No. 12-3284

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MIAMI VALLEY FAIR HOUSING CENTER, INC.,

Plaintiff-Appellant

v.

THE CONNOR GROUP, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL

THOMAS E. PEREZ
Assistant Attorney General

DENNIS J. DIMSEY
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4757

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

REGULATIONS:

MISCELLANEOUS: **PAGE**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-3284

MIAMI VALLEY FAIR HOUSING CENTER, INC.,

Plaintiff-Appellant

v.

THE CONNOR GROUP, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL

ISSUE PRESENTED

Whether the district court applied an incorrect legal standard in assessing whether a rental advertisement violated 42 U.S.C. 3604(c), the provision of the Fair Housing Act that prohibits the publication of "any notice, statement, or advertisement, with respect to the * * * rental of a dwelling that indicates any preference, limitation, or discrimination based on * * * sex [or] * * * familial status."

INTEREST OF THE UNITED STATES

This case involves the proper interpretation and application of Section 3604(c) of the Fair Housing Act (FHA), 42 U.S.C. 3604(c). The United States Department of Justice and the United States Department of Housing and Urban Development (HUD) share enforcement authority under the FHA. See 42 U.S.C. 3612(a) and (o), 3614(e). The United States thus has a strong interest in ensuring the correct interpretation and application of Section 3604(c). Pursuant to that interest, the United States recently filed an amicus brief in this Court in *Fair Housing Resources Center, Inc.* v. *DJM's 4 Reasons Ltd.*, No. 10-3365 (6th Cir.), addressing the legal standards for proving a violation of Section 3604(c).

STATEMENT OF THE CASE

1. Section 3604(c) makes it "unlawful * * * [t]o make, print, or publish * * * any notice, statement, or advertisement, with respect to the * * * rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status,[1] or national origin, or an intention to make any such preference, limitation, or discrimination." Section 3604(c) applies to all written statements, including advertisements, by a person engaged in the rental of a dwelling. 24 C.F.R. 100.75(b) and (c). Although the Act does not

[1] The FHA defines "[f]amilial status" as "one or more individuals (who have not attained the age of 18 years) being domiciled with" a parent or guardian. 42 U.S.C. 3602(k)(1); 24 C.F.R. 100.20.

define the terms "preference, limitation, or discrimination," the Second Circuit has held that "a plaintiff could bring an action against a defendant * * * if the defendant's housing ads suggested to an ordinary reader that a particular race was preferred or dispreferred for the housing in question, regardless of the defendant's intent." *Ragin* v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993) (internal quotation marks, brackets, and citation omitted).

2. Defendant-appellee The Connor Group (Connor) and its related organizations own and manage approximately 15,000 rental units nationwide, a few thousand of which are located in the Dayton, Ohio, area. On April 4, 2009, Connor posted the following advertisement on Craigslist.com for rental units at its Chesapeake Landing property in the Dayton area with the tag line "$599/1 br—Great Bachelor Pad! (Centreville)":

> Our one bedroom apartments are a great bachelor pad for any single man looking to hook up.
>
> This apartment includes a large bedroom, walk in closet, patio, gourmet kitchen, washer dryer hook up and so much more.
>
> Call today to cash in on our move in specials.

(R. 1, Compl., Ex. A, p. 7 (Single Man Ad).)[2]

[2] "R. __" refers to the docket entry number of documents filed in the district court.

3. Plaintiff-appellant Miami Valley Fair Housing Center, Inc. (MVFHC) is a private non-profit fair housing organization that works to eliminate discrimination in housing in the Miami Valley region. When MVFHC became aware of the Single Man Ad, it filed a complaint with HUD, alleging that the advertisement expressed an unlawful preference on the basis of sex and familial status. HUD referred the complaint to the Ohio Civil Rights Commission. The Commission found probable cause to believe that the advertisement discriminated based on sex and familial status in violation of Ohio Revised Code §§ 4112.02(H) and (J), which prohibit advertisements relating to the rental of any housing accommodation that indicate a preference, limitation, specification, or discrimination based on sex or familial status.

MVFHC subsequently discovered additional advertisements posted by Connor on Craigslist.com that it believed also violated the FHA. On March 5, 2010, MVFHC filed this action against Connor, alleging that several advertisements in connection with the rental of dwellings that Connor posted on Craigslist.com indicated a preference based on sex or familial status in violation of Section 3604(c) of the FHA and Ohio Revised Code § 4112.02(H). MVFHC sought injunctive and declaratory relief, compensatory and punitive damages, and attorneys' fees.

