IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-WY-0460-AJ (OES)

HOUSING FOR ALL,
RAMONA GAVIN,
DEBRA WOODS,
PATRICE SWAIN,
SHARON HERNDON, and
DELILAH HICKS,

Plaintiffs,

v.

MONROE GROUP LTD.,
ALICE ROBINSON,
THE AURORA MONTVIEW HEIGHTS LIMITED PARTNERSHIP,

Defendants.

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through their attorneys, Fox & Robertson, P.C., hereby submit this Reply Memorandum in Support of Their Motion for Partial Summary Judgment and in Opposition to Defendants' Cross Motion for Summary Judgment.

Defendants maintain a curfew for minors at Montview Heights Apartments. In support of their Motion for Partial Summary Judgment, Plaintiffs provided this Court with five cases -- three of which were decided in favor of the plaintiffs on summary judgment -- holding that rules that restrict use of an apartment's facilities by children constitute facial disparate treatment discrimination in violation of the familial status provisions of the Fair Housing Act ("FHA"). 42

U.S.C. § 3604(a) & (c). Defendants cite no cases to the contrary. Instead, Defendants base their opposition on a complete misunderstanding of Plaintiffs' case, ignoring Plaintiffs' disparate treatment argument and instead arguing that Plaintiffs' have not met the standard for disparate impact discrimination. Analyzed under the correct standard, Defendants' curfew constitutes facial disparate treatment discrimination and Defendants are thus required to demonstrate both that the curfew serves a compelling business necessity and that they have used the least restrictive means to achieve that end. Because Defendants have not -- and cannot as a matter of law -- make this showing, it is appropriate to deny their motion for summary judgment and grant Plaintiffs' motion for partial summary judgment as to liability.

Background

The parties agree on the undisputed facts set forth in Plaintiffs' Memorandum in Support of Their Motion for Partial Summary Judgment ("Summary Judgment Memorandum" or "Pls. Summ. J. Mem."). (See id. at 2-4; Opening Br. in Supp. of Defs.' Cross Mot. for Summ. J. ("Opening Brief" or "Defs.' Br.") at 2.) Plaintiffs demonstrate here and in their Summary Judgment Memorandum that these facts entitle them to summary judgment as to liability in this case.

In their Opening Brief, Defendants assert several additional facts, for example, that the curfew is effective in minimizing crime. The effectiveness of the curfew in minimizing crime is, however, irrelevant because Defendants have not -- as a matter of law -- provided sufficient evidence that the curfew is the least restrictive means of achieving that goal. However, should the Court determine that it is necessary to examine the effectiveness of the curfew, the proper

approach at this juncture is to deny both motions for summary judgment and permit the parties to take discovery on this subject.[1]

Argument

I. Plaintiffs Have Stated A Prima Facie Case of Familial Status Discrimination.

The parties agree that the Tenth Circuit case of Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995) sets forth the standard for disparate treatment. (See Defs.' Br. at 2.) According to the Bangerter standard, Plaintiffs "make[] out a prima facie case of intentional discrimination under the [Fair Housing Act] merely by showing that a protected group has been subjected to explicitly differential -- i.e. discriminatory -- treatment." Id. at 1501. Plaintiffs have done that here, by showing that Defendants' curfew subjects families with children -- a protected group -- to explicitly differential treatment by limiting the ability of children to use the complex after the curfew. The curfew does this on its face because it explicitly applies only to individuals under 18 years of age. See, e.g., Llanos v. Estate of Coehlo, 24 F. Supp. 2d 1052, 1060-61 (E.D. Cal. 1998) (holding that rules limiting access of children to swimming pools were facially discriminatory); Fair Hous. Cong. v. Weber, 993 F. Supp. 1286, 1290-91 (C.D. Cal. 1997) (holding that rule prohibiting children from running or playing inside apartment building was facially discriminatory).

---

[1] The Second Declaration of Amy F. Robertson sets forth the reasons, pursuant to Rule 56(f), why additional discovery is required should the Court wish to analyze the effectiveness of the curfew.

