is brought under 42 U.S.C. § 1983. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343 and 1367. The Court has authority under 28 U.S.C. § 2201 to provide appropriate declaratory relief as to matters within its jurisdiction.

6. Venue is proper pursuant to 28 U.S.C. § 1391(b) because Mr. Justice and Defendants reside in the District of Delaware.

PARTIES

7. Plaintiff resides at 100 Long Island Court in Dover, Delaware. He is a registered sex offender and, as such, is subject to § 70-7, which will prohibit him from residing within 500 feet of a day care center.

8. Defendant City of Dover is an incorporated municipality of the State of Delaware.

9. Carleton E. Carey, Sr. is the Mayor of the City of Dover. He is sued in his official capacity.

10. James Hosfelt is the Police Chief of the City of Dover. He is sued in his official capacity.

11. Mayor Carey, Police Chief Hosfelt and persons under their direct and indirect supervision are responsible for enforcing Dover Code § 70-7.

RELEVANT STATUTES

12. Dover Code Section 70-7(b) provides, in pertinent part:

- (1) Sex offenders assigned as Risk Assessment Tier II or Tier III under the provisions of 11 Del C., c. 41, §4120, shall be prohibited from residence or employment within 500 feet of a day care center as defined in Appendix B – Zoning, Article 12 – Definitions, of the Dover Code.
- (2) Any sex offender assigned as Risk Assessment Tier II or Tier III who maintains residence or employment within 500 feet of a day care center on the date of adoption of this ordinance shall comply with the provisions of the ordinance within 12 months.

13. 11 Del. C. §§ 4120-4122 set out a comprehensive scheme for registration and public notification regarding sex offenders, as well as establishing a statewide Sex Offender Management Board for the "evaluation, identification, classification, treatment, and continued monitoring of sex offenders..."

14. 11 Del. C. § 4120 requires any person who has been convicted of violating, *inter alia*, 11 Del. C. § 770, who is released, discharged or paroled from a Delaware Department of Correction Level IV or Level V facility to register as a sex offender.

15. Pursuant to 11 Del. C. § 4120-4121, any person convicted of violating 11 Del. C. § 770 shall be designated to Risk Assessment Tier II. With exceptions not here relevant, any person designated to Risk Assessment Tier II is required to register for 25 years after being released from incarceration.

16. 11 Del. C. section 1112 prohibits sexual offenders who commit certain offenses "upon a child under 16 years of age" from residing within 500 feet of, *inter alia*, any "preschool, kindergarten, elementary school, [or] secondary school."

FACTUAL ALLEGATIONS

17. Mr. Justice was convicted in 2006 of violating 11 Del. C. § 770(a)(2), which provides that “[a] person is guilty of rape in the fourth degree when the person: (2) Intentionally engages in sexual intercourse with another person, and the victim has not yet reached that victim's eighteenth birthday, and the person is 30 years of age or older, except that such intercourse shall not be unlawful if the victim and person are married at the time of such intercourse.”

18. The crime occurred on December 29, 2005, three months before the victim reached age 18.

19. As the result of the conviction, Mr. Justice was required to register as a sex offender under 11 *Del. C.* § 4120, and he complied with that requirement.

20. In January, 2012, upon being discharged from a Delaware Department of Correction facility, he began residing with his mother in an apartment located at 100 Long Island Court, Dover, Delaware. He has resided with his mother at that address continuously since then.

21. Promptly after moving into that apartment he registered as a sex offender in accordance with 11 *Del. C.* § 4120, and his name and address were placed in the Delaware Sex Offender Central Registry. On information and belief, the Delaware State Police promptly furnished his name and address to the City of Dover Police, as required by statute.

22. At the time Mr. Justice began residing in the apartment, a day care center, was located less than 500 feet away.

23. The Delaware state statutes in effect on December 29, 2005 limited where registered sex offenders may live. They did not (and still do not) prohibit a registered sex offender from residing within 500 feet of a day care center.

24. No government official challenged Mr. Justice's right to live in the apartment, notwithstanding the presence of the day care center.

25. On April 9, 2012 the City of Dover adopted Dover Code § 70-7, which prohibits registered sex offenders from residing within 500 feet of a day care center.

26. Thereafter, Mr. Justice received a letter instructing him that he is required to vacate his 100 Long Island Court apartment by April 9, 2013. On information and belief, the letter was sent by an employee of the Dover Police Department acting pursuant to City of Dover policy.

27. Pursuant to § 70-7(f) the penalty for violation of the requirement that he vacate his home by April 9, 2012 is a fine of \$500 for each day that he continues to reside there after April 9, 2013.

28. Because Mr. Justice is required to register as a sex offender for twenty-five years, he is barred by § 70-7 from living within 500 feet of a day care center in Dover until 2037.

29. Mr. Justice has no adequate remedy at law.

STATE PREEMPTION

30. Section 70-7 imposes restrictions on sex offenders such as plaintiff greater than those imposed by Delaware state laws governing sex offenders, because it applies without regard to the age of the victim. State statutory law comprehensively addresses punishment, probation, supervision, registration, and residency restrictions for sex offenders and balances the paramount interest of public safety with the need to reintegrate offenders in the community. By imposing restrictions greater than those imposed by the state, § 70-7 conflicts with the state law in policy and operational effect, and interferes with the effective management and treatment of offenders by corrections, law enforcement, and social service agencies.

31. Therefore, §70-7 is preempted by Delaware law.

VIOLATION OF THE EX POST FACTO CLAUSE

32. Section 70-7 imposes retroactive punishment on Plaintiff, who committed his offense approximately five and one-half years before the date Dover Code § 70-7 was adopted. Section 70-7 is punitive because it (a) imposes an affirmative disability and restraint by barring persons subject to it from living and working where they choose and by requiring persons such as Plaintiff to vacate their homes and incur the financial burdens of new residences, (b) is applied equally upon all Tier II and Tier III offenders regardless of whether their offense occurred against a child or an adult, (c) does not consider the danger posed by a person to whom it applies, (d) is not rationally related to public safety; (e) amounts to banishment; (f) promotes general deterrence through the threat of negative consequences, and (g) applies for at least 25 years, among other reasons.

33. Therefore, Defendants' enforcement, under color of state law, of § 70-7 against Plaintiff violates his rights under the Ex Post Facto Clause of the United States Constitution.

34. The Attorney General of the State of Delaware is being served with a copy of this Complaint in accordance with 10 *Del. C.* § 6511.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

a. Temporarily restraining and preliminarily and permanently enjoining Defendants and all persons acting in concert or participation with them, including all persons subject to their supervision, from enforcing of § 70-7 against him;

b. A declaratory judgment that § 70-7 is unconstitutional as applied to registered sex offenders who committed their offenses prior to April 9, 2012;

- c. A declaratory judgment that § 70-7 is void as preempted by Delaware state law;
- d. An award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988;
- e. Such other and further relief as this Court finds just and equitable.

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