The district court denied MVFHC's motion for partial summary judgment, rejecting MVFHC's argument that the language of the advertisements constituted facial violations of the FHA and state law. See *Miami Valley Fair Hous. Ctr., Inc.* v. *The Connor Grp.*, 805 F. Supp. 2d 396, 408 (S.D. Ohio 2011). MVFHC voluntarily dismissed all claims except those relating to the Single Man Ad. The case proceeded to a four-day jury trial.

4. At trial, MVFHC presented testimony of several of its representatives. President and CEO Jim McCarthy testified that he believed that the Single Man Ad "was plain on its face," and that MVFHC did not need to further investigate Connor to obtain additional proof of the advertisement's unlawfulness. (R. 109, Tr. Vol. 1, pp. 53, 59, 164.) John Zimmerman, who serves as MVFHC's vice-president, testified that based on his experience with fair housing matters, terms such as "ideal for a man or ideal for a woman" are unacceptable ways to advertise. (R. 110, Tr. Vol. 2, pp. 261, 274-276.) MVFHC's Enforcement Coordinator Anita Schmaltz testified that MVFHC immediately filed an administrative complaint with the Ohio Civil Rights Commission concerning the Single Man Ad after finding it online. (R. 110, Tr. Vol. 2, pp. 236-237, 242-243.) After presenting its case, MVFHC moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), arguing that the terms "single man" and "bachelor pad" indicate a preference based on sex and familial status in violation of the FHA and Ohio's fair

housing statute. (R. 110, Tr. Vol. 2, pp. 296-298, 302-303.) Connor also moved for a directed verdict, maintaining that a statement that Connor "like[s] this particular type of tenant or this apartment is ideal for this particular type of tenant" merely indicates "the suitability of the property to [the] renter" and is therefore lawful. (R. 110, Tr. Vol. 2, pp. 298-300.) Despite MVFHC's objection to consideration of whether the advertisement was simply referring to the suitability of the apartment to the renter (R. 110, Tr. Vol. 2, pp. 302-303), the district court denied both motions, stating that this matter should be decided by the jury. (R. 111, Tr. Vol. 3, p. 316.)

Connor presented evidence that its employees did not intend to discriminate based on sex or familial status when posting the Single Man Ad. Connor's Regional Vice-President Sean Foreman testified that families with children typically do not seek apartments with one bedroom and one bathroom. (R. 111, Tr. Vol. 3, pp. 319, 336.) MVFHC renewed, and the court denied, its Rule 50 motion for judgment as a matter of law. (R. 111, Tr. Vol. 3, p. 385.)

In closing, MVFHC argued that the jury need only decide if the Single Man Ad "indicat[es] a preference or indicat[es] a specification" in violation of the FHA and state law, and that this case does not involve the discrimination or limitation categories in Section 3604(c). (R. 112, Tr. Vol. 4, p. 442.) Connor argued in closing that the jury need not decide this case from the point of view of a member

of a protected group, and that the jury need only decide if the advertisement "focuses on the suitability of the property to the renter, which is permissible, or impermissibly on the suitability of the renter to the property." (R. 112, Tr. Vol. 4, p. 451.)

The district court instructed the jury that it must decide whether the Single Man Ad "indicated a preference, limitation, specification, or discrimination based on sex or familial status and, if so, whether the advertisement directly and proximately caused damage to Plaintiff." (R. 112, Tr. Vol. 4, pp. 494-495; R. 89, Final Jury Instructions, pp. 22-23.) The court further instructed the jury that in doing so, it "must determine how an 'ordinary reader' would interpret the advertisement." (R. 112, Tr. Vol. 4, p. 496; R. 89, Final Jury Instructions, p. 26.) Over MVFHC's objections (R. 111, Tr. Vol. 3, pp. 397-400), the court next instructed the jury that the FHA is violated only if the advertisement discouraged members of a protected group from applying for an apartment "because of some discriminatory statement or indication contained therein." The court also instructed the jury to "[a]sk * * * whether the message focuses on the suitability of the property to the renter, which is permissible, or whether it impermissibly focuses on the suitability of the renter to the owner." (R. 89, Final Jury Instructions, pp. 23-24; R. 112, Tr. Vol. 4, p. 497.) The jury returned a verdict for Connor on all counts. (R. 112, Tr. Vol. 4, pp. 512-514.)

