

U.S. 934 (1972). Discriminatory housing advertisements represent “precisely one of the evils the [Fair Housing] Act was designed to correct.” *Id.*, at 211.

The Department objects to any attempt to limit the liability of advertisers or publishers, regardless of the fact that the limitation applies to civil penalties payable to the government, rather than to actual damages payable to an aggrieved person(s). In addition, the practical effect of the provision is to treat one class of respondents differently, *i.e.*, more favorably, than any other class of respondents. Such an approach is inconsistent with the goals and purposes of the Fair Housing Act. PHRA’s civil penalty cap is especially inappropriate in that the maximum allowable civil penalty in any case where a complainant is not actually denied housing is significantly less than that allowed for even a first violation under the FHAct.

As such, discriminatory advertising complaints received by HUD that do not involve an actual denial of housing will not be referred to the Pennsylvania Human Relations Commission (PHRC) for dual filing and will be processed under the provisions of the FHAct, not the provisions of the PHRA. In addition, HUD will require PHRC to refer to HUD for processing any discriminatory advertising complaints that do not involve an actual denial of housing.

Comment: PHRA sets forth affirmative defenses to a finding that an advertiser has knowingly and willfully violated PHRA. Such affirmative defenses are not included in the FHAct.

Section 9.1(c) of the PHRA sets forth several affirmative defenses to a finding that an advertiser has knowingly and willfully violated PHRA. The affirmative defenses include the following: (1) If the advertiser in good faith attempted to comply with the list and specific examples of impermissible housing advertisements promulgated and published by the PHRC; (2) if the advertiser complied with an interpretation of the commission or its personnel concerning what constitutes appropriate housing advertisements; and (3) if the advertiser has made reasonable efforts in good faith to comply with PHRA. These affirmative

defenses do not exist in the FHAct. The Department concludes that the affirmative defenses narrow the rights of aggrieved persons. As such, discriminatory advertising complaints received by HUD that implicate the affirmative defenses enumerated in section 9.1(c) of the PHRA will not be referred to PHRC for dual filing and will be processed under the provisions of the FHAct, not the provisions of the PHRA. In addition, HUD will require PHRC to refer to HUD for processing any discriminatory advertising complaints that may implicate the affirmative defenses enumerated in section 9.1(c) of the PHRA.

Comment: In certain circumstances, attorney fees may be awarded to a respondent under PHRA.

Section 9(d)(4) of the PHRA states that “[i]f after a trial, the Commonwealth Court finds that a respondent has not engaged in any unlawful discriminatory practice as defined in this act, the court may award attorney fees and costs to the prevailing respondent if the court determines that the complaint is frivolous and that the Commission dealt with the party complained against in a willful, wanton, and oppressive manner, in which case, the Commission shall be ordered to pay such costs and attorney fees.” The Department does not view this as a problem since the FHAct has a similar provision. The FHAct authorizes the payment of attorney fees and costs to a “prevailing party” (other than the United States) whether it be the complainant(s), other aggrieved person(s), or the respondent(s). See 42 U.S.C. section 3612(p).

Comment: Under PHRA, cases will be dismissed where the respondent offered an appropriate remedy and the complainant rejected the remedy.

Section 9(c.1) of PHRA states that “The Commission shall dismiss a case with prejudice, before, or after a finding of probable cause, where in its opinion, appropriate remedy has been offered by the respondent and refused by the complainant.” The FHAct has no corresponding provision. The FHAct encourages conciliation and settlement but does not require complainants to accept settlement offers, however appropriate settlement offers might appear. PHRA has informed the

Department that since it is impossible to precisely quantify embarrassment and humiliation damages, PHRC has interpreted the section in such a way that does not cover those cases in which embarrassment and humiliation damages are available. PHRC informed HUD that it views all cases dual-filed with HUD as possibly resulting in embarrassment and humiliation damages. Therefore, it will not dismiss these cases in accordance with section 9(c.1). HUD will include a provision in the Memorandum of Understanding (MOU) between HUD and PHRC stating that section 9(c.1) will not be applied to any dual-filed cases. The MOU will also require PHRC to inform complainants in dual-filed cases that complaints will not be dismissed where the respondent offered an appropriate remedy and the complainant rejected the remedy.

Comment: In Hoy v. Angelone, 720 A.2d 745 (Pa. 1998), the Pennsylvania Supreme Court held that punitive damages are not available in court proceedings brought under the PHRA.

The *Hoy* case involved employment discrimination, and it is unclear whether the court would rule in the same manner in a housing case. If the Pennsylvania courts were to rule that punitive damages are not available in cases involving housing discrimination, this would raise a significant substantial equivalency issue because punitive damages are available in court proceedings under the FHAct. HUD’s understanding is that there have been no post-*Hoy* Pennsylvania court decisions in which punitive damages were sought as a remedy for housing discrimination. HUD will continue to monitor developments in this area to see how the Pennsylvania courts address this issue with respect to housing discrimination. HUD will also require PHRC to keep it informed of any relevant post-*Hoy* Pennsylvania court decisions.

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