Newspapers, Responsibility for Ads
5 M.R.S.A. § 4553
" " § 4572(2)
" " § 4572-1-d-4

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To: Terry Ann Lunt-Aucoin, Executive Director, Maine Human Rights Comm.

From: Kate Clark Flora, Assistant Attorney General

This responds to your opinion request which poses two questions concerning the status of newspapers which publish discriminatory classified advertisements. Specifically, the questions you have asked are:

1. Whether a newspaper is an employment agency within the meaning of Title 5 M.R.S.A. § 4553 and § 4572(2); and

2. Whether a newspaper is engaged in unlawful discrimination when it aids an employment agency, employer or labor organization by publishing a notice which is in violation of 5 M.R.S.A. § 4572(d).

Summary Conclusion

A newspaper which publishes an ad advertising an employment vacancy is not an employment agency within the meaning of the Maine Human Rights Act. However, depending upon the facts, a newspaper which carries an ad which is prohibited by the Maine Human Rights Act may be guilty of aiding or abetting an employer or an employment agency within the meaning of the act.

Discussion

The question of whether a newspaper is an employment agency has been addressed in Brush v. San Francisco Newspapers Printing Co., 315 F.Supp. 577 (ND Cal. 1970) which held that a newspaper was not an employment agency within the meaning of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (Title VII). In the analysis of why the newspaper was not an employment agency, the court indicated that the intention of the law was to include within the definition of employment agency "only those engaged to a significant degree in that kind of activity as their profession or business." Brush, supra, at 580. The Maine Human Rights Act, like Title VII, contains a specific definition of employment agency in § 4553(5). The definition reads:

> "Employment Agency. Employment agency includes any person undertaking with or without compensation to procure opportunities to work, or to procure, recruit, refer or place employees; it includes, without limitation, placement services, training schools and centers, and labor organizations to the extent that they act as employee referral sources; and it includes any agent of such person."

You have asked whether this definition is broad enough to include newspapers. Although the statutory definition includes the words "without limitation," they must be viewed within the context of the definition.[1/] The definition addresses itself to persons undertaking to procure, recruit, refer or place employees. Specifically enumerated are placement services, training schools and centers and labor organizations. Used within this context, the language "without limitation" must be read to mean that it applies to organizations similar to those already enumerated. This is in accordance with the Brush analysis which suggests that the definition of employment agency includes those engaged to a significant degree in placement or recruitment activities as a part of the business or profession. While it is true that a newspaper is involved in this process by carrying of an ad for an employment opportunity, its role is the much more passive one of intermediary or facilitator, rather than the active recruitor or procurer. I therefore conclude that it was not the Legislature's intent to include newspapers within the meaning of employment agency under the Human Rights Act.

Your second question asks whether, even if a newspaper is not an employment agency it may be guilty of aiding and abetting an employer or employment agency or labor union by the act of carrying discriminatory ads. The Maine Human Rights Act in §§ 4553, sub-§ 10(D) provides that "unlawful discrimination" includes:

> "Aiding, abetting, inciting, compelling, or coercing another to do any of such types of unlawful discrimination; obstructing or preventing any person from complying with this act or any order issued hereunder; attempting to do any act of unlawful discrimination; and punishing or penalizing, or attempting to punish or penalize, any person for seeking to exercise any of the civil rights declared by this act or for complaining of a violation of this act or for testifying in any proceding brought hereunder."

While a newspaper may not be active in the recruitment process in the sense that an employment agency is active, i.e., itself seeking the applicant with some intention to place such an applicant or employ such an applicant, its role is active in the sense that it actively seeks advertising business. Thus, while a newspaper may not violate the Maine Human Rights Act in an employment agency capacity, it may violate the Human Rights Act by aiding and abetting an employer, employment agency or labor organization by accepting and publishing an illegal ad.

Title 5 M.R.S.A. § 4572(1)(d)(4) provides that:

> "It shall be unlawful employment discrimination, in violation of this act, except when based on a bona fide occupational qualification...for any employer or employment agency or labor organization, prior to employment...to:

1/ Words of enumeration followed by words of general import, when the use of the general words is uncertain, should be governed by the specific. State v. Ferris, 284 A.2d 288 at 290 (Me. 1970). The rule that the specific controls the interpretation of the general holds true where general is followed by specific as well as where specific is followed by general. 2A Sutherland, Statutory Construction, § 47.17.

> 4. Print or publish or cause to be printed or published any notice or advertising relating to employment or membership indicating any preference, limitation, specification or discrimination based upon race or color, sex, physical or mental handicap, age, ancestry or national origin, except under physical or mental handicap when the text of such printed or published material strictly adheres to this act."

The Commission has interpreted its laws to prohibit the carrying and distribution of discriminatory ads in its administrative guidelines.

> "B. Advertising and solicitation
> 1. It shall be unlawful employment practice for any person to print or publish or cause to be printed or published any notice or advertisement relating to employment or membership in a labor organization indicating any preference, limitation, specification or discrimination based upon race or color, sex, physical handicap, religion or country of ancestrial origin unless there is a bona fide occupational qualification for such preference, limitation, specification or discrimination.
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> 2. The Commission will consider to be a violation of the act the acceptance for publication, by any communciations medium, of any notice or advertisement relating to employment or membership in a labor organization indicating any preference, limitation, specification or discrimination based on race or color, sex, physical handicap, religion or country of ancestrial origin unless there is a bona fide occupational qualification for such prefered limitation, specification or discrimination. Placement of any notice or advertisement of job opportunities in newspaper columns classified on the basis of age, sex or race such as columns headed male or female will be considered a violation of the act. Section 3.03.D."