5. Following the trial, MVFHC moved for judgment as a matter of law pursuant to Rule 50, and/or for judgment notwithstanding the verdict or for a new trial under Federal Rule of Civil Procedure 59(e). MVFHC again argued that the advertisement's use of "single man" and "bachelor pad" satisfies the objective "ordinary reader" standard that the advertisement on its face would "suggest[] to an ordinary reader that a member of a protected group is 'preferred or dispreferred for the housing in question' or would discourage an ordinary reader of a protected group from answering it." (R. 93, Motion For New Trial, p. 2 (citation omitted).) Alternatively, MVFHC argued that a new trial is warranted because the jury instructions incorrectly instructed the jury to find liability only if MVFHC proved (1) that the advertisement contained a discriminatory statement (even though MVFHC alleged that the advertisement indicated an unlawful preference); and (2) that the advertisement "focuse[d] on the suitability of the renter to the owner," rather than "the suitability of the property to the renter." (R. 93, Motion For New Trial, pp. 6-7.) According to MVFHC, the district court inappropriately relied on a Wisconsin court of appeals decision, which interpreted a Wisconsin statute to impose the additional requirement that the jury consider whether the advertisement focuses on the suitability of the apartment to the renter – a requirement found in neither the FHA nor Ohio state law. (R. 93, Motion For New Trial, pp. 6-7.)

In opposition, Connor argued that liability was a jury question and plaintiff offered no evidence to support a finding that an ordinary reader would decide that the advertisement indicated a preference, limitation, discrimination, or specification. (R. 95, Response In Opposition, p. 3.) Connor also stated that the jury instructions were not an abuse of discretion because the district court instructed the jury that it may find liability based on a preference, and specifically instructed the jury that MVFHC need not prove an intent to discriminate. (R. 95, Response In Opposition, pp. 9-16.)

6. On February 13, 2012, the district court denied MVFHC's motion. The court stated that "[a]lthough the ad in question is designed to appeal to single men, it contains no express preference or limitation, and an ordinary reader would not necessarily conclude that women or people with children were not welcome at this apartment complex." (R. 101, Decision And Entry Overruling Plaintiff's Motion, p. 5.) Rather, according to the court, "[t]he focus of the advertisement 'is the suitability of the property to the renter – not the acceptability of the renter to the owner.'" (R. 101, Decision And Entry Overruling Plaintiff's Motion, p. 6 (citing *Metropolitan Milwaukee Fair Hous. Council* v. *Labor Indus. Review Comm'n*, 496 N.W.2d 159, 162 (Wis. Ct. App. 1992)).) Again citing *Milwaukee Fair Housing Council*, the court downplayed the likelihood that women and families with children "may be somewhat dissuaded from responding to an ad for a 'great

bachelor pad,'" because "that dissuasion is not 'the product of any discriminatory statement or indication in the advertisement.'" (R. 101, Decision And Entry Overruling Plaintiff's Motion, p. 6 (citation omitted).) As for the jury instructions, the court agreed with Connor that the instructions as a whole properly instructed the jury that it need not find intent to discriminate, and that it is unlawful to publish an advertisement that indicates a preference, limitation, specification, or discrimination. (R. 101, Decision And Entry Overruling Plaintiff's Motion, p. 10.)

ARGUMENT

THE DISTRICT COURT APPLIED AN ERRONEOUS LEGAL STANDARD TO DETERMINE WHETHER THE SINGLE MAN AD INDICATES AN IMPERMISSIBLE PREFERENCE BASED ON SEX AND FAMILIAL STATUS IN VIOLATION OF THE FAIR HOUSING ACT

This case involves a straightforward application of the language in Section 3604(c) of the FHA, which provides, in relevant part, that it is unlawful to make or publish an advertisement with respect to the rental of a dwelling that indicates a preference based on sex or familial status. By stating that "[o]ur one bedroom apartments are great bachelor pads for any single man looking to hook up," the Single Man Ad indicates an illegal preference against women and families with children. In reaching the contrary conclusion, the district court erroneously applied legal standards from *Metropolitan Milwaukee Fair Housing Council* v. *Labor Industry Review Commission*, 496 N.W.2d 159, 162 (Wis. Ct. App. 1992) – a state court decision addressing a state statute – in analyzing MVFHC's FHA claim. The

district court incorrectly determined the inquiry to be whether the focus of the advertisement was on the suitability of the property to the renter, rather than the suitability of the renter to the owner. The FHA does not permit – let alone require – such consideration. No court, other than the court below, has applied such a standard in determining whether an advertisement or statement violates Section 3604(c). See, *e.g.*, *Ragin* v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898, 906 (2d Cir. 1993) (to establish a claim based on an impermissible preference, a plaintiff need only show that an ordinary reader of the advertisement would find that the advertisement expresses a preference based on one of the protected characteristics in Section 3604(c)).