After correctly setting forth the case citation for the disparate treatment standard, Defendants devote the remainder of this section of their brief to attacking Plaintiffs' case as if Plaintiffs were proceeding on a disparate impact theory. (See Defs.' Br. at 3-4.) This is not accurate. As explained above, Plaintiffs are alleging disparate treatment by Defendants' facially discriminatory policy. As such, Defendants' reliance on the cases of Pfaff v. U.S. Department of Housing and Urban Development, 88 F.3d 739 (9th Cir. 1996) and Mountain Side Mobile Estates Partnership v. Secretary of Housing and Urban Development, 56 F.3d 1243 (10th Cir. 1995) -- and their discussion of statistics -- are completely irrelevant to the present case. Both of these cases concerned facially neutral rules that the plaintiffs alleged had a disparate impact on families with children. For example, the Pfaff case involved a rule limiting occupancy of a house to four persons, id. at 742, and Mountain Side involved a rule limiting occupancy of a mobile home to three persons. Id. at 1246. In neither case -- in contrast to the present case -- did the rule itself address, limit or even mention the ages of the residents in question. Under such circumstances, statistical evidence becomes relevant to show that occupancy limitations of three or four persons tend to screen out more families with children than other types of families. Pfaff, 88 F.3d at 746; Mountain Side, 56 F.3d at 1251-52.

No such showing is required here, however, when the discrimination is obvious on the face of the rule itself. As the Tenth Circuit held in Bangerter, Plaintiffs' prima facie case is complete upon a showing of "explicitly differential . . . treatment." Id., 46 F.3d at 1501.

Defendants also argue that the curfew applies equally to all residents because households without children may have children as guests. (See Defs.' Br. at 3.) This represents a

misreading of the Fair Housing Act. That statute prohibits discrimination on the basis of "familial status," and defines that term as one or more individuals under the age 18 domiciled with a parent or other adult with legal custody. 42 U.S.C. § 3602(k). The protected class is thus families with children -- not childless households with minor guests -- and the former are precisely the families singled out by the Montview curfew for disparate treatment. Households without children -- that is, any member of such a household or the entire household together -- may use the complex unfettered by the curfew.

II. Defendants Cannot as a Matter of Law Justify Their Curfew.

A. Defendants Are Required to Show That the Curfew Serves a Compelling Business Necessity and That They Have Used the Least Restrictive Means to Achieve That End.

Because Defendants' curfew policy is discriminatory on its face, Defendants can only justify the policy by demonstrating that it serves "a compelling business necessity and that they have used the least restrictive means to achieve that end." Weber, 993 F. Supp. at 1292. Defendants argue that all they are required to show is a "'manifest relationship to the housing in question,'" (Defs.' Br. at 4 (quoting Mountain Side, 56 F.3d at 1254)), or that the curfew is "'reasonably necessary to achieve an important business objective.'" (Defs.' Br. at 4 (quoting Hack v. President and Fellows of Yale Coll., 237 F.3d 81, 100 (2d Cir. 2000) (Moran, J., dissenting)).)[2] Neither of these is the standard in disparate treatment cases. Both Mountain Side

[2] The text in Hack on which Defendants rely in their Opening Brief occurs in the dissent. The majority held that because the plaintiffs -- religious college students protesting co-educational dormitories -- sought exclusion rather than integration, they had not stated a claim (continued...)

and Hack address disparate impact, and both make clear that the standard annunciated is directed toward those types of cases. See Hack, 237 F.3d at 102 (Moran, J., dissenting); Mountain Side, 56 F.3d at 1254. As such, neither provides the standard for the present case.

Even under the standard urged by Defendants, however, Plaintiffs are entitled to summary judgment. Defendants concede that they cannot "unreasonably refuse[ ] to adopt an alternative policy 'that would provide a comparably effective means of meeting the defendant's objective without imposing significant additional costs.'" (See Defs.' Br. at 8 (quoting Hack, 237 F.3d at 102) (Moran, J., dissenting).) As demonstrated below, Defendant has unreasonably refused to adopt more narrowly tailored rules -- rules that would target specific unwelcome conduct and thereby achieve their goal of punishing that conduct, without simultaneously punishing innocent families with children.

B. Defendants Cannot as a Matter of Law Show That They Have Used the Least Restrictive Means of Achieving Their Stated Goals.