The Law Court has held that the Commission's guidelines are entitled to great deference, M.H.R.C. v. Local 1361, 383 A.2d 269 (Me. 1978).

In accepting and publishing an advertisement which is prohibited by the statutory sections and guidelines set out above, a newspaper thus assists the person placing the ad in committing an illegal act. It would negate the effectiveness of the act, as well as conflict with the meaning of the statute, if the placer of the advertisement were precluded from discrimination, but not the person printing and distributing the advertising, Evening Sentinel v. National Organization for Women, 357 A.2d 498, (Conn. 1975) See also National Organization for Women v. State Division of Human Rights, 314 N.E.2d 867 (N.Y. 1975).2/ As the New Jersey Supreme Court quite properly recognized in Passaic Daily News v. Blair, 308 A.2d 649 (N.J. 1973), the role newspaper advertising plays in the employment field is too significant to exclude it from the coverage of remedial legislation designed to achieve discrimination-free employment practices.

> "It seems to us that the prominent, if not indispensable place of newspaper classified advertising in the employment recruiting field is such that it is unrealistic to contend that a publisher of a paper who either initiates or acquiesces in advertising publication practices which discriminate or encourage or facilitate discrimination in employment is not 'aiding' in such discrimination within the meaning of the statute. To borrow, as do appellants, from definitions of aiding and abetting in the criminal field, where criminal intent is stressed because the abettor is a criminal principal, is entirely inappropriate in the context of the present statute which is basically a remedial, not a criminal one."

Therefore under the Maine Human Rights Act, a newspaper which accepts and publishes a discriminatory ad may be guilty of aiding and abetting the employer who seeks to place the ad. You should note specifically the use of the word "may," since the issue of whether aiding and abetting has taken place may depend on the circumstances of the case. While intent is not a necessary element of a violation of the act, there may be instances in which the improper

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2/ It would be inappropriate to apply the criminal standards for aiding and abetting in a civil context such as this, especially since intent is not a necessary element of a violation of the act. MHRC v. Local 1361, supra, at 375.

nature of the ad is unclear. In such a situation a newspaper which screens an ad in a good faith attempt to comply with the law and regulations may not be aiding and abetting discrimination.

A problem which frequently arises in cases dealing with the question of whether or not newspapers' acceptance of and publication of advertising should be regulated under Human Rights Laws is the question of potential infringement on First Amendment Freedom of Speech. The question was directly addressed by the Supreme Court in Pittsburg Press Company v. Pittsburg Commission on Human Relations, 413 U.S. 376 (1973). In that case the Pittsburg Commission on Human Relations held the petitioner had violated a city ordinance by using sex designated advertising columns in its daily newspaper. The Pittsburg Press countered that the ordinance interfered with its Constitutional rights to Freedom of the Press. The Supreme Court held that the advertisements in question, which did not implicate the newspaper's freedom of expression or its financial viability were " purely commercial advertising" and therefore not protected by the First Amendment.

Since the Pittsburg Press decision, Supreme Court has decided several cases dealing with commercial speech, and the principle that commercial speech enjoys no first amendment protections has been substantially erroded. See, e.g., Carey v. Population Services International, 431 U.S. 678 (1977); Virginia Pharmacy Board v. Virginia Consumer Counsel, 425 U.S. 748 (1976); Ohralik v. Ohio State Bar Association, 36 L.W. 4511 (May 30, 1978). These cases indicated that the First Amendment does afford a "measure of protection" for commercial speech. The test is well articulated in the case of Pittsburg Press Company v. Pennsylvania Human Relations Commission, 16 FEP cases 430 (1977), (a case dealing with stituation-wanted advertising as opposed to help wanted advertising) as a balancing test. In that case the court stated

> "We believe that a balancing analysis is the appropriate standard of review for the present case. The factors to be weighed are the opposing first amendment and governmental interests; the effectiveness of the speech restriction in promoting the underlying valid regulation; and the extent of any incidental restrictions on legitimate forms of commercial speech."

The court's concern has been with obstructing the flow of "truthful and legitimate information." Applying the test to this case, the first thing which becomes clear is that the underlying activity, that of placing discriminatory ads, is not a legitimate activity because it is one which is prohibited by the Maine Human Rights Act. The government's interest involved is both the promotion of equal employment opportunity by ensuring compliance with the Maine Human Rights Act, and prohibiting both the underlying illegal activity and the aiding and abetting of such underlying activity. Thus there is a substantial governmental interest in regulating the carrying of discriminatory advertisements. The advertisements themselves are not legitimate commercial speech because their content is prohibited by law. Thus there is no "incidental restriction" on legitimate forms of commercial speech, because there is involved in a discriminatory ad no legitimate commercial speech. As the Supreme Court recognized in Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 (1976), there is

a distinction among kinds of commercial speech:

> "We reaffirm our statement in Virginia Pharmacy Board that the 'common sense differences between speech that does "no more than propose a commercial transaction"' Pittsburg Press Company v. Human Relations Commission, 413 U.S. 376, 385 (1973) and other varieties . . . suggests that a different degree of protection is necessary to ensure that the flow of truthful and commercial information is unimpaired."

This suggests that speech which does no more than propose a commercial transaction, and which is not containing legitimate, i.e., legal, commercial information does not enjoy the kind of First Amendment protection that the Supreme Court has ~~begun to extend to some forms of commercial~~ speech. Thus, where the underlying substance of the ad is prohibited by the Human Rights Act, the fact that the ad is published in a newspaper, which enjoys some form of First Amendment protection does not extend the First Amendment protection to speech which is already illegal in nature. Therefore, there is no First Amendment bar to prohibiting newspapers from aiding and abetting employers who would violate the law by permitting them to publish discriminatory ads.

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