Even if this Court were to find that MVFHC was not entitled to judgment as a matter of law because the advertisement did not facially violate Section 3604(c), the Court would then need to address whether the jury was properly instructed. Because the district court incorrectly instructed the jury to consider the FHA claims under the legal standards from *Milwaukee Fair Housing Council*, the jury instructions similarly constitute reversible error.

A.& The District Court Used An Incorrect Legal Standard In Denying MVFHC's Motions For Judgment As A Matter Of Law

Section 3604(c) prohibits the making or publishing of any statement or advertisement that indicates any preference, limitation, or discrimination based on, among other factors, sex or familial status. It is undisputed that Connor posted the

Single Man Ad on Craigslist.com with respect to the rental of a dwelling. Whether the Single Man Ad "indicates" an unlawful "preference" is the central question in this case. This Court reviews de novo the district court's denial of MVFHC's motions for judgment as a matter of law or for a new trial. See, *e.g.*, *Jackson* v. *FedEx Corporate Servs., Inc.*, 518 F.3d 388, 391-392 (6th Cir. 2008) (reviewing denial of motion for judgment as a matter of law at the conclusion of trial de novo); *National Ecological Found.* v. *Alexander*, 496 F.3d 466, 476 (6th Cir. 2007) ("[T]o the extent that the motion to alter or amend was based on an erroneous legal doctrine, the standard of review is *de novo*.").

1. Every court of appeals that has considered whether a statement or advertisement indicates an impermissible preference, limitation, or discrimination in violation of Section 3604(c) has held that an objective "ordinary reader" standard should be applied in determining what is "indicate[d]" by the statement or advertisement. See, *e.g.*, *White* v. *HUD*, 475 F.3d 898, 905-906 (7th Cir. 2007) (citing *Jancik* v. *HUD*, 44 F.3d 553, 556 (7th Cir. 1995)); *Ragin* v. *New York Times Co.*, 923 F.2d 995, 999 (2d Cir.), cert. denied, 502 U.S. 821 (1991); *United States* v. *Hunter*, 459 F.2d 205, 215 (4th Cir.), cert. denied, 409 U.S. 934 (1972); accord *Spann* v. *Colonial Village, Inc.*, 899 F.2d 24, 29 (D.C. Cir.) (applying "reasonable reader" standard to determining a Section 3604(c) violation), cert. denied, 498 U.S. 980 (1990). Section 3604(c) is violated if an advertisement for

housing suggests to an ordinary reader that a particular race or other protected group is preferred or disfavored for the housing in question, regardless of the defendant's intent. *Jancik*, 44 F.3d at 556; *Ragin*, 6 F.3d at 906. In cases in which the advertisement is alleged to indicate an unlawful "preference," the correct inquiry is "whether a hypothetical ordinary reader would find that a defendant's ads expressed an impermissible * * * preference." *Ragin*, 6 F.3d at 906 (emphasis omitted). The ordinary reader "is neither the most suspicious nor the most insensitive of our citizenry." *Ragin*, 923 F.2d at 1002. Courts also have allowed parties to establish violations of Section 3604(c) by proving an actual intent to discriminate. See *Housing Opportunities Made Equal, Inc.* v. *Cincinnati Enquirer, Inc.*, 943 F.2d 644, 646 (6th Cir. 1991); *Hunter*, 459 F.2d at 215.

In *Hunter*, 459 F.2d at 209 n.1, for example, the Fourth Circuit assessed whether a newspaper advertisement offering for rent a "[f]urnished basement apartment[] [i]n private white home" violated Section 3604(c). The court of appeals held that "[t]o the ordinary reader the natural interpretation" of the words "white home" in the advertisements at issue in that case "is that they indicate a racial preference in the acceptance of tenants." *Id*. at 215. The court further stated that "[a]ny other interpretation of the advertisements would severely undercut the objectives of the legislation." *Ibid*. According to the Fourth Circuit, "[i]f an advertiser could use the phrase 'white home' in substitution for the clearly

proscribed 'white only,' the statute would be nullified for all practical purposes." *Ibid*. See also *Soules* v. *HUD*, 967 F.2d 817, 824 (2d Cir. 1992) ("In cases where ads are clearly discriminatory, a court may look at an ad and determine whether it indicates an impermissible preference to an ordinary reader, and inquiry into the author's professed intent is largely unnecessary.") (citing *Hunter*, 459 F.2d at 215).