Assuming, arguendo, that the goals of safety and quality of life are compelling, Defendants have selected a means of achieving those goals that is grossly over-restrictive. In order to prevent crime and protect children, Defendants prohibit all children from any activity anywhere on the Montview Heights premises after 9:00 in the evening. They cannot, as a matter

---

[2](...continued)
under the Fair Housing Act. Hack, 237 F.3d at 90. As such, the majority did not analyze the questions at issue here. Because Defendants relied on text from the dissent -- on issues not addressed by the majority -- Plaintiffs' discussion also addresses the dissent.

of law, demonstrate that this blanket prohibition is the least restrictive way to accomplish their stated goals.[3] This rule would prohibit, for example, the following activities:

- A child retrieving laundry for a sick parent after 8:00 or 9:00[4] (see Pls. Summ. J. Mem., Tab 2, Herndon Decl. ("Herndon Decl.") ¶ 4);
- Family cook-outs that go past 8:00 or 9:00 (see Pls. Summ. J. Mem., Tab 1, Gavin Decl. ("Gavin Decl.") ¶ 10);
- Families of adults and children playing together outdoors after 8:00 or 9:00 (see Gavin Decl. ¶¶ 8, 9);
- A parent sending a child to run an errand to a neighbor's house after 8:00 or 9:00;
- A 12-year-old playing indoors at a friend's house if he had to return home after 8:00 or 9:00;
- A 14-year-old attending a church activity that caused him to arrive home after 8:00 or 9:00;

---

[3] Defendants have the burden of showing this. Weber, 993 F. Supp. at 1292. Defendants cite to Keys Youth Servs., Inc. v. City of Olathe, Kansas, 248 F.3d 1267, 1276 (10th Cir. 2001) for the proposition that "plaintiff's requested accommodation must substantially negate the defendant's concern in order to be considered reasonable." This discussion in Keys, however, concerns the provision of the Fair Housing Act requiring reasonable accommodations for individuals with handicaps. See id. at 1275 (citing 42 U.S.C. § 3604(f)(3)(B)). As such, it is irrelevant to the question whether Defendants have selected the least restrictive means when imposing a rule that facially discriminates on the basis of familial status.

[4] Defendants concede that the curfew has been as early as 8:00 p.m. seven days a week. (Defs.' Br. at 1 n.1.) Defendants have provided no reassurances that they will not go back to this early hour.

- A 15-year-old coming home after a school athletic or music activity after 8:00 or 9:00;
- A 17-year-old having a job that ended after 8:00 or 9:00 or the commute for which brought him or her home after that time.

This is an enormous burden on families with children. Instead of enjoying Colorado's long, warm summer evenings together, families at Montview must stay indoors after 8:00 or 9:00. Instead of teaching children to contribute to the family by running errands, assisting with laundry or getting a job, Montview parents must curtail these activities -- and participation in church or school functions -- if they might result in children being outside their units after 9:00. This is a radically over-restrictive way of attempting to protect children and prevent crime. And, of course, the curfew does nothing to prevent crimes committed by individuals over 18 years of age at Montview Heights.

Instead of essentially locking children inside their units every night, Defendants could promulgate and enforce rules that target specific, unwelcome conduct. Indeed, Defendants essentially concede this point when they offer the testimony of Alice Robinson that "[a]ll but one of the tickets . . . referenced by plaintiffs in their Motion for Summary Judgment were issued because the tenant to whom the ticket was issued was disturbing other tenants." (Defs.' Br. at 7.)[5] That is, if Ms. Robinson in fact observed the children in question "disturbing other tenants,"

[5] Plaintiffs dispute that this was the case. However, it is clear that Ms. Robinson perceives that she is already ticketing only offensive behavior.

she could have issued tickets for that infraction, rather than enforcing a rule that catches within its net all of the innocent activities listed above.

