

Liability For Discriminatory Advertising Under Fair Housing Law

The Fair Housing Act. 42 U.S.C. 3604(c), makes it unlawful:

To make, print, or publish, or cause to be made, printed or published, any notice statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion, sex, national origin, handicap or familial status, or an intention to make any such preference, limitation or discrimination.

A U.S. Department of Housing and Urban Development (HUD) regulation concerning the use of human models in advertising provides as follows:

Human models in photographs, drawings or other graphic techniques may not be used to indicate exclusiveness because of race, color, religion, sex, handicap, familial status or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing the majority and minority groups in the metropolitan area, both sexes and, when appropriate, families with children. Models, if used, should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap familial status or national origin, and is not for the exclusive use of one such group.

In the case *Saunders v. General Services Corporation*, 659 F. Supp. 1042 (Ed Virginia 1987), the Federal Court was presented with a case which concerned the question of the discriminatory utilization of human models under the Fair Housing Law and the HUD regulation. In *Saunders*, the defendant management company (GSC) operated and managed fourteen apartment complexes in the Richmond, Virginia area. Its President, Mr. Johnathan Perel, has a financial interest in the entities which own the complexes and are managed by GSC and both were named as defendants. Previous to the lawsuit, the Non-Profit Fair Housing Corporation had brought allegations against GSC and Mr. Perel alleging housing discrimination which was aimed at discouraging or preventing blacks from renting at the apartment complexes managed by GSC. The allegations involved discouraging social events that could encourage blacks to attend at the apartment complexes and "turning off the charm" to prospective black tenants. These initial allegations were resolved by a conciliation agreement whereby GSC agreed to adopt a Fair Housing Policy Statement and distribute such to all of its employees and agreed to utilize an equal housing opportunity logo in its newspaper advertisements. As part of the agreement, the claims against GSC and Perel for violation of the Fair Housing Act were released, but approximately two years later, the Non-Profit Fair Housing Corporation discovered that GSC had continued to utilize advertising brochures without the EHO logo or slogan and only after a significant period of time did GSC change its advertisements to include the EHO logo or slogan but did so that it was inconspicuously displayed in its advertisements. Subsequently, this lawsuit was brought against GSC and Perel alleging that it had committed common law fraud in misrepresenting that the brochures it was using at the time of the conciliation agreement would contain the EHO logo and that it had breached the conciliation agreement by failing to include such logos indicating a

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racial preference in violation of the Fair Housing Act and finally, certain violations of the Fair Housing Act alleging a racial preference in advertising.

In regard to the fair housing claims, it was contended that the absence of any black models from sixty eight photographs contained in the advertising brochure indicated a preference or an intention to make a preference based upon race. The court noted that in order to establish a fair housing violation, it was not necessary that it be shown that the management company "intended" to express a racial preference, but that a violation would be found if "to an ordinary reader the natural interpretation of the advertisements published in the {newspaper} is that they indicate a racial preference in the acceptance of tenants." The court then went on to examine the evidence to determine whether the advertising brochures' lack of black models indicated a racial preference to an ordinary reader. The court acknowledged that there was conflicting evidence on this issue but there was a finding by a preponderance of the evidence that the advertising brochure indicated a racial preference. This conclusion was reached after hearing from two expert witnesses who had done academic and market research on the effect of racial composition of advertising models on the average consumer, They both gave opinion testimony that the advertising brochure evidenced a preference for white tenants and a message that black tenants would not be as welcome. The court also noted that the readers of the advertising brochure would look at the human models depicted as being those representative of the types of individuals residing at the GSC apartment complexes, The court observed that a prospective tenant reading the advertising brochure and seeing no models whom he or she could identify with, would probably result in the prospective tenant concluding that the apartments were not for their "kind". The court felt that it was natural for the advertising brochure to be interpreted so as to conclude that the apartment complexes were designed for white, not black tenants that discouraged blacks from seeking housing at the apartment complexes. Moreover, there was additional factual basis for this conclusion including a memo from Mr. Perel to another employee of GSC indicating that the advertising brochure was to convey its "institutional/upper income/exclusivity approach". Also after the revisions were made to the advertising brochure, GSC circulated a questionnaire among its management asking how the brochure should "treat children, seniors" and where "the best places for blacks" would be in the advertising brochure. Finally, a memorandum existed indicating that the black models should not be shown swimming in the advertising brochure. GSC denied that they were concerned about blacks swimming, but that they were concerned about any model swimming. GSC offered their own expert who raised some questions as to the studies and conclusions offered by the Plaintiff's experts, but on balance, the court was not persuaded by the Defendant's expert testimony.

Because the court found that GSC's use of the advertising brochure violated the Fair Housing Act, the court then turned to the questions as to whether the Defendant, Johnathan Perel, could be liable for such violations. **The court concluded that a corporation and its officers "are responsible for the acts of a subordinate employee {in violation of the act}, even though these acts were neither directed nor authorized".** This conclusion followed because even the innocent and well intentioned employers have a statutory duty not to discriminate which cannot be delegated to those in

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their employ. So even while the court found that Mr. Perel's testimony indicated that he did not intend to discriminate and that he supported the goals of equal and open housing as the President of GSC, it found that he had a non-delegable duty to ensure that GSC, through its employees, followed such goals and complied with the Fair Housing Act. By failing in such duty, he was held jointly liable with the corporation for the violations.

The court then turned to the remedies available to the Non-Profit Fair Housing Corporation in this action and while it denied injunctive relief to prevent the further dissemination of discriminatory advertising materials, the court found that a declaratory judgement of the violation of the act along with monetary damages was appropriate. In discussing this issue, the court indicated that it cannot force GSC to give "proportional representation to blacks in their advertising" nor that such representation in the advertising is necessary in order to avoid a racial preference.

The court found in violating the Fair Housing Act, the Non-Profit Fair Housing Corporation was entitled to their actual damages and not more than \$1,000.00 in punitive damages together with court costs and attorney's fees. It looked to the Plaintiff's time and resources devoted to pursuing this claim and awarded damages to compensate it for these activities that were necessary to pursue the violations. Moreover, it found that compensation for damages to the fair housing goals as intended by the Fair Housing Act was appropriate and found an award of \$10,000.000 was appropriate in this regard. It went on to find that damages for emotional distress and humiliation as a result of a prospective tenant reading the advertising brochure is compensable under the act and felt an award of \$2,5000.00 in actual damages was appropriate to one of the Plaintiffs who alleged that she was deeply affected by the message conveyed by the advertising brochure.

The court refused to award punitive damages to the Plaintiffs indicating that they had not proved ill-will, malice or a desire to injure the Plaintiffs on the part of the Defendants and the court noted that being that this was an action of first impression in interpreting the fair housing law {in 1987}, the Defendants did not have clear legal authority indicating that their conduct was illegal under the act which did not indicate any willfulness or wantonness to violate the fair housing law.

Consequently, the court found in favor of the Plaintiffs and awarded \$12,800.00 in damages against Defendants GSC and Perel.

By Scott M. Clark, Esq.

3008 N. 44th Street, Phoenix, AZ 85018

602.957.7877

sclark@scottclarklaw.com

<http://www.scottclarklaw.com>

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