2. Here, the district court misconstrued Section 3604(c) by erroneously applying legal standards from *Milwaukee Fair Housing Council*, 496 N.W.2d at 162, a state court of appeals decision addressing a state statute that is much narrower than the FHA. In *Milwaukee Fair Housing Council*, the advertisement at issue stated that a two-bedroom cottage was "ideal for couple." *Id*. at 160-161. Plaintiff challenged the advertisement as discriminatory based on marital status under the Wisconsin Open Housing Act, which prohibited advertisements that "state[] or indicate[] any discrimination in connection with housing." *Id*. at 161-162 & n.3. "[D]iscrimination" under the state law included excluding or treating any person unequally because of marital status. *Id*. at 162 n.4. The state court of appeals stated that "[m]ost advertisements will tempt some and deter others," and that the "correct inquiry is whether such dissuasion is the product of any discriminatory statement or indication in the advertisement." *Id*. at 162. Applying this standard, the court held that the advertisement did not state or indicate

discrimination, because "the focus of the message is the suitability of the property to the renter – not the acceptability of the renter to the owner." *Ibid.*

The district court, citing *Milwaukee Fair Housing Council*, denied MVFHC's motions for judgment as a matter of law. The court held that, to establish a violation of Section 3604(c), MVFHC had to show not only that the advertisement in question indicates a preference based on sex or familial status, but also that the preference focuses on the acceptability of the renter to the owner, rather than the suitability of the property to the renter. (R. 101, Decision And Entry Overruling Plaintiff's Motion, p. 6 (citing *Milwaukee Fair Hous. Council*, 496 N.W.2d at 162).) The court borrowed the language for the additional requirement from *Milwaukee Fair Housing Council*, which did not involve the FHA. 496 N.W.2d at 162 n.3. Imposing such a requirement is reversible error. The FHA does not impose – and no other court has interpreted the statute as imposing – such a requirement.

Allowing defendants to avoid liability under Section 3604(c) by characterizing preferences as commentary on the suitability of the property would severely undermine the objectives of the FHA.[3] It would also be contrary to the

[3] For example, Connor's counsel argued at trial that a statement that the property owner "like[s] this particular type of tenant" is lawful because it merely is a statement about the suitability of the property to the renter. (R. 110, Tr. Vol. 2, p. 300.)

well-established doctrine that the FHA as a whole is "broad and inclusive," and should be given "generous construction." *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972); accord *Campbell* v. *Robb*, 162 F. App'x 460, 466 (6th Cir. 2006); *Metropolitan Hous. Dev. Corp.* v. *Village of Arlington Heights*, 616 F.2d 1006, 1011 (7th Cir. 1980).

3. To establish a violation of Section 3604(c), MVFHC needed to establish only that an ordinary reader would find that the advertisement expresses an impermissible preference. *Ragin*, 6 F.3d at 906. Like the "white home" advertisement in *Hunter* that the Fourth Circuit held indicated an unlawful preference in violation of Section 3604(c), the Single Man Ad indicates an impermissible preference based on sex. Without doubt, the words "great bachelor pad for any single man" in the advertisement indicate to the ordinary reader an unlawful preference for male renters. The natural interpretation of these words on their face is that male renters are preferred over female renters. The unlawfulness of the preference created by the words "great bachelor pad for any single man" is easily demonstrated by substituting the words "great apartment for whites."