Defendants argue that the curfew is proactive, preventing problems before they happen, on the grounds that any other rule would "require[ ] tenants to report problems, after the problem has already occurred." (Defs.' Br. at 8.) Through this, Defendants concede that the curfew essentially treats all children as "problems" and punishes them all, without waiting for an infraction. Furthermore, this statement makes no sense: curfew tickets are given out when Ms. Robinson observes or receives a report of children out of doors after the designated time; presumably, violations of the curfew are prevented "proactively" by tenants who do not want to receive tickets and therefore keep their children inside. With similar effectiveness, Ms. Robinson could give out tickets for specific offending behaviors either when she observes them or when she receives a report of them. Those offending behaviors would be prevented "proactively" by such narrowly tailored rules by tenants who do not want to receive tickets and therefore refrain from -- and teach their children to refrain from -- committing those offenses. A more narrowly-tailored rule would have the added salutary effects of (1) punishing not only children but adults who commit these specific offenses; and (2) permitting parents rather than the landlord to take responsibility for teaching and disciplining their children and keeping them safe. See Llanos, 24 F. Supp. 2d at 1060-61 ("As a general rule, safety judgments are for informed parents to make, not landlords.") (quotation omitted); Weber, 993 F. Supp. at 1293 (same).

Defendants rely on the Bangerter case for the proposition that "[t]he FHA 'expressly allows discrimination rooted in public safety concerns' and it permits 'reasonable restrictions on

the terms or conditions of housing when justified by public safety concerns.'" (Defs.' Br. at 4 (quoting Bangerter, 46 F.3d at 1503).) A review of the Tenth Circuit's language in context demonstrates (1) that it was addressed to 42 U.S.C. § 3604(f)(9), which applies only to discrimination on the basis of handicap; and (2) that the Tenth Circuit's interpretation of the provision would bar the sorts of gross overgeneralizations relied on by Defendants here. The Tenth Circuit held:

> [T]he FHAA [Fair Housing Amendments Act] expressly allows discrimination rooted in public safety concerns when it provides that "[n]othing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. § 3604(f)(9). We read section 3604(f)(9) as permitting reasonable restrictions on the terms or conditions of housing when justified by public safety concerns, given that housing can be denied altogether for those same reasons. However, the exceptions to the FHAA's prohibitions on discrimination should be narrowly construed.
>
> Restrictions predicated on public safety cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents.

Id., at 1503 (citations omitted). Because section 3604(f)(9) applies only to discrimination on the basis of handicap, it is not applicable here. In any event, Defendants' curfew imposes restrictions on the use of the premises by children based entirely on "blanket stereotypes" about those children; they have made no attempt to tailor these restrictions to "particularized concerns about individual residents." As such, even if § 3604(f)(9) did apply to familial status discrimination, it would not permit Defendants' curfew.[6]

---

[6] Defendants also attempt to justify their curfew by relying on a case approving a (continued...)

Finally, Defendants argue that state law imposing on them a duty to "exercise reasonable care to protect against dangers of which [they] actually knew or should have known," C.R.S. § 13-21-115(3)(c)(I), implicitly authorizes the curfew. Defendants offer no support the proposition that they may fulfill this duty through discriminatory rules, rules that violate federal law, or rules that impose restrictions on the tenants, rather than seeking out and remedying the dangerous conditions. For example, in Taco Bell, Inc. v. Lannon, 744 P.2d 43 (Colo. 1987), on which Defendants rely, the defendant restaurant was held liable for the plaintiff's injuries sustained in a robbery. The measures it should have taken but did not take, however, were not restrictions on patrons but the hiring of an armed security guard. Id. at 51. Although an armed guard may not be an appropriate solution at Montview Heights, the case illustrates the important point that businesses protect their customers not by locking them up but by attacking the source of the threat.

C. Defendants Have Failed to Distinguish or Offer Contradictory Precedent to Plaintiffs' Cases Prohibiting Housing Rules That Limit the Use of Premises by Children.