Moreover, HUD's policy guidance regarding advertisements under Section 3604(c) states that advertisements for rental units "should contain no explicit preference * * * based on sex." See Roberta Achtenberg, Office of the Assistant Secretary for Fair Housing and Equal Opportunity, *Guidance Regarding*

Advertisements Under § 804(c) of the Fair Housing Act at 3-4 (Jan. 9, 1995) (1995 Guidance). [4] This policy guidance is entitled to judicial deference. See, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998) ("[W]ell-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'") (citation omitted); *Meyer* v. *Holley*, 537 U.S. 280, 287-288 (2003) (deferring to HUD's "reasonable interpretation" of the FHA). See also Charge Of Discrimination, *HUD* v. *Duncan*, FHEO Case No. 05-09-1298-8, at 4 (filed Sept. 9, 2009) (advertisement that an apartment "[m]akes a very nice apt for single *guy* tenant" indicates a preference based on sex in violation of Section 3604(c)) (emphasis in original). [5]

4. The ordinary reader would also easily conclude that the combination of "single man," "bachelor pad," and "hooking up" indicates a preference against families with children. While the term "single," can mean unmarried, the term "single man," particularly as used in this context, also implies a man living alone without dependents. See, *e.g.*, 15 The Oxford English Dictionary 518 (2d ed. 1989) (defining single as, *inter alia*, "[u]naccompanied or unsupported by others[,]

---

[4] This guidance is reproduced in the addendum to this brief as Attachment B.

[5] This Charge of Discrimination is appended to Appellant's Brief as Exhibit A. The Charge was resolved by a Consent Order. See Appellant's Br., Ex. B.

alone, solitary"). Recognizing this common meaning of the term "single," HUD's policy guidance prohibiting advertisements that express an unlawful preference against families with children states that "[a]dvertisements may not * * * state a preference for adults, couples, or *singles*." See 1995 Guidance at 4 (emphasis added).[6] The advertisement's use of "single man" – in connection with "bachelor pad" and "hooking up" – indicates the same sort of unlawful preference against families with children as an advertisement stating a preference for "adults, couples, or singles." See also Charge Of Discrimination, *HUD* v. *Duncan*, FHEO Case No. 05-09-1298-8, at 3-4 (stating that "[a] rental advertisement is discriminatory on its face against families with children if it uses the limiting and preferential term 'single'").

Because MVFHC may establish liability under Section 3604(c) by showing that the advertisement indicates an unlawful preference, it need not prove that the Single Man Ad focuses on the acceptability of the renter to the owner, rather than the suitability of the property to the renter. Viewed under the correct legal standard, the Single Man Ad indicates to an ordinary reader a preference for renters based on sex and familial status. Indeed, the district court acknowledged

[6] As HUD's policy guidance states, terms such as "mother-in-law suite" and "bachelor apartment" are commonly used real estate terms that provide a physical description of a dwelling and do not violate the Act. See 1995 Guidance at 4. Here, however, the content of the Single Man Ad goes well beyond such a mere physical description of the apartment.

that the challenged advertisement was "designed to appeal to single men," and that women and families with children "may be someone dissuaded from responding to" the advertisement. (R. 101, Decision And Entry Overruling Plaintiff's Motion, pp. 5-6.) Accordingly, on this record, the district court erred in denying MVFHC's motions for judgment as a matter of law.

B.& The Jury Instructions Contained An Incorrect Legal Standard For Considering Whether The Single Man Ad Indicates An Unlawful Preference Against Women And Families With Children

If this Court nevertheless rules that MVFHC was not entitled to judgment as a matter of law on the ground that the Single Man Ad facially violates Section 3604(c), it must then determine whether the jury was properly instructed. The legal errors discussed above also infected the jury instructions. Specifically, the instruction defining the "'Ordinary Reader' Standard" contained the incorrect legal standard from *Milwaukee Fair Housing Council*:

> The question is not whether the particular advertisement discourages some potential renters from applying. The appropriate question is whether such discouragement is the product of any discriminatory statement or indication in the advertisement.
>
> If an ordinary reader who is a member of a protected class would be discouraged from answering the advertisement because of some discriminatory statement or indication contained therein, then the fair housing laws have been violated.
>
> Focus on the message being conveyed by the advertisement at issue in this matter. *Ask yourselves whether the message focuses on the suitability of the property to the renter, which is permissible, or*

> *whether it impermissibly focuses on the suitability of the renter to the owner.*

(R. 89, Final Jury Instructions, pp. 26-27 (emphasis added).) For the reasons explained above, these instructions misstate the requirements of Section 3604(c). This incorrect statement of the law rendered the jury instructions confusing, misleading, and prejudicial. Accordingly, the Court may reverse the jury's verdict on this alternative ground as well. See *Bridgeport Music, Inc.* v. *UMG Recordings, Inc.*, 585 F.3d 267, 274 (6th Cir. 2009) ("Reversal of a jury verdict based on incorrect jury instructions is warranted only when the instructions, viewed as a whole, [are] confusing, misleading, and prejudicial.") (internal quotation marks and citation omitted). Indeed, the district court's instruction for the jury to consider whether the advertisement focuses on the suitability of the property to the renter rather than the acceptability of the renter to the owner – standing alone – requires reversal of the jury's verdict.