In their Summary Judgment Memorandum, Plaintiffs presented five cases in which restrictions on the use of premises by children were held invalid and noted that, in three of them,

---

[6](...continued)
curfew imposed by a municipal government. (Defs.' Br. at 5 (quoting Ramos ex rel. Ramos v. Town of Vernon, 48 F. Supp. 2d 176, 185 (D. Conn. 1999).) But Defendants concede that this case is not apposite: "defendants are not a municipality and the constitutionality analysis [in their brief] is not directly applicable to the present action." (Defs.' Br. at 6.) The Tenth Circuit confirmed this in Bangerter, when it explicitly rejected the use of a constitutional analysis under the Fair Housing Act. Id. at 1503.

the court had granted summary judgment to the plaintiffs declaring the restrictions to be in violation of the Fair Housing Act. Llanos, 24 F. Supp. 2d at 1060-61 (granting summary judgment to plaintiff holding that rules restricting children to two of the six swimming pools and restricting them from playing in designated "adult areas" violated the FHA); Weber, 993 F. Supp. at 1291-92 (granting summary judgment to plaintiff holding that rule prohibiting children from playing or running inside apartment building violated FHA); United States v. M. Westland Co., No. CV 93-4141 (AWT), Fair Housing-Fair Lending (P-H) ¶ 15,941, at 15,941.3 - .4 (C.D. Cal. August 3, 1994) (Pls. Summ. J. Mem., Tab 5 ("Robertson Decl."), Ex. 4) (granting summary judgment in favor of plaintiffs holding rules that barred children from recreational areas and required children to be accompanied by adult in pool violated FHA); Dep't of Hous. and Urban Dev. v. Paradise Gardens, HUDALJ 04-90-0321-1 & 04-90-0726-1, slip op at 13-16 (H.U.D. Oct. 15, 1992) (Robertson Decl. Ex. 5) (holding that community covenants restricting the use of the pool by children was discrimination not justified by safety or quality of life concerns); Dep't of Hous. and Urban Dev. v. Edelstein, HUDALJ 05-90-0821-1, slip op at 5-6 (H.U.D. Dec. 9, 1991) (Robertson Decl. Ex. 6) (holding that lease provision prohibiting children under 18 from using swimming pool was discrimination).

Defendants have cited no cases to the contrary. That is, they can cite no case in which the court has approved a limitation on the use of premises by children.

Defendants attempt to distinguish Plaintiffs' cases by arguing that they involve "More egregious facts." (Defs.' Br. at 6.) As an initial matter, the Defendants offer no legal support for the proposition that less egregious but still facially discriminatory rules are permissible.

Bangerter suggests that when a rule is discriminatory on its face, it is illegal unless justified. In any event, a review of the facts in each of the cases cited by Plaintiffs reveals that the curfew at issue here is, in fact, far more restrictive. Recalling that Defendants prohibit all children from any activity anywhere on the Montview Heights premises after 8:00 or 9:00:

- Llanos involved a restriction on use of a swimming pool and a requirement that children not play in "adult areas." Id. at 1060.
- Weber involved a rule prohibiting children from playing or running inside the apartment building. Id. at 1289.
- Westland involved rules that made several specific areas off limits to children (the jacuzzi and clubhouse rooms) and required adult supervision in others. Id. at 15,941.3.
- Although Paradise Gardens and Edelstein both involved statements that families were not welcome, the administrative law judges specifically held that rules limiting use of the swimming pool by children violated the Fair Housing Act. Paradise Gardens, slip op. at 13-16; Edelstein slip op. at 6.

All of these rules were declared unjustified by safety and/or quality of life concerns; all were found to violate the FHA. While it is true that -- during daylight hours -- the rules at issue in these cases are more restrictive than Montview's curfew, this begs the question. None of these cases involved a blanket prohibition on use of the common area by children at any time. Even Weber, which addressed use by children of the indoor common area, limited the restriction to "playing or running," rather than banning children completely. There is no sense in which the

facts of these cases are "more egregious" than the curfew at issue here and no sense in which any differences can serve to justify Montview's blanket curfew.

It is not clear what Defendants mean when they dismiss Plaintiffs' cases as "California cases." (Defs.' Br. at 6.) The first three were decided by federal district courts in California, applying the same federal statute that is at issue here. There is no question of differing standards under different states' laws. And while precedent from the Tenth Circuit would be binding, in the absence of such cases, this Court may look to sister districts for guidance and reasoning. The last two cases were decided by administrative law judges of the Department of Housing and Urban Development. As Plaintiffs pointed out in their Summary Judgment Memorandum, "HUD is the federal agency charged by Congress with interpreting and enforcing the Act, and it has special expertise in housing discrimination. . . . Therefore, these decisions are entitled to great weight." Llanos, 24 F. Supp. 2d at 1060 n.8 (citations and quotation omitted).