CONCLUSION

This Court should reverse the judgment below and remand the case for further proceedings.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/Teresa Kwong
DENNIS J. DIMSEY
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4757

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL does not exceed the type-volume limitation imposed by Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). The brief was prepared using Microsoft Office Word 2007 and contains 4,621 words of proportionally spaced text. The typeface is 14-point Times New Roman font.

s/Teresa Kwong
TERESA KWONG
Attorney

Dated: June 22, 2012

CERTIFICATE OF SERVICE

I certify that on June 22, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/Teresa Kwong
TERESA KWONG
Attorney

ADDENDUM

ATTACHMENT A

DESIGNATION OF RELEVANT RECORD DOCUMENTS

DOCKET NUMBER	DOCUMENT DESCRIPTION
1	Complaint
89	Final Jury Instructions
93	Plaintiff's Motion For New Trial
95	Response In Opposition To Plaintiff's Motion For New Trial
101	Decision And Entry Overruling Plaintiff's Motion For New Trail
109	Transcript, Vol. 1
110	Transcript, Vol. 2
111	Transcript, Vol. 3
112	Transcript, Vol. 4

ATTACHMENT B

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-2000

January 9, 1995

OFFICE OF THE ASSISTANT SECRETARY
FOR FAIR HOUSING AND EQUAL OPPORTUNITY

MEMORANDUM FOR: FHEO, Office Directors, Enforcement Directors, Staff, Office of Investigations, Field Assistant General Counsel

FROM: Roberta Achtenberg, Assistant Secretary for Fair Housing and Equal Opportunity, E

SUBJECT: Guidance Regarding Advertisements Under §804(c) of the Fair Housing Act

The purpose of this memorandum is to provide guidance on the procedures for the acceptance and investigation of allegations of discrimination under Section 804(c) of the Fair Housing Act (the Act) involving the publication of real estate advertisements.[1]

Recently, the number of inquiries involving whether or not potential violations of the Act occur through use of certain words or phrases has increased, and these issues cannot, in some situations, be answered by referring to decided cases alone. In some circumstances, the Advertising Guidelines, published at 24 C.F.R. Part 109, have been interpreted (usually by persons outside of HUD) to extend the liability for advertisements to circumstances which are unreasonable.

This guidance is meant to advise you of the Department's position on several of these issues.

Previous guidance already requires that Intake staff review a potential complaint, gather preliminary information to ascertain whether the complaint states a claim under the Act, and consult with counsel on any legally questionable matters before the complaint is filed. Likewise, jurisdictional issues such as standing and timeliness should also be established prior to filing.

---

[1] This memorandum does not address fair housing issues associated with the publication of advertisements containing human models, and does not address 804(c) liability for making discriminatory statements.

If the Advertising Guidelines, this memorandum, or a judicial decision clearly indicate that the language used in the advertisement is a potential violation of Section 804(c) and the criteria for establishing jurisdiction are met, the complaint should be filed and processed. Any complaint concerning an advertisement which requires an assessment of whether the usage of particular words or phrases in context is discriminatory, requires the approval of Headquarters FHEO before a complaint is filed. If the advertisement appears to be discriminatory, but the Advertising Guidelines, this memorandum, or a judicial decision do not explicitly address the language in question, supervisory staff must also obtain approval of Headquarters FHEO before the complaint is filed. Potential complaints regarding advertisements which do not meet the above descriptions should not be filed.

Where there is a question about whether a particular real estate advertising complaint should be filed, relevant information regarding the factual and/or legal issues involved in the complaint should be gathered, and counsel should be consulted prior to contacting the potential respondent publisher. The matter should then be referred to the Office of Investigations for review. Such referrals may take the form of a short memo, reciting the applicable advertisement language, and any factual or legal analysis which is appropriate.

Section 804(c) of the Act prohibits the making, printing and publishing of advertisements which state a preference, limitation or discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin. The prohibition applies to publishers, such as newspapers and directories, as well as to persons and entities who place real estate advertisements. It also applies to advertisements where the underlying property may be exempt from the provisions of the Act, but where the advertisement itself violates the Act. See 42 U.S.C. 3603(b).