In any event, a case recently decided by a Colorado state court -- applying the Colorado equivalent of the FHA -- held that a lease provision requiring that children under twelve be accompanied by an adult on the grounds of the apartment violated that statute. Atzenbeck v. Westport Apartments, Case No. 01CV749, Div. 5 (Jeff. Co. Dist. Ct. Sept. 11, 2002), transcript ("Tr.") at 30-31 (text of discriminatory provision); 53-55 (holding).[7] The decision came in response to the plaintiffs' motion for a directed verdict in a case before Judge Frank Plaut of the Jefferson County District Court. The defendants in that case, like Defendants here, argued that

[7] A copy of the portion of the transcript relating to the directed verdict motion is attached as Exhibit 1 to the Second Declaration of Amy F. Robertson.

the restrictive lease provision served the interests of safety and quality of life. (Tr. at 29-30.) Judge Plaut held that the lease provision violated the Colorado Fair Housing Act, which contains provisions that track sections 804(a) and 804(c) of the federal statute, the provisions at issue here. C.R.S. §§ 24-34-502(1)(a) & (d).[8] Specifically, that court held that the provision requiring adult supervision "is discriminatory on its face and that there is no legitimate business reason for a policy that is that restrictive." (Tr. at 53.) Judge Plaut explained:

> I don't think the first sentence in that paragraph on unaccompanied children is susceptible of a nondiscriminatory interpretation. And it was not supported by any legitimate business reason. The whole idea that a lease provision can exist which precludes an 11-year-old from walking to the mailbox or the grocery store or local park, which this provision does, is one that the Court rejects.

(Id. at 54.) While it is true that the Aztenbeck lease provision applied throughout the day, it is also true that it was not a complete ban on children -- as is the curfew here -- and did not apply to children 13 to 18 years of age. For example, families with children at the Westport Apartments presumably could play or cook-out or travel together at any hour, whereas such activities are prohibited after 8:00 or 9:00 by Montview's curfew.

Defendants have offered no cases that contradict the conclusion dictated by Weber, Llanos, Westland, Paradise Gardens, Edelstein, and Atzenbeck: restrictions that facially target children are illegal.

---

[8] One of the counsel for Defendants here -- Heather Salg – represented the defendants in the Atzenbeck case and argued against the directed verdict. In that case, Ms. Salg acknowledged that "[i]n cases of fair housing discrimination, federal case law is persuasive in interpreting the Colorado Fair Housing Act because it is similar to the federal Fair Housing Act and case law that supports that is [Weinstein v. Cherry Oaks Retirement, 917 P.2d 336, 339 (Colo. App. 1996).]" (Tr. at 50-51.)

III. As a Matter of Law, the Curfew Constitutes a Notice, Statement or Advertisement Expressing a Preference, Limitation and Discrimination Based on Familial Status.

Plaintiffs have presented evidence, which Defendants do not contest,[9] of a number of different publications of Montview's curfew. It appeared in Montview's written rules[10] and was the subject of a notice sent to all tenants, informing them -- in all capital letters using bold-face type -- of the curfew.[11] In addition, some residents were required to sign a document entitled "Formal Notice and Agreement," which informed them of the curfew and purported to bind them to it.[12] These notices constitute "notice[s], statement[s], [and/]or advertisement[s], with respect to the sale or rental of a dwelling that indicate[ ] [a] preference, limitation, or discrimination based on. . . familial status. . . or an intention to make any such preference, limitation, or discrimination" and are barred by § 804(c). 42 U.S.C. § 3604(c). In their Summary Judgment Memorandum, Plaintiffs cited to three cases in which published limitations on the use by children of an apartment's premises were held to violate this provision. Weber, 993 F. Supp. at 1290-92 (granting summary judgment for plaintiffs holding that the promulgation and enforcement of a rule prohibiting children from running or playing inside an apartment building was a violation of section 804(c)); Westland, ¶ 15,941 at 15,941.3 - .4 (granting summary judgment in favor of plaintiffs holding rules that barred children from recreational areas and

---

[9] Defs.' Br. at 2.