Publishers and advertisers are responsible under the Act for making, printing, or publishing an advertisement that violates the Act on its face. Thus, they should not publish or cause to be published an advertisement that on its face expresses a preference, limitation or discrimination on the basis of race, color, religion, sex, handicap, familial status, or national origin. To the extent that either the Advertising Guidelines or the case law do not state that particular terms or phrases (or closely comparable terms) may violate the Act, a publisher is not liable under the Act for advertisements which, in the context of the usage in a particular advertisement, might indicate a preference, limitation or discrimination, but where such a preference is not readily apparent to an ordinary reader. Therefore, complaints will not be accepted against publishers concerning advertisements where the language might or might not be viewed as being used in a discriminatory context.

For example, Intake staff should not accept a complaint against a newspaper for running an advertisement which includes the phrase **female roommate wanted** because the advertisement does not indicate whether the requirements for the shared living exception have been met. Publishers can rely on the representations of the individual placing the ad that shared living arrangements apply to the property in question. Persons placing such

advertisements, however, are responsible for satisfying the conditions for the exemption. Thus, an ad for a female roommate could result in liability for the person placing the ad if the housing being advertised is actually a separate dwelling unit without shared living spaces. See 24 CFR 109.20.

Similarly, Intake staff should not file a familial status complaint against a publisher of an advertisement if the advertisement indicates on its face that it is housing for older persons. While an owner-respondent may be held responsible for running an advertisement indicating an exclusion of families with children if his or her property does not meet the "housing for older persons" exemption, a publisher is entitled to rely on the owner's assurance that the property is exempt.

The following is policy guidance on certain advertising issues which have arisen recently. We are currently reviewing past guidance from this office and from the Office of General Counsel and will update our guidance as appropriate.

1. **Race, color, national origin.** Real estate advertisements should state no discriminatory preference or limitation on account of race, color, or national origin. Use of words describing the housing, the current or potential residents, or the neighbors or neighborhood in racial or ethnic terms (i.e., **white family home, no Irish**) will create liability under this section.

However, advertisements which are facially neutral will not create liability. Thus, complaints over use of phrases such as **master bedroom, rare find, or desirable neighborhood** should not be filed.

2. **Religion.** Advertisements should not contain an explicit preference, limitation or discrimination on account of religion (i.e., **no Jews, Christian home**). Advertisements which use the legal name of an entity which contains a religious reference (for example, **Roselawn Catholic Home)**, or those which contain a religious symbol, (such as **a cross)**, standing alone, may indicate a religious preference. However, if such an advertisement includes a disclaimer (such as the statement "This Home does not discriminate on the basis of race, color, religion, national origin, sex, handicap or familial status") it will not violate the Act. Advertisements containing descriptions of properties **(apartment complex with chapel)**, or services (**kosher meals available**) do not on their face state a preference for persons likely to make use of those facilities, and are not violations of the Act.

The use of secularized terms or symbols relating to religious holidays such as **Santa Claus, Easter Bunny or St. Valentine's Day** images, or phrases such as **"Merry Christmas", "Happy Easter"**, or the like does not constitute a violation of the Act.

3. **Sex.** Advertisements for single family dwellings or separate units in a multi-family dwelling should contain no explicit preference, limitation or

discrimination based on sex. Use of the term **master bedroom** does not constitute a violation of either the sex

discrimination provisions or the race discrimination provisions. Terms such as **"mother-in-law suite"** and **"bachelor apartment"** are commonly used as physical descriptions of housing units and do not violate the Act.

4. **Handicap.** Real estate advertisements should not contain explicit exclusions, limitations, or other indications of discrimination based on handicap (i.e., **no wheelchairs).** Advertisements containing descriptions of properties **(great view, fourth-floor walk-up, walk-in closets),** services or facilities (**jogging trails**), or neighborhoods **(walk to bus-stop)** do not violate the Act. Advertisements describing the conduct required of residents (**"non-smoking", "sober"**) do not violate the Act. Advertisements containing descriptions of accessibility features are lawful **(wheelchair ramp).**

5. **Familial status.** Advertisements may not state an explicit preference, limitation or discrimination based on familial status. Advertisements may not contain limitations on the number or ages of children, or state a preference for adults, couples or singles. Advertisements describing the properties **(two bedroom, cozy, family room**), services and facilities **(no bicycles allowed)** or neighborhoods (**quiet streets**) are not facially discriminatory and do not violate the Act.