[10] Gavin Decl. ¶ 11 & Ex. 2.

[11] Id. ¶ 12 & Ex. 3.

[12] Id. ¶ 13 & Ex. 4; Herndon Decl. ¶ 6 & Ex. 2; Pls. Summ. J. Mem., Tab 3, Woods Decl. ¶ 5 & Ex. 4.

required children to be accompanied by adult in pool violated section 804(c)); Paradise Gardens, slip op. at 15-16 (holding that published rules limiting access of children to swimming pools violated section 804(c)).

Defendants' primary response to this argument is to assert incorrectly that all but one of Plaintiffs cases dealt with "advertisements rather than rules in a lease contract." (Defs.' Br. at 9.) As an initial matter, as noted above, Plaintiffs provided three cases that were directly on point. In addition, the present case does not concern a "rule in a lease contract." Rather, it concerns a set of published rules, a one-page notice in capitalized, bold-face type, and a document titled "Formal Notice and Agreement." All of these are clearly notices and/or statements, two types of communication explicitly covered by the statute.[13]

Defendants also argue that an "ordinary reader" would not infer an "anti-children" preference from the curfew notices or tickets. (Defs.' Br. at 9.) The statute is not limited to "preferences," however, but prohibits statements or notices that express a "preference, limitation or discrimination." 42 U.S.C. § 3604(c). There can be no question that a curfew that prohibits individuals under the age of 18 from being outdoors after a certain period is -- on its face, without the need for inference or interpretation -- a "limitation" on children and therefore discriminates against them and their families. As such, Defendant's reliance on Soules v. United States Department of Housing and Urban Development, 967 F.2d 817 (2d Cir. 1992), is

[13] Judge Plaut in Atzenbeck held that the lease provision in that case did not violate the equivalent Colorado law. (Tr. at 58-59.) However, there is no evidence of additional notices above and beyond the lease provision, as there is in this case.

misplaced. The challenged conduct in that case was a question: "How old is your child?" Id. at 820. It was not a notice, a statement or an advertisement and because -- as a question -- it asked rather than asserted, it did not on its face contain any preference, limitation or discrimination. In analyzing this question under § 804(c), the Soules court first noted that "[i]n cases where ads are clearly discriminatory" and with respect to "openly discriminatory" statements, the court may resolve the matter by considering the statement on its face. Id. at 824. Only where statements are not facially discriminatory -- such as the question at issue in that case -- is a further examination of the speaker's rationale or intent required. Id. at 824-25. Thus, Defendants' assertion that Soules permits inquiry into whether there was a legitimate reason for the statements here is incorrect. Defendants' statements are all discriminatory on their face and the reasons for the statements, as Soules made clear, are irrelevant.

Conclusion

For the reasons set forth above and in Plaintiffs' Memorandum in Support of Their Motion for Partial Summary Judgment, Plaintiffs respectfully request that this Court grant their motion for partial summary judgment as to liability under sections 804(a) and 804(c) and deny Defendants' motion for summary judgment. Should this Court determine that Plaintiffs are not entitled to partial summary judgment, Plaintiffs respectfully request that this Court deny both parties' motions and permit discovery to proceed on (1) Defendants' reasons for the curfew; and (2) the means Defendants have used to achieve their goals.

Respectfully submitted,

FOX & ROBERTSON, P.C.

Amy F. Robertson
Timothy P. Fox
910 - 16th Street, Suite 610
Denver, CO 80202
303.595.9700

Dated: October 7, 2002

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that on October 7, 2002, a copy of Reply Memorandum in Support of Their Motion for Partial Summary Judgment and in Opposition to Defendants' Cross Motion for Summary Judgment, and the Second Declaration of Amy F. Robertson were served by first-class mail, postage prepaid, on:

Arthur R. Karstaedt III
Heather A. Salg
Harris, Karstaedt, Jamison & Powers, P.C.,
383 Inverness Drive South
Suite 400
Englewood, CO 80